



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS - REGION VII

July 13, 2007

Aaron M. Podolefsky, President  
University of Central Missouri  
Administration Building, Room 202  
Warrensburg, Missouri 64093

Re: OCR Docket # 07072024

Dear President Podolefsky:

On January 16, 2007, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received a complaint against the University of Central Missouri (University), Warrensburg, Missouri, alleging discrimination on the bases of sex, disability, and retaliation. This is to inform you we have completed our investigation and reached a determination regarding this complaint. For the reasons explained in this letter, we have determined there is insufficient evidence to support a conclusion the University failed to comply with a law or regulation enforced by OCR, as alleged in the complaint.

Specifically, the complainant alleged the following:

1. The clinical instructor sexually harassed the complainant on the first day of clinical by asking that he date a close friend of hers and after he refused, she failed him in the clinical;
2. University officials treated the complainant differently than a similarly situated female student on the basis of sex when he was dismissed from the program even though he followed proper medical procedures while the female student performed a forbidden unsupervised medical procedure and the University allowed her to continue in the program;
3. Two of the complainant's instructors became aware he had Attention Deficit Hyperactive Disorder (ADHD) and then committed disability harassment by frequently accusing him of being anxious and used the alleged anxiety as one of the reasons for his dismissal; and

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4. University officials retaliated against the complainant after he filed a complaint of sex and disability discrimination with the University's Human Resource Office by denying him the opportunity to retake the clinical.

OCR is responsible for enforcing:

- Section 504 of the Rehabilitation Act of 1973, 29 United States Code (U.S.C.) § 794 (Section 504), and its implementing regulation, 34 Code of Federal Regulations (C.F.R.) Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance.
- Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131, and its implementing regulation, 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities.
- Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, and its implementing regulation, 34 C.F.R. Part 106. Title IX prohibits discrimination on the basis of sex in any education program or activity operated by a recipient of Federal financial assistance.
- Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and its implementing regulation, 34 C.F.R. Part 100. Title VI prohibits recipients of Federal financial assistance from retaliating or taking adverse action against a person who engages in a protected activity. Protected activity includes filing an OCR complaint or taking other action opposing any activity that violates laws OCR enforces. The Section 504 and Title IX regulations incorporate the Title VI retaliation prohibition. The Title II regulation contains a similar retaliation prohibition.

As a recipient of Federal financial assistance from the Department and a public entity, the University is subject to Section 504, Title II, Title IX and Title VI.

As explained in our February 16, 2007 letter to you, OCR is aware the complainant filed an internal grievance. The University's results of investigation were dated January 2, 2007. The findings covered allegations one, two and three but not allegation four, retaliation. OCR reviewed the University's decision regarding the grievance to determine whether allegations one, two, and three were investigated, appropriate legal standards were applied, and any remedies secured meet OCR's standards. The complainant's allegation four was not investigated in his grievance and was investigated by OCR.

Pursuant to OCR's Case Resolution and Investigation Manual (CRIM), if the same complaint allegations have been filed with another federal, state, or local agency, or through

a recipient's internal grievance procedures, including due process proceedings, OCR will review the results of the other entity's action and determine whether the other entity provided a comparable process and met appropriate legal standards. See Section 109(j) of the CRIM.<sup>1</sup>

OCR determined the University's investigation by the Assistant Director of Human Resources/Employee Relations (HR investigator) was not comparable to an investigation by OCR, pursuant to Section 109(j) of the CRIM, and OCR decided to conduct a supplemental investigation based on the following reasons:

1. The University's investigation did not address the complainant's allegation or the legal standard of retaliation;
2. The University's investigation did not include information, evaluations or interviews from other clinical instructors, relevant University officials, or an alleged male comparator who is not disabled.

OCR's investigation involved a review of numerous documents provided by the complainant and the University, in-person and telephone interviews with the complainant, University decision-makers and officials, other clinical instructors, and another student. OCR carefully considered all of the information obtained. Based on the information and evidence obtained during the investigation, OCR's determination regarding findings of fact and conclusions of law are set forth in the following paragraphs.

#### The University's Complaint Resolution Process and OCR's Investigation

The complainant participated in three separate procedures with the University to contest the failing grade in his nursing practicum (Nursing 4621): 1) the academic grade appeal procedure, 2) a request for retention in the nursing program with the retention committee, and 3) the discrimination grievance procedure handled by the University's Human Resources Office, entitled "Discrimination and Harassment: Procedures for Reporting and Investigating Complaints." The third process by the University specifically addressed his allegations of sex and disability discrimination.

The University's HR investigator met with the complainant on November 27, 2006, and confirmed his allegations of discrimination the next day, as follows:

**Allegation # 1:** Prior to clinical rotations for class NUR 4621 (Fall 2006), the complainant disclosed to his instructor that he had been diagnosed with Attention Deficit Hyperactivity

<sup>1</sup> The OCR CRIM is available on the U.S. Department of Education's website at [http://www.ed.gov/about/offices/list/ocr/docs/ocrcrm.html#I\\_4](http://www.ed.gov/about/offices/list/ocr/docs/ocrcrm.html#I_4).

Disorder (ADHD). The complainant's instructor then used that information to discriminate against him on the basis of his disability by overly scrutinizing certain aspects of the disability (primarily his anxiety level) throughout the complainant's instructor's evaluation of his clinical performance resulting in a failing grade for him.

**Allegation # 2:** The complainant's instructor discriminated against him on the basis of sex by holding him to a higher standard than other female members of the class. The complainant alleged that at least one female student was allowed to pass the course after committing similar if not more serious errors. The complainant believes that his instructor's alleged behaviors described in the finding of fact for allegation # 1 on pages 6 and 7 of this letter were used as the mechanism to discriminate against him on the basis of his sex.

The investigation by the HR investigator consisted of interviews with the complainant and his instructor, written statements from the complainant, his instructor, his preceptor, and two female students, and a review of his written evaluations and other documents. With respect to Allegation # 1 based on disability discrimination, the HR investigator identified three sub-allegations: 1a) on several occasions, during the complainant's clinical experience, his instructor inquired about the complainant's anxiety level, 1b) his instructor did not provide him feedback in a manner consistent with the requirements of the course syllabus, and 1c) the complainant's instructor suggested he see a doctor and have his medication changed to BuSpar®.

The HR investigator substantiated sub-allegation 1c of allegation # 1 concerning the complainant's instructor's suggestion that he see a doctor and have his medication changed to BuSpar. However, the remaining sub-allegations in allegation # 1, and allegation # 2 based on sex discrimination, were not substantiated. The HR investigator concluded the complainant was not discriminated against on the basis of his sex or disability.

#### General Findings of Fact

- On May 8, 2005, the complainant signed the Application for Admission for the Baccalaureate Nursing Major (Nursing Program) at Central Missouri State University. In his application he noted that he had attended a nursing program at Presentation College in Aberdeen, South Dakota. The complainant indicated he was "unable to successfully meet the academic requirements for my last adult health nursing class to graduate." In a letter dated May 16, 2005, the Chair & Associate Professor at Presentation College stated, "he was not able to finish the [nursing program] because he was unsuccessful in two nursing courses (at the senior level)." This letter concluded, "[complainant] was a dedicated, determined, dependable and compassionate student. He has consistently demonstrated integrity. I do believe that he is capable of success in nursing."

- In the fall of 2005, the complainant was accepted into the Nursing Program at Central Missouri State University and began attending classes.
- In the fall of 2006, he enrolled in “Leadership and Management for Professional Nurses” (course number 4620), which consists of a theory portion in the classroom and a clinical portion at St. Luke's Hospital located in Kansas City, Missouri (course number 4621, referred to as “clinical”). The clinical consists of 8 clinical days in a hospital. Each clinical day is a 12-hour shift and students have two clinical days per week.

#### Allegation One

The complainant alleged the clinical preceptor sexually harassed him on the first day of his clinical by asking that he date a close friend of hers and after he refused to do so, the preceptor failed the complainant in the clinical.

#### Legal Standards for Sexual Harassment

The regulation implementing Title IX at 34 C.F.R. § 106.31(b)(1)-(4) states:

in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

- 1) treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
- 2) provide different aid, benefits, or services, or provide aid, benefits, or services in a different manner;
- 3) deny any student any such aid, benefit, or service;
- 4) subject any person to separate or different rules of behavior, sanctions or other treatment.”

Sexual harassment of students is a form of sex discrimination prohibited by Title IX. The germane issue under Title IX is whether the harassment rises to such a level that it denies or limits a student's ability to participate in or benefit from the school's program based on sex.<sup>2</sup>

One type of sexual harassment involves a hostile educational environment. To establish a *prima facie* case (or initial case) of a hostile educational environment, OCR will determine

<sup>2</sup> See OCR's guidance entitled “Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties” (January 2001) (referred to as OCR's Revised Sexual Harassment Guidance), pp. 2 and 5. This guidance is available at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.html>.

whether 1) a hostile environment based on sex existed; 2) the educational institution had actual or constructive notice of the hostile environment; and 3) the educational institution failed to respond adequately to redress the hostile environment. To establish a hostile environment based on sex, the evidence must support a conclusion there was verbal and/or physical conduct constituting harassment, the harassment was sexual in nature or based on the aggrieved student's sex, and the harassing conduct was sufficiently severe, pervasive, and/or persistent so as to interfere with or limit the ability of the student to participate in or benefit from the services, activities, and/or privileges provided by the educational institution.

The other type of sexual harassment, traditionally referred to as *quid pro quo* harassment, occurs if a teacher conditions an educational decision or benefit on a student's submission to unwelcome sexual or gender-based conduct.<sup>3</sup>

OCR evaluates evidence obtained during an investigation under a "preponderance-of-the-evidence" standard to determine whether the greater weight of the evidence is sufficient to support a conclusion a recipient (such as the University) failed to comply with a law or regulation enforced by OCR or whether the evidence is insufficient to support such a conclusion.

#### Findings of Fact

- The complainant stated in his complaint and in a telephone conference with members of my staff on June 28, 2007, that his preceptor asked him on September 6, 2006, the first day of the complainant's clinical, to date a close friend of hers. The complainant stated the preceptor asked him to date her friend several times and the complainant told her he was not interested.
- The complainant informed the preceptor that he was already involved with someone and he was not interested. In the complainant's 25-page written complaint provided to the University's Human Resources Office, he stated that "[s]he seemed disappointed at my refusal of the request, so she then again offered me her friend's number in case my present relationship dissolved. She stressed that I seemed to be a good match for her friend. Again, I refused to accept the phone number from her."
- After this interchange with the preceptor on the first day of his clinical, the complainant indicated the preceptor did not broach the topic of her best friend again. The complainant stated the preceptor did not make any other inappropriate comments based on his sex or indicative of sex-stereotyping.

<sup>3</sup> See OCR's Revised Sexual Harassment Guidance, p. 5.

- During a conversation on June 28, 2007, with OCR staff, the complainant stated he did not file a grievance concerning the preceptor's action, or complain to his instructor. He stated he did not want to affect his working relationship with his preceptor so he did not pursue the matter.
- OCR's investigation revealed that the complainant first informed University officials of the matter concerning the preceptor's actions on October 9, 2006, when the complainant submitted his 13-page grade appeal to the Chair of the Nursing Department.
- In addition, the complainant stated the instructor of the course (who is different from the preceptor of the clinical portion of the course) introduced herself on August 29, 2006, the first day of class. At that time she shared with all the students that her husband divorced her for a younger woman. The complainant felt the instructor was bitter towards men based on her comment to the class.

#### Legal Analysis of Sexual Harassment Allegation

The complainant alleged that on the first day of his nursing clinical in course 4621, the preceptor asked him if he would be interested in pursuing a romantic relationship with her best friend and she offered him her phone number. The complainant informed the preceptor that he was already involved with someone and he was not interested. In the complainant's written complaint, he stated that "[s]he seemed disappointed at my refusal of the request, so she then again offered me her friend's number in case my present relationship dissolved. She stressed that I seemed to be a good match for her friend. Again, I refused to accept the phone number from her."

After this interchange with the preceptor on the first day of the clinical, the complainant indicated the preceptor did not broach the topic of her best friend again. Nor did the preceptor make any other inappropriate comments based on his sex or indicative of sex-stereotyping, according to his statements during an interview with OCR staff. Therefore, the preceptor's attempt to schedule a date with the complainant and her best friend appears to be an isolated incident and does not establish sufficiently severe or pervasive harassment under the fourth prong of the *prima facie* case for hostile educational environment.

The complainant also stated the instructor introduced herself during the first day of class and shared with all the students that her husband divorced her for a younger woman. The complainant felt the instructor was bitter to men based on her comment to the class. The instructor made no other comments to him based on sex or indicative of sex-stereotyping during his clinical or class with her. As such, the instructor's comment was an isolated incident and does not establish sufficiently severe or pervasive harassment, even if combined with the preceptor's comment.

In addition, OCR finds no evidence that the comments made by the preceptor and instructor were connected to the decisional process regarding the complainant's failure in the clinic. He has not provided any specific information indicating the preceptor or instructor conditioned a successful evaluation or grade in the clinical on his submission to unwelcome sexual or gender-based conduct. Therefore, the evidence does not establish a *quid pro quo* claim for sexual harassment.

Based on the analysis above, there is insufficient evidence to establish that the preceptor or clinical instructor sexually harassed the complainant. Therefore, allegation one is closed effective the date of this letter.

### Allegation Two

The complainant alleges he was treated differently than a similarly situated female student on the basis of sex when he was dismissed from the program even though he followed proper medical procedures, while the female student performed a forbidden unsupervised medical procedure, and the University allowed her to continue in the program.

### Legal Standards for Sex Discrimination based on Disparate Treatment

The Title IX regulation set forth in the legal standards for sexual harassment, above, prohibits sex discrimination based on disparate treatment. OCR must first establish a *prima facie* case of discrimination. The elements of a *prima facie* case for sex discrimination based on the circumstances of the complaint are: 1) the complainant is a member of a protected class (sex), 2) the complainant is eligible for a particular benefit or program, and 3) the University treated the complainant less favorably than a similarly situated student of a different sex with respect to the benefit or program in question. Once OCR establishes a *prima facie* case, the burden shifts to the University to produce a legitimate, non-discriminatory reason for the denial of an educational benefit or other adverse action. If the University is able to articulate a legitimate, non-discriminatory reason for the denial or adverse action, OCR examines whether the University's proffered reason is merely a pretext for discrimination.

OCR may show intentional discrimination based on sex by direct evidence or circumstantial evidence. Direct evidence includes conduct or statements by persons involved in the decision-making process that may be viewed as directly reflecting the alleged discriminatory attitude. Any direct evidence of discrimination must show that discrimination motivated the denial of an educational benefit or other adverse action. However, stray remarks in the educational environment, statements by people who are not decision-makers, and statements by decision-makers unrelated to the decisional process do not constitute direct evidence.

### Findings of Fact

- During an orientation for the clinical on August 29, 2006, you stated that the instructor gave a general overview of the clinical, including an explanation of the nursing practices at St. Luke's Hospital and some "do's and don'ts." One of the areas specifically covered by the instructor was the fact that no student could give an IV push medication without the direct supervision of an RN. The instructor stated it is a violation of state law to do so. The complainant stated he could not remember if the instructor said it would be an automatic failure of the clinical if a student administers an IV push medication without an RN present.

- OCR reviewed the syllabus for the clinical (Nursing 4621) to determine what it stated concerning the administration of IV push medication. The "Policies for Clinical Practicum" in the syllabus set forth the following:

Students may give IV "push" medications only . . . under the direct supervision of a RN [emphasis original].

Failure to comply with above policies will result in an "Unsatisfactory" for the clinical day and possible removal from the clinical site for that day as well. Continued failure to comply with these policies, the policies of the agency, or the policies within your student handbook regarding safe nursing practice may result in probation, failure of course, and /or disenrollment from program.

- During a telephone interview with OCR staff members on June 27, 2007, another male student (referred to as male comparator), who also failed the same clinical with the same instructor, stated he specifically remembers the instructor saying to the student group that if a student did administer an IV push without the supervision of an RN, that student would automatically fail the clinical.
- OCR reviewed a written statement from a female nursing student in the same course. She stated, "[a]ccording to state law a licensed RN must be present during all IV push medication administration. [The instructor], my professor, made it clear that failure to do this would result in a clinical failure." The female student became aware of another female student (referred to as female comparator) who administered an IV push medication without an RN present: "I was drawing up an IV push med and then proceeded to ask the RN nearest to me to assist. Another UCM nursing student [female comparator] stated that we did not have to have a RN present unless it was a narcotic. I informed the student of the policy that was established at the start of the semester. The student's response was "oops, I forgot. I have been doing IV pushes

without a RN for the past 5 days. The student reported her behavior to the instructor [name deleted], who in turn told the student to be 'more aware.' The student passed clinical and is set to graduate Dec. 16, 2006."

- OCR reviewed the written statement from the female comparator who made the error. She wrote that once the error was discovered, she immediately reported it to the instructor. She wrote that the medication was the "correct dose" and was administrated correctly. She also wrote that it "was pure miscommunication."
- During an in-person interview with OCR staff members on June 25, 2007, the instructor stated she did remember the situation. She stated she communicated to the female comparator that an error had occurred. She stated that the preceptor had witnessed the student perform the IV push two hours earlier and the student had performed the IV push correctly. The preceptor also told the instructor that she had forgotten the rule and had told the student to do it. The instructor told OCR staff that she did not fail the student on the spot because the preceptor told the student to do it (the preceptor said she trusted the student completely). In addition, the instructor stated the student is an excellent student and the student reported it immediately when she came to the floor. She stated it would have been much more serious if the student would have hidden the matter.
- OCR reviewed the female comparator's transcript from the University, which indicated she had an overall GPA of 2.71.
- Based on a review of the female comparator's clinical evaluations, OCR found the female student received positive mid-term and final evaluations from the instructor. The female comparator received passing marks in all five categories on the midterm evaluation dated 9/19/06: Communication, Nursing Reasoning, Professional Valuing, Interacting, and Managing Information. Contemporaneous comments from the instructor on the female comparator's mid-term include: 1) Meeting course objectives at good level; 2) Working with good autonomy; self-direction; 3) Using preceptor as resource; 4) Asking appropriate questions, and 5) Good insight into learning need; 6) Goals for 2<sup>nd</sup> half of rotation; 7) Continue to work on arranging report: time management on AM; 8) Work on asking fewer questions while still maintaining client safety; 9) Make suggestions to preceptor instead of asking questions; 10) Continue to look for opportunities to delegate effectively.
- The female comparator received the following comments on her final evaluation: 1) Has achieved course objectives consistently and at high level; 2) Strengths in areas of interacting and communicating; 3) Work on organizing report logically; 4) Nursing reasoning could be strengthened through collection and analysis of comprehensive

information . . . inferences are drawn; and 5) Excellent job in this clinical rotation. In addition, evaluations from previous clinicals indicate the female comparator had no consistent or repeated performance issues.

- The complainant alleged in his 25-page written complaint that of the 17 nursing students in his clinical, only two students are male and both were failed by the instructor.
- The complainant received failing marks on his midterm and final evaluations by the instructor. A detailed description of his evaluations is listed in the disability harassment findings of fact, below. In summary, the instructor assessed several deficiencies in the complainant's clinical performance, including failure to chart patient assessments in a timely manner, failure to independently apply nursing reasoning to draw accurate clinical inferences, ineffective time management skills, a lack of adequate self-direction and self-confidence, a consistently high level of anxiety, and difficulty interacting effectively.
- Another male student in the same class (referred to as male comparator) received failing marks on his final evaluation by the instructor for several medication errors during his seventh day of clinical, which constituted unsafe nursing practices. In addition, the male comparator's preceptor stated to the instructor that the male comparator "was not organized or 'on task,' and that he required continuous supervision to ensure client safety. The preceptor also conveyed that he "functions like he has in his first clinical rotation," and he did not function with self-direction or autonomy in previous clinical days.<sup>4</sup>

#### Legal Analysis of Sexual Discrimination based on Disparate Treatment

The complainant alleged in his 25-page written complaint that of the 17 nursing students in his clinical, only two students were male and both were failed by the instructor. The complainant also alleged that the female comparator made a serious medication error in violation of the nursing course policy and state law by administering an IV push medication without the direct supervision of an RN. This female comparator was not given an "unsatisfactory" for the clinical day or failed in the clinical course. Yet the complainant asserted he was failed in the clinical even though he did not perform any serious "medication" errors. The male comparator was given a failure in the clinical for at least three medication errors during his clinical.

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<sup>4</sup> The male comparator's deficiencies are set forth in a memorandum from the instructor to the student file and copied to the Department Chair.

Based on the *prima facie* case set forth above, OCR established that the complainant is in a protected group based on his sex (male), he was enrolled in and eligible to participate in a nursing program at the University, and he was treated less favorably than a female student who made a serious medicine error and was not failed in the clinical. The complainant also provided two comments, one by his preceptor and one by his instructor, which he believes reflected discriminatory attitudes. As discussed in the sexual harassment section above, the complainant's preceptor asked him to date her friend during the first day of clinical, which he declined to do. In addition, the complainant's instructor disclosed to him and his classmates during the first day of class that her husband divorced her for a younger woman. The complainant felt the comment indicated the instructor was bitter to men.

No other similar comments were made by the instructor or preceptor during the complainant's clinical. Therefore, OCR considers these two statements to be "stray" comments that do not constitute direct evidence of discrimination. Neither of these comments "directly" reflects a discriminatory attitude. As such, the burden shifts to the University to show the instructor's actions were based on a legitimate, non-discriminatory reason.

The instructor states that the female comparator was not given a failure in the course because she was instructed by the preceptor to administer the IV push medication by herself after the preceptor observed her administer the medication successfully. In addition, the instructor indicated during an interview with OCR staff that the student was an excellent student and there were no other concerns or issues in her clinical. OCR reviewed the female comparator's evaluations by the instructor and the female student was given generally positive contemporaneous comments, including an "excellent" comment in the final evaluation.

The complainant indicates that the instructor's reasons for not failing the female comparator are pretextual, since the instructor announced during the orientation session before the clinical started that if a student administers an IV push medication without the direct supervision of an RN, it would be grounds for failure in the clinical. In addition, two other students in the class explicitly remember the instructor informing the class that it would be an "automatic" failure in the class. At least two nursing staff who teach other courses also confirmed during interviews with OCR staff it was a practice in the nursing program to "automatically" fail students who administer an IV push medication without the direct supervision of an RN.

The instructor, however, stated during an interview with OCR staff that the policy in the course syllabus does not mandate automatic failure in the clinical. The syllabus states: "[f]ailure to comply with above policies will result in an "Unsatisfactory" for the clinical day and possible removal from the clinical site for that day as well. Continued failure to comply with these policies, the policies of the agency, or the policies within your student handbook

regarding safe nursing practice may result in probation, failure of course, and/or disenrollment from program." The instructor indicated the female comparator reported the IV push medication issue to her immediately after she realized she failed to ensure an RN was present, showing accountability for her actions. In addition, the female comparator administered the medication correctly; no medication administration error was made aside from her failure to have an RN present.

While the instructor's action appears to be inconsistent with what she allegedly announced in class concerning an "automatic" failure, such inconsistency does not necessarily rise to the level of a discriminatory motive based on sex, without additional circumstantial evidence. Rather, it appears the instructor considered the female comparator's violation as an isolated mistake, not a "continued failure," and she took into account the female comparator's excellent performance in class. On the other hand, the instructor considered the male comparator's alleged performance an unacceptable pattern of mistakes dealing with medication administration that created unsafe nursing practices. Likewise, she considered the complainant's alleged performance issues more than an isolated mistake, based on her statements during our interview. Therefore, based on a preponderance of the evidence, OCR does not find sex discrimination based on disparate treatment in violation of Title IX.

There is insufficient evidence to establish that University officials treated differently than a similarly situated female student on the basis of sex. Therefore, allegation two is closed effective the date of this letter.

### Allegation Three

The complainant alleged two of his instructors became aware he had Attention Deficit Hyperactive Disorder (ADHD) and then committed disability harassment by frequently accusing him of being anxious and used the alleged anxiety as one of the reasons for his dismissal.

### Legal Standards for Disability Harassment

To be protected by Section 504, a person must be a qualified individual with a disability. Section 504 regulation at 34 C.F.R. § 104.3(j)(1) defines an individual with a disability as any person who has a physical or mental impairment which substantially limits one or more major life activities. The Section 504 regulation at 34 C.F.R. § 104.3(l)(3) defines a qualified person with a disability, with respect to postsecondary education services, as a person with a disability "who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity." Title II defines a "qualified individual with a disability" as "an individual with a disability, who, with or without reasonable modification to rules, policies, or practices . . . meets the essential eligibility

requirements for the receipt of services or the participation in programs or activities provided by a public entity

The Section 504 regulation at 34 C.F.R. § 104.4(a) provides 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 that receives Federal financial assistance. The Title II regulation, at 28 C.F.R. § 35.130, includes a similar prohibition. Disability harassment is a form of disability discrimination prohibited by Section 504 and Title II.

Disability harassment under Section 504 and Title II is intimidation or abusive behavior toward a student based on disability that creates a hostile environment by interfering with or denying a student's participation in or receipt of benefits, services, or opportunities in the school's educational program. Harassing conduct may take many forms, including verbal acts and name-calling, as well as nonverbal behavior, such as graphic and written statements, or conduct that is physically threatening, harmful, or humiliating.

When harassing conduct is sufficiently severe, persistent, or pervasive that it creates a hostile environment, it can violate a student's rights under the Section 504 and Title II regulations. Such harassment can include subjecting a student to inappropriate physical restraint because of conduct related to his disability. A hostile environment may exist even where the harassment is serious enough to adversely affect the student's ability to participate in or benefit from the educational program.

To determine whether a recipient is responsible under Section 504 and Title II for disability harassment, OCR examines: (1) whether a hostile environment exists because harassing conduct is sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient; (2) if a hostile environment exists, whether a recipient has actual or constructive notice of the hostile environment; and (3) if a recipient has notice, whether the recipient took appropriate responsive action.

#### Findings of Fact

##### *Clinical goals and orientation:*

- OCR reviewed the syllabus for the clinical (Nursing 4621), including the following provisions:
- The instructor will assign the preceptor and clinical location. "Along with your instructor, your preceptor will function as coach, mentor, role model, and identifier of areas of growth."

- "In general, final course goals are the provision of care to a full team of clients (as defined by the particular agency), with the student assuming the responsibilities of team leader and providing care as autonomously as possible while acting within the student role. The role of team leader must be demonstrated at a passing level in a consistent manner over the entire course"
- The preceptor provides ongoing feedback regarding the student's performance to both the student and the instructor.
- The methods of assessment include weekly self-evaluations, supportive incidents, instruction evaluations, and clinical conference participation.
- The course grade will be determined by successful completion of each of the following: 1) Clinical Conference Activities; 2) Evaluation of Clinical Objectives, which include weekly journaling, Midterm formative evaluation of clinical performance, and Final summative evaluation of clinical performance; 3) Professional Portfolio Project; 4) Clinical Management Tool; 5) Documentation Exercise Project; and 6) Senior Assessment Day Plan. Each of the above is pass/fail. "Students must achieve a passing grade in each clinical objective on the final evaluation of clinical performance, and a passing grade for all course activities in order to pass the course."
- In the complainant's 13-page grade appeal <sup>5</sup> he stated during the first class period for 4620, which is the theory portion the course, the complainant's instructor shared with the class she had ADHD. The complainant stated after the class he went to her and shared that he also had ADHD. The complainant stated he felt comfortable about sharing this information with the instructor and that he did this on his own and without any pressure from anyone to share this information.
- The complainant stated he had not shared this with other instructors because he "did not want it to be subject to scrutiny." The complainant stated he shared the information with this instructor because he wanted "to see if there were any techniques or helpful advice she could relay to me."
- In the complainant's 13-page grade appeal he stated he and his classmates were given an orientation on August 30, 2006, at St. Luke's Hospital for his clinical rotation. During the meeting the complainant was asked to share something about himself to the group. The complainant stated he told the group about his ADHD. The

<sup>5</sup> The complainant submitted an initial 13-page written complaint for his grade appeal to the Director of the Nursing Department after he was failed in the nursing clinical.

complainant told the group that his medication was working well and that it did not affect his ability to react to situations.

- During an in-person interview with OCR staff members on June 25, 2007, the instructor stated the complainant came in to see her several times to inquire and make sure he had everything he needed in order to begin clinical. The complainant's instructor stated she considered this somewhat odd since this was his last semester before graduation and everything he needed for clinical is identified in the syllabus. The instructor also stated to OCR staff that the complainant appeared quite anxious when he came in to visit with her. The instructor informed OCR staff that she decided to find a preceptor who had worked with anxious students before. The instructor stated she found an experienced preceptor that had worked with three other students who appeared anxious and the preceptor is very calm and supportive. The instructor stated that all three of these previous students did well and achieved all course objectives. The instructor further stated that she asked the preceptor to give the complainant positive feedback to help encourage him and to improve his confidence.

*The Six Clinical Days and Mid-term evaluations:*

- The first clinical day in the hospital took place on September 6, 2006. During an in-person interview with OCR staff members on June 25, 2007, the complainant indicated the instructor stated the first day is mainly orientation and she allows the students to learn about the hospital (all hospitals are somewhat different) and learn the routine that will occur the rest of the clinical days.
- In the complainant's 13-page grade appeal he stated before the rotation began he introduced himself to his preceptor and advised her that he "learns best through experience." The complainant stated he informed her about his ADHD and expressed to her that feedback in association with experience on the floor is intricate to his level of confidence. The complainant stated he found it difficult to remember how to properly complete all new documentation required at each hospital. The complainant stated each hospital has different documentation requirements and he asked his preceptor to be patient with him while he "integrate the different style of documentation." The complainant stated that later in the day his instructor came on the floor and asked how things were going. The complainant stated she also quizzed him about his anxiety. The complainant stated he "informed her that it was minimal and not affecting my performance."
- The second clinical day in the hospital took place on September 7, 2006. The complainant stated in his written complaint that everything went well on the second

clinical day and he was given no negative feedback from his preceptor or instructor. The syllabus states that the preceptor is to give the complainant a written evaluation after the second clinical day. The complainant stated in his complaint that he received no such written evaluation from the preceptor. The information provided by the University included an evaluation written by the preceptor addressing the first four days of this clinical. In the complainant's 13-page grade appeal he stated the instructor appeared on the floor in late afternoon. The complainant stated, "she asked me several questions but one in particular was beginning to appear on a frequent basis. She asked me again about my anxiety level. The continual questioning of my anxiety levels began to make me more anxious and cringe wherever she approached me." The complainant stated he again told her his anxiety was minimal.

- During a telephone interview with members of my staff on June 28, 2007, the complainant stated he turned in his self-evaluation for the first two clinical days (September 6 and 7, 2006) and that he did receive written feedback from his instructor by her returning the self-evaluation to him with written comments.
- OCR reviewed the instructor's evaluation for day one and two. On the line stating "Effectively prioritizes activities for self and others," the instructor wrote that the complainant needed to provide examples of how he does this. Another line stated, "Delegates tasks effectively and efficiently." The instructor wrote that this "is a skill you need to practice." The instructor wrote that the complainant should look for areas of improvement. She wrote he did well the first week, but his performance was not outstanding. She wrote, "You're off to a good start. Keep up the good work."
- The third clinical day in the hospital took place on September 14, 2006. The complainant stated in his complaint his preceptor said he was doing fine. However, he did notice that the preceptor was taking care of some things for his patients instead of allowing him to do them. In the complainant's 13-page grade appeal the complainant stated he still felt a bit unfamiliar with the unit and with the required documentation. The complainant stated that during the lunch break he spoke to his preceptor about his performance. The complainant stated she avoided the subject and just said he was doing all right. The complainant stated he admitted to his preceptor that he was struggling some to adequately maintain all necessary documentation regarding client care. The complainant stated, however, he did not feel this affected client safety. The complainant further stated his instructor came on the floor and again asked him several times whether he was anxious. The complainant stated he told her he was not anxious. The instructor informed OCR staff during an interview on June 25, 2007, that the complainant was very anxious and that it was quite noticeable to her and the preceptor.

- The fourth clinical day in the hospital took place on September 15, 2006. The complainant stated in his 13-page grade appeal that his instructor asked him several times that day about his anxiety level. The complainant stated his instructor began the day by assessing how accurately he took the report on the three patients he had that day. The complainant stated that after the report his instructor questioned him about each patient and criticized his preoccupation with writing the information down as opposed to maintaining eye contact with the nurse as she spoke.
- The complainant stated that for him to see the entire clinical portrait being explained about the client, it was crucial for him to write all pertinent information down. In a telephone conversation with members of my staff on June 28, 2007, the complainant made it clear he did not feel eye contact was an issue at all.
- The complainant stated that after the shift was over he met with the instructor and his preceptor and was verbally told that he was failing the class. The complainant stated in his complaint this was the first time he was given negative comments about his performance. The complainant used the term “blind-sided” in a telephone conversation with members of my staff. The complainant stated he was completely surprised that he was failing the clinical.
- In a telephone conversation with members of my staff on June 28, 2007, the complainant stated he received a four-day mid-term evaluation from his preceptor. The complainant indicated the preceptor failed to evaluate him in a timely manner after day two of the clinical, contrary to procedures outlined in the syllabus, and instead combined the first evaluation with the second evaluation after day four of the clinical. The complainant stated the preceptor was hastily completing the evaluation for all four days while she and the instructor were giving him verbal feedback at the end of his shift on day four.
- The mid-term evaluation, entitled “Clinical Performance Objective Criteria,” rates students in the five categories of Professional Valuing, Nurse Reasoning, Communication, Interacting and Managing Information. The preceptor and instructor use the following rating scale for 30 specific items within the combined five categories:
  - 1: Not meeting expectations
  - 2: Developing appropriately
  - 3: Performance outstanding
  - 4: Experience unavailable

- On the complainant's mid-term evaluation, his preceptor wrote he has "had difficulties in anticipating needs of patient ahead of time. [The complainant is] focused on the task at hand, which is good - however needs guidance in knowing what task to do next." She also stated he knows the correct answer but he is not confident in self-knowledge. "Once he is re-focused -with much proding [sic] - can finish task effectively." On the next page of the evaluation, she noted the complainant needs guidance prioritizing and he seeks the preceptor's acceptance of ideas that are his own. She stated the complainant takes "creative criticism [sic] with difficulty" and he has difficulty making decisions autonomously. She noted the complainant double-check yourself well, but he is overly nervous when multi-tasking. She noted the complainant was "improving on giving report to on-coming nurses" and he gives pertinent information in the report. Of the 30 items on the complainant's mid-term evaluation, the preceptor gave him a rating of one (not meeting expectations) in eight items, a rating of two (developing appropriately) in 18 items, and a rating of 3 in one item. The remaining three items received a rating of four, "1/2" and no rating.

- The complainant also stated he received his mid-term evaluation for days three and four from his instructor. Of the 30 items, the complainant's instructor gave him a rating of one in 15 items and a rating of two in 15 items. She noted the complainant's "lack self direction or autonomy" and his preceptor "still needs to direct you - work on independent documentation." The complainant's instructor made the following "additional comments" on his mid-term evaluation:

Conferenced at clinical site with preceptor to review clinical performance and outline strategies/plan for improvement. As discussed, extreme anxiety is impairing your ability to reason and function. Plan to use strategies we outlined in conference: suggested counseling center to correct deficits. Self eval. this week reflects increased insight . . . your learning need and performance issues.

- The complainant's instructor and preceptor both rated him with a one in the following items on his mid-term evaluations requiring independence and time management:
  - Functions in the role of the registered nurse with focus on client outcomes (not task performance).
  - Able to complete course expectations with minimal supervision.
  - Manages time effectively to complete responsibilities within allotted time frames.

- Self-directed in clinical practice; seeks direction from preceptor/instructor appropriately.
  - Able to independently analyze solutions with logical reasoning to reach a conclusion.
  - Able to autonomously make decisions efficiently and safely.
  - Effectively prioritizes activities for self and others.
- 
- Based on the midterm feedback the complainant received during the meeting with his instructor and preceptor at the end of the fourth day, he was required to complete a self-evaluation. Of the 30 rating items, the complainant assigned himself a rating of one in 16 items and a rating of two in 12 items. In the remaining two items, the complainant gave yourself a combination rating of “2/1” and “2/2.” The complainant did not rate yourself as performing at a level three (“Performance outstanding”) in any items on his self-evaluation. The complainant also rated himself as a one in some of the items requiring independence and time management, listed in the bullet above.
  - The complainant stated during an interview with OCR staff that he rated himself as “Not meeting expectations” in about half the rating items because his instructor and preceptor expected him to reflect their feedback in his self-evaluation.
  - The complainant stated in his 13-page grade appeal both his instructor and preceptor stated they would “pursue any means possible to assist” him, including extra clinical time if necessary. The complainant wrote that it “was demeaning” being their project, but wanted to be successful. The complainant stated he was “amazed” that his instructor and preceptor were willing to work with him to be successful. The complainant wrote: “Still, during my first four clinical days, my preceptor gave me no indication that I had a problem.”
  - The complainant stated in his complaint that during the meeting at the end of his fourth clinical day, he was asked by his instructor to seek counseling services and suggested that he change his medication to BuSpar, a prescription drug for anxiety. During an in-person interview with OCR staff members on June 25, 2007, the instructor stated she cancelled his next clinical day so he could go to the counseling office.
  - The complainant stated that on September 18, 2006, he went to the campus counseling services offered by the University. The complainant stated he met with a counselor and after his discussion they both agreed to not change his medication but to attempt cognitive therapy. The complainant stated he called his instructor and

explained what had been decided. The complainant stated that his instructor appeared to him to be discouraged at the course of action chosen.

- In the complainant's 25-page written complaint, the complainant stated that "[o]n 9/19/2006, I had another short meeting with [the instructor] regarding the mid-term meeting where she advised me to consider additional medications anyway. She advised me to contact my primary care provider and explore BuSpar again. She then encouraged me to make several adjustments to my clinical management tools and continue to make improvements to my clinical performance. As I walked out of her office, she again stated that she believed I needed some type of medication."
- In a December 15, 2006 written statement the instructor provided to the University's HR investigator, the instructor stated she suggested to the complainant a re-evaluation of his medication and she mentioned a specific medication for anxiety, BuSpar. She stated the complainant did go to the counseling center and a decision was made to use cognitive-behavioral therapies. She also stated "I strongly believe in this approach, but was frustrated because this type of therapy is long-term, and [the student's] needs were immediate. In this case, my nursing and personal knowledge of mental health disorders and therapeutics contributed to my overstepping my bounds. This was done, however, with the intention of helping a failing student."
- On September 19, 2006, the complainant met with his instructor to discuss his mid-term evaluation. The complainant signed a sheet that indicated he was failing all five elements in this clinical. She mentioned his self-evaluation, which described many of the items mentioned to him on the meeting held on September 15, 2006, and she stated this showed self-insight.
- The fifth clinical day in the hospital took place on September 21, 2006. In an in-person interview with members of my staff on June 18, 2007, the complainant stated he did not interact very much with his preceptor. The complainant's instructor continued to ask the complainant about his anxiety, which he stated only made his anxiety to increase. The complainant received positive feedback from his preceptor at the end of day five, and his instructor indicated to OCR staff that he had shown improvement during day five.
- The sixth clinical day in the hospital took place on September 27, 2006. During an in-person interview with members of my staff on June 18, 2007, the complainant stated he was given three very difficult patients needing "nearly complete total care." The complainant stated the preceptor had five patients, but two of those patients were very easy. The complainant stated the morning went well but he did not get the documentation on two his patients completed. The complainant stated his preceptor

told him she did not think the instructor would pass him. During an in-person interview with members of my staff on June 21, 2007, the instructor stated the preceptor had told her she didn't want to work with the complainant anymore because the preceptor felt he was unsafe. The instructor also stated she had no other preceptor that she could utilize to work with the complainant and she felt legally and ethically obligated to remove him from the clinical. At approximately 1:30 PM the complainant was told by his instructor to leave the hospital. The complainant then left the hospital.

*Actions Taken After Failure in Clinical*

- On September 28, 2006, the complainant sent a memo to the department chair mentioning his failure and that he wanted a meeting with her to discuss the options available.
- On September 28, 2006, the day after the instructor gave the complainant a failing grade in the clinical the instructor sent an email message to the department chair. In the email message the instructor states that after the complainant was failed in the clinic and left the hospital, the preceptor checked his work and found he had charted only one of three patients and he also "missed a 0900 medication on one of his patients." The instructor's recommendation to the department chair was "I hope you will strongly encourage him not to come back."
- On September 29, 2006, the complainant met with the department chair to discuss his options. She informed the complainant about the grade appeal and suggested he could file a grievance.
- On October 4, 2006, the complainant communicated for the first time with the Disability office at the University and he requested extended time to take tests in course 4420 to accommodate his ADHD. In the medical paperwork submitted to the University, he provided a doctor's statement with his diagnosis of ADHD. The complainant stated during an interview with OCR staff that he did not request any academic accommodations or adjustments earlier because he did not know they were available.
- The Disability office granted him extended time for tests in his courses because of his ADHD.
- On October 9, 2006, the complainant officially presented his initial grade appeal grievance to the department chair when he sent her a 13-page written document outlining why he believed his grade should be changed.

*Final Evaluation:*

- On October 10, 2006, the complainant met with his instructor and she asked him to review and sign his final performance evaluation for his 4621 nursing clinical, which was a failure. The complainant had not received his written final evaluation prior to this date. The complainant's instructor failed the complainant on all five elements of his clinical. According to the syllabus, the complainant had to pass all five areas in order to pass the clinical. Failure on one item would result in failing the class.

- The first area of failure is in the category of **Communicating**. In this category, the instructor stated the complainant required "supervision in documentation. On the final day of clinical, [the complainant] left the floor after 1330. When charts were checks, only 1 of 3 shift assessments had been charted. Independence in documentation is an issue that had previously been addressed." The complainant indicated during his interview with OCR staff that he had been on the floor from 7:00 AM to approximately 1:00 PM and had not charted two patients because of his "high-needs" patients. The complainant also indicated that if he had not been ordered off the floor by his instructor, he would have been able to complete the charts.

- The second area of failure is **Nursing Reasoning**. Nursing staff stated during interviews with OCR staff that the category of nursing reasoning is the most important and challenging category for nursing students, since it requires students to actually apply all of the theory they have learned in a clinical environment. In this category the complainant's instructor evaluated the complainant as follows:

Comments from RN preceptor indicated that [the complainant was] not able to independently apply nursing reasoning to draw accurate clinical inference. Sometimes able to verbalize appropriate priorities to me with prompting, but has difficulty adjusting nursing care based upon changes in priority. Preceptor said "he just can't do this." Although some improvement was seen following midterm conference, [his] time management remains ineffective. [His] clinical performance was deemed potentially unsafe, as [he] continued to require close supervision in the clinical area.

- The remaining categories in the final evaluation are **Professional Valuing, Interacting, and Managing Information**. In these categories, the instructor provided some positive comments, such as: 1) "[The complainant has] demonstrated increased insight into [his] own learning needs and [have] maintained a positive attitude towards the supervision of myself and [his] preceptor. It appears that [he

has] made significant effort to correct deficiencies" (Professional Valuing); 2) "[Y]ou have shown some improvement in interpersonal style, especially in the area of eye contact" (Interacting); 3) "Better information management seen following revision of clinical management tool" (Managing Information). However, the complainant's instructor continued to provide comments indicating the complainant did not show an acceptable level of independence or adequate self-direction. The instructor provided the following comment in the Interacting category:

[The complainant has] shown some improvement in interpersonal style, especially in the area of eye contact. However, continues to have difficulty interacting effectively. For example, on the final clinical day, a PCT [patient care technician] informed [the complainant] of a markedly abnormal pulse rate. [The complainant] did not make eye contact with this tech, or acknowledge to her that [he] recognized the significance of what was reported. This PCT initially informed the preceptor of the abnormality, and only informed [the complainant] upon my request. This suggests that she did not recognize [the complainant] as the client's nurse. [The complainant] continue to appear very anxious; does not appear self-confident in the clinical area.

- In addition, the complainant's instructor stated that "it is not clear that [the complainant] fully recognize deficiencies and [he has] not been able to achieve a passing level of performance" (Professional Valuing), and "[The complainant has] not demonstrated the ability to cluster data in order to make sound clinical inferences" (Managing Information).
- In a written statement from the complainant's preceptor to the University's Office of General Counsel and the Dean of Health Professions, dated November 13, 2006, his preceptor stated he is a "tunneled vision thinker," he was unable to multi-task, and he needed "constant supervision." In addition, the complainant's preceptor stated he were "uncontrollably anxious for much of the time" and provided the following example:

We start morning report at 0645 am every morning. It is basic knowledge that a nurse gets report on her patients before she begins to take care of them for the day. [The complainant] had been with me four days up to that point. He came in that morning and rushed down the hall. He stopped me and said, "OK - SO I NEED TO ASK YOU A QUESTION." I said, "ok." He said, "DO I GO AND SEE MY PATIENTS FIRST OR DO I GET REPORT?" It was questions such as these that occurred several times throughout the day. It's basic safe patient care that you know their name and why their [sic] at the hospital and what the plan of care is. I talked with [the complainant] and told him he would want to get report so that he would know about his patients.

- With respect to the instructor's comments involving the patient with an elevated pulse rate, the complainant stated during an interview with OCR staff and in his 25-page written complaint that the patient care technician (PCT) initially informed the preceptor of the abnormality because she was standing right outside the patient's door and he was in the storage room collecting supplies. The complainant stated the PCT had reported vital signs to him earlier that day indicating she did recognize him as the patient's nurse. In addition, the complainant was aware of the patient's pain medication schedule and the patient's standing request to receive pain medication once the patient was within the window of time to administer another dosage of medication. The complainant stated he turned to find the preceptor because only the preceptor was allowed to obtain morphine for the patients, not students. The complainant also stated his instructor was observing him during his interaction with the PCT and after his preceptor left the area, his instructor asked him what his next action would be. In his complaint, the complainant alleged that before he could respond, his instructor told him to first assess his patient. The complainant indicated he had planned to assess his patient before his instructor's question, and his assessment confirmed the patient's elevated heart rate was associated with her severe pain and her recent ambulation. The complainant stated he and his preceptor proceeded to address the patient's pain appropriately. The complainant emphasized in his written complaint he did not endanger his clients' safety in any fashion.
- In the complainant's written complaint he also responded to his instructor's comment about inadequate charting in the category of Communicating, as follows:

[The instructor] described that I only completed the assessment documentation on one client. I maintain that with my increasing experience, I had been becoming more confident with independently and correctly documenting all necessary forms on that floor. Due to client situations occurring at the time and correctly prioritizing necessary actions, it was impossible for me to document each assessment upon completion. Whether I was a student or an actual practicing nurse, I would be legally negligent for not addressing client issues immediately. I made a personal log on a separate sheet of paper for transcribing later to the official document. I maintain that as the day progressed, I would have accurately documented the assessments. As a student nurse being assigned to care for three very difficult clients proved to be challenging. Unfortunately, [the instructor] prematurely ordered me off the floor before I could adequately document the rest of my assessments.

- With respect to the instructor's comments in the Nursing Reasoning category, the complainant stated in his written complaint that the preceptor did not give him an

adequate opportunity to address the situation before completing patient care herself. "She then reported that my inaction was being incapable of effective time management, independence, and multi-tasking. I contend that there are always improvements that I could make and that with adequate experience, my abilities to function would improve. Lastly, the instructor was extremely vague upon how my clinical performance was deemed unsafe due to excessive amounts of supervision."

- The complainant also responded in his written complaint to the instructor's comments that he was not self-directed, he relied on the preceptor for routine tasks, he did not cluster data, and he was anxious and not self-confident in the clinical area. The complainant asserts the preceptor's report was subjective and it was not clear to him which routine tasks he needed guidance with in the clinical. The complainant emphasized he writes information down to fully absorb the meaning of what is being relayed, which assists him with his ADHD, and as his experience was increasing on the floor, his level of confidence was growing as well. "If I appeared anxious to [the instructor], it was primarily due to my fear of her relentless questioning of my anxiety level."
- The complainant alleges the instructor's comment on the final evaluation reflects a discriminatory animus: "[i]t was determined that [the complainant] could not, even if deficiencies were corrected, demonstrate the required consistency of behavior required in the Department of Nursing clinical grading criteria."
- In a subsequent clinical entitled "Advanced Concepts of Community/Mental Health Practicum" (NURS 4421) during the fall of 2006 with a different instructor, the complainant passed that clinical and received some positive comments on his evaluation. For instance, the complainant's instructor commented that he was "eager, interested and empathetic. Monitor self for abrupt interruptions into other conversations (over-eagerness)." In the course objective of "Interacting," the complainant's instructor stated he fosters a positive "atmosphere with clients, very accepting and affirming. Maintained tx. [treatment] boundaries and able to work in goal directed manner with [other student]." However, the complainant's instructor also stated he "[n]eed to work on observing milieu and group's overall issues as well as specific issue he is addressing - group teaching project appeared tunnel visioned. [More] anxiety unable to address group issues effectively." The instructor also stated during an interview with OCR staff she asked the complainant to work on maintaining good eye contact, which he did improve.

*Grade Appeal:*

- As stated above, on October 9, 2006, the complainant officially presented his initial grade appeal grievance to the Department Chair when he sent her a 13-page document outlining why he believes his grade should be changed. The complainant's grade appeal was denied at each level of the process, as follows:
  - On October 13, 2006, the Department Chair denied the complainant's grade appeal grievance.
  - On October 19, 2006, the complainant sent a 25-page grievance to the Dean of College of Applied Sciences and Technology (Dean).
  - On November 7, 2006, the Dean interviewed the complainant and his girlfriend. In a letter dated November 10, 2006, the Dean denied his grade appeal. The complainant expressed concern that it took 25 days instead of 5 days.
  - On November 17, 2006, the complainant sent a 5-page grievance letter to the Provost & the Vice President of Academic Affairs.
  - In a letter dated December 19, 2006, the Assistant Provost denied the complainant's grade appeal. This ended his grade appeal according to the University's grade appeal process.
  
- The complainant alleged during his interview with OCR staff he believes he is discriminated against based on his disability when the instructor failed him in the clinical and then refused to recommend that he be retained with conditions, like the male comparator who failed the clinical for more serious conduct, yet was retained with conditions. The complainant stated he believes his circumstances warrant a second chance and he deserves an opportunity to correct any deficiencies, like the male comparator. The complainant stated he also felt blind-sided, since he had received only positive comments during days one through four (until the mid-term meeting at the end of the shift) and during day five.

**Legal Analysis of Disability Harassment**

OCR analyzed the complainant's disability allegation in accordance with the standards for disability harassment and disability discrimination, based on information OCR obtained during our investigation. The University recognized the complainant as an individual with a disability, ADHD, as defined by the Title II and Section 504 regulations. The complainant is a qualified person with a disability because the University initially admitted him into the nursing program based on his meeting the requisite admission standards.

The complainant's instructor knew about his disability at the beginning of the course and questioned him every day during his clinical about his "anxiety" level. The complainant's

preceptor also knew about his disability. Beginning on the first day of his clinical, he asserts in his written statement that the instructor "quizzed [you] about any anxiety that [you] may be experiencing about clinical." Although the complainant stated to the instructor his anxiety was "very minimal" and not affecting his performance, he states the instructor persisted in questioning him during each clinical and closely scrutinizing his anxiety level, unlike other students. At the end of his fourth clinical, he states the instructor strongly suggested he change his medication for ADHD to BuSpar due to his anxiety level during a meeting with him, the instructor and the preceptor. According to the complainant's statement, he indicates the instructor told him to make an appointment with the campus counseling services to change his medication immediately. The instructor rescheduled the complainant's next clinical to allow him time to seek counseling services.

During this same meeting, the instructor and preceptor presented the complainant with negative feedback concerning his performance during clinical. Prior to this meeting, the complainant stated he had received positive feedback from them during days one, two, three, and four of the clinical.

After the complainant's appointment with campus counseling services, he notified his instructor of his decision to pursue cognitive therapy instead of a medication change. The complainant indicated the instructor seemed "somewhat discouraged," that he is not changing his medication. During a meeting with the instructor the next day, the complainant said the instructor renewed her request that he change his medication and she encouraged him to contact his primary care provider to explore BuSpar. The complainant also asserts during the next clinical (day 5) he received positive feedback from the instructor and preceptor, including comments that he was improving, although he did not interact very much with his preceptor. According to the complainant's statements during an interview with OCR staff, the complainant believes that on day 6, his instructor and preceptor were trying to set him up to fail by assigning him three very difficult patients.

The complainant stated the preceptor failed to evaluate him according to the course syllabus, and when she did evaluate him, she combined all four days of clinical and she hastily wrote down comments on his evaluation while she was simultaneously giving him verbal feedback with the instructor. In addition, the complainant alleges the instructor's final evaluation was vague, some information was misleading, and the instructor failed to provide him with specific examples. Moreover, the instructor stated on the complainant's final evaluation that "[i]t was determined that [complainant], could not, even if deficiencies were corrected, demonstrate the required consistency of behavior required in the Department of Nursing clinical grading criteria." This statement, the complainant believes, reflects a discriminatory animus; even if he performed adequately with no deficiencies, he would not meet the instructor's expectations. In addition, he believes this comment reflects the instructor's attitude that there was only one accommodation for his anxiety; a medication change. The complainant asserts the instructor initiated and strongly encouraged this accommodation but

she was inflexible to entertain cognitive therapy as an alternative accommodation recommended by his therapist, including consideration of this strategy for his retention request.<sup>6</sup>

The University produced legitimate, non-discriminatory evidence indicating the complainant had consistent deficiencies in his performance during his clinical, and the instructor and preceptor identified these deficiencies in his midterm and final evaluations. On the complainant's final evaluation, the instructor assessed several deficiencies in his clinical performance, including failure to chart patient assessments in a timely manner, failure to independently apply nursing reasoning to draw accurate clinical inferences, ineffective time management skills, a lack of adequate self-direction and self-confidence, a consistently high level of anxiety, and difficulty interacting effectively. The instructor and preceptor stated they gave the complainant positive feedback during the first four days of his clinical to increase his self-confidence.

However, the instructor also asserted in her written statement she gave the complainant verbal feedback throughout his clinical about his anxiety, since "your apparent nervousness and/or anxiety were marked." According to the instructor, his failure in the clinical was precipitated by the preceptor refusing to work with him on the sixth day of his clinical, because she felt he was unsafe. The instructor stated during an interview with OCR staff that she felt legally and ethically obligated to fail him based on the preceptor's refusal to work with him. Moreover, the instructor indicated she had no other preceptor she could assign to the complainant, particularly with only 2½ days left in the clinical.

The instructor stated in her written statement to the HR manager that she identified the complainant's anxiety, attention, and focus problems early and assigned a supportive preceptor to help him. She also disclosed her own diagnosis of ADHD to promote trust: "I have, obviously, been successful and I assured [the complainant] that there were many strategies that could be used to compensate for this condition." With respect to the medication change, the instructor stated in her written statement "I also mentioned a specific medication, BuSpar, as an effective medication for anxiety. I should not have done this, but I was looking for any possible way to help this student who was failing my course. [The complainant] did go to the counseling center, and the decision was made to use cognitive-behavioral therapies. I strongly believe in this approach, but was frustrated because this type of therapy is long-term, and [his] needs were immediate."

The final course goals are the provision of care to a full team of clients, "with the student assuming the responsibilities of team leader and providing care as autonomously as possible while acting within the student role. The role of team leader must be

<sup>6</sup> The complainant asserts the instructor initiated and insisted on a medication accommodation. He states that him and his therapist did not believe this was an appropriate accommodation.

demonstrated at a passing level in a consistent manner over the entire course [emphasis added].” The instructor and preceptor, based on their clinical observations, judgment and experience, determined the complainant did not meet the expectations of a team leader, providing care in an autonomous manner, consistently over the entire course, which was an overarching goal for the clinical. In addition, they determined that the complainant lacked self-insight to correct the alleged deficiencies and to show the required consistent, autonomous behavior in a future clinical. Such educational decision-making and professional judgment by faculty is generally given respect and deference in the courts.

A different instructor also identified some of the same performance deficiencies during a subsequent clinical in Community/Mental Health in the fall of 2006. She stated she asked the complainant to improve his eye contact during the clinical and he appeared to have tunnel-vision and anxiety during a group presentation.

The instructor’s and preceptor’s questioning the complainant about his anxiety level did not rise to the level of intimidation or abusive behavior based on his disability. As such, the instructor’s and the preceptor’s comments were not disability harassment and does not establish a hostile environment.

Based on a preponderance of the evidence presented in the paragraphs above and in the specific findings of fact, OCR finds the instructor’s decision to fail the complainant in the clinical was motivated by legitimate, non-discriminatory factors.

There is insufficient evidence to establish that two of the complainant’s instructors committed disability harassment by frequently accusing the complainant of being anxious and used the alleged anxiety as one of the reasons for his dismissal. Therefore, allegation three is closed effective the date of this letter.

#### Allegation Four

The complainant alleges University officials retaliated against him after he filed a complaint of sex and disability discrimination with the University’s Human Resource Office by denying him the opportunity to retake the clinical.

#### Legal Standards for Retaliation

The Title VI regulation at 34 C.F.R. § 100.7(e) states that no recipient shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing. This regulation is incorporated by reference into the Section 504 regulations at 34 C.F.R. § 104.61 and the Title IX regulations

at 34 C.F.R. § 106.71. The Title II regulation at 28 C.F.R. § 35.134 contains a similar retaliation prohibition.

To establish a *prima facie* case of retaliation, OCR must establish: 1) the complainant engaged in a protected activity, 2) an adverse action was taken against the complainant contemporaneously with or subsequent to his participation in the protected activity, and 3) an inferable causal connection between the adverse action and the protected activity. If a *prima facie* case is established, OCR will use a burden-shifting framework to determine if the University articulated a legitimate non-retaliatory reason for the adverse action, and if so, whether OCR can show the University's reason is pretext for discrimination.

#### Findings of Fact

##### *Complaint of discrimination to the University HR office:*

- On November 17, 2006, the complainant sent a 25-page document by email to the HR office alleging discrimination on the basis of sex and disability.
- On November 27, 2006, an HR investigator interviewed the complainant about the complainant's discrimination complaint he emailed to HR. On November 28, 2006, the HR investigator emailed him explaining the allegations that he had gleaned from his email and the conversation he had with him. The complainant called the HR investigator and approved his assessment of the allegations.
- On December 4, 2006, a day before the complainant's instructor submitted her decision not to recommend him for retention, the HR investigator met with his clinical instructor who failed him and provided her with a list of his allegations. He asked her to write a response to his allegations.
- On December 15, 2006, the complainant's instructor sent a written statement to the HR investigator responding to his allegations of discrimination.
- On December 23, 2006, the HR investigator completed his report concerning his investigation of the complainant's discrimination complaint and sent the complainant a letter dated January 2, 2007, indicating he found no discrimination.
- In an email from the instructor to the Department Chair dated September 28, 2006, the instructor recommended to the Department Chair: "I hope you will strongly encourage him not to come back."

*Request for Retention:*

- On October 23, 2006, the male comparator, who failed the same clinical as the complainant, submitted a request to retake the nursing clinical and be retained in the nursing program (referred to as a "request for retention" or retention request) to the Admission and Progression Committee (also referred to as the Retention Committee), along with supporting materials. The complainant and the male comparator were the only students the instructor failed in the clinical she taught during the fall of 2006.
- The male comparator received failing marks on his final evaluation by the instructor for several medication errors during his seventh day of clinical, which constituted unsafe nursing practices according to the instructor. In addition, the male comparator's preceptor stated to the instructor that the male comparator "was not organized or 'on task,' and that he required continuous supervision to ensure client safety." The preceptor also conveyed that he "functions like he was in his first clinical rotation," and he did not function with self-direction or autonomy in previous clinical days.
- The Retention Committee is comprised of six voting members, some of whom are nursing faculty in other courses. If there is a tie, the department chair votes to break the tie. The Retention Committee may vote to 1) retain the student, 2) not retain the student, or 3) retain with conditions.
- The retention request is a form with two sections. The first section must be completed by the student and includes two questions: 1) "In your own words (50 or less), state reason(s) for withdrawal or failure (please type your response)," and 2) "Please describe your specific plan for improvement or continued growth which you feel will prepare you for success if readmitted."
- OCR interviewed each member of the Retention Committee during our investigation. Every member stated that the instructor's recommendation is given great weight. In addition, the student's plan of improvement is carefully reviewed in determining whether to grant the request.
- The male comparator provided a description of his medication errors in response to the first question on the retention request. With respect to the second question, the male comparator listed several specific corrective actions he would take in the future, including the following: 1) review literature about infusion lines, 2) review hospital standards regarding documentation, 3) review different IM sites and needles, 4) pay attention to patient safety when functioning on a clinical site by reviewing each

patient's mars thoroughly to make sure all medication is administered per physician orders and ensure all six rights of medications are observed, and 5) utilize ATI handouts. In addition, the male comparator included a letter from a registered nurse (RN) who works with him outside the school environment, indicating the RN would be willing to mentor him.

- On November 13, 2006, the instructor submitted her decision to the Retention Committee recommending retention with conditions for the male comparator. The conditions were determined by the instructor and the Retention Committee at a later date.
- The instructor submitted typed, detailed memoranda in support of her recommendation. She based her recommendation to retain the male comparator, in part, on a lack of feedback from the second preceptor: "[the male comparator] actively sought feedback from his preceptor on an ongoing basis, but the preceptor did not give any indication of her degree of concern (to either [the male comparator] or myself). On day 7 (when [the male comparator] was removed for unsafe behavior) [the male comparator] was somewhat blind sighted. I am not sure that [the male comparator] was given ample opportunity to correct his deficiencies, but I had no choice but to remove him from the clinical area. A student cannot be expected to correct deficiencies of which he or she is unaware."
- The instructor's recommendation for retention with conditions for the male comparator was subsequently approved by the Retention Committee.
- On December 4, 2006, the complainant submitted a request for retention to the Retention Committee. In response to the first question on the retention request form concerning the reason(s) for his failure, he stated he "apparently failed from this clinical practicum for unsafe clinical behavior due to instructor discretion. The true reasons for my failure remain extremely subjective and vague." The complainant also state the instructor diagnosed him with a "severe debilitating anxiety condition," although he states he "denied this affliction to the fullest extent, committed no medical errors, and have never been scrutinized for anxiety in the clinical setting until now."
- The complainant also alleged discrimination in response to the first question in his retention request: "my failure was due to a high degree of instructor/preceptor prejudice. There are two separate forms of discrimination intertwined with harassment that ultimately affected their ability to fairly determine my clinical performance. My ADHD disability is documented within the department and has never been an issue before I disclosed it to [my instructor] and the clinical preceptor.

I believe I faced a level of gender discrimination due to many inconsistent clinical grading from this instructor. . . . If I was originally judged fairly, there would be no need to seek retention in the program, thus repeating an exact duplicate of a class I passed at another institution."

- In response to the second question on the retention request form concerning a specific plan for improvement, the complainant stated he will "continue to extensively read [his] textbooks, polish all clinical skills, utilize the nursing process as necessary, review practice exams, and seek instructor guidance to successfully exceed the requirements of the nursing department." In addition, the complainant requested another instructor who is unbiased, and a harassment-free environment to receive fair clinical evaluations regarding his performance. The complainant stated that "[t]his would include a fair list of conditions for retention in the program, adequate written and verbal feedback, and consistent instructor grading." The complainant also stated he would not switch his medication to BuSpar, as his instructor suggested, for retention in the program. Rather, the complainant stated he would continue to take his medication prescribed by his family physician and utilize a cognitive deep breathing approach recommended by the therapist at the campus counseling office to control his alleged anxiety.
- On December 5, 2006, the complainant's instructor submitted her decision to the Retention Committee recommending that he not be retained in the nursing program. The complainant's instructor provided the following hand-written explanation:

Evidence of unsatisfactory performance has been extensively documented by both myself and the preceptor. I assigned the student the most supportive preceptor available and we worked extensively to build his confidence and promote his success. I was very direct with the student, as I am with all management students. However, it is apparent that the student lacks self-insight, so there is no reason that he would be more safe if he repeated the course. [The student's] inability to function with any degree of independence constituted unsafe behavior. He has taken no steps to correct (or even acknowledge) his deficiencies. I do not recommend him for readmission.

- On December 8, 2006, the Department Chair sent a memo to retention committee members requesting their responses to his retention request.
- One Retention Committee member stated during an interview with OCR staff that she called the Department Chair to inquire about the complainant's allegations of discrimination in his retention request. According to the member, the Department Chair told her that the student had refused to change his medication and then the

problems started. The Department Chair later told OCR she does not recall that statement. No other members of the Retention Committee inquired about the complainant's allegations of discrimination.

- The Retention Committee denied the complainant's request for retention on December 12, 2006, with one member voting yes and five members voting no to his retention. Nearly all the members who voted no stated during their interview with OCR staff that the instructor's recommendation, and the student's lack of a sufficient improvement plan, were germane factors in their decision. Most members stated the instructor's recommendation is given great weight.
- The member who voted to retain the complainant provided the following explanation in an email to the Department Chair:

I think first and foremost, we have to protect the safety and well being of the public. Secondly, we have an obligation to retain the integrity and reputation of the nursing program. And lastly we have to do right by our students. Having said that, I recommend that [the student] be retained in the program CONTINGENT on the satisfactory completion of a remediation plan developed by [the instructor] or a committee appointed by the department within a specified timeframe. As I discussed with you, this is a case where a student moved successfully through the program until the very end. We will need to think about how we might catch such deficiencies earlier to avoid this kind of issue in the future, but in the meantime, I believe we should give him ONE more chance to demonstrate his competency following some specified remediation.

- On December 12, 2006, the Director wrote "no" on a memo indicating "denial" of retention for the complainant, and on December 13, 2006, the Retention Committee's decision denying his request for retention was emailed to him. The complainant never received a formal letter denying his request for retention.

#### Legal Analysis of Retaliation

On November 17, 2006, the complainant filed a complaint with the University's HR office alleging discrimination on the basis of sex and disability. On December 4, 2006, the HR investigator met with the complainant's clinical instructor who failed the complainant and provided her with a list of his allegations. OCR determined the complainant was involved in a protected activity and the University had notice of the protected activity.

On December 5, 2006, the complainant's instructor submitted her decision to the Retention Committee recommending that he not be retained in the nursing program. OCR determined that the decision not to retain the complainant in the nursing program was an adverse action subsequent to his protected activity.

The complainant filed his complaint on November 17, 2006, and on December 5, 2006, his instructor submitted her decision recommending that he not be retained in the nursing program. OCR determined based on the closeness in time of the adverse action and his participation in the protected activity, a causal connection can be inferred and, therefore, the fourth element of the retaliation analysis has been met.

The instructor stated that she did not recommend the complainant for readmission because of his unsatisfactory performance and his inability to function with any degree of independence which constituted unsafe behavior. She further stated that the complainant lacked self-insight and had taken no steps to correct (or even acknowledge) his deficiencies, so there is no reason that he would be safer if he repeated the course.

OCR interviewed each member of the Retention Committee during our investigation. Every member stated that the instructor's recommendation is given great weight. In addition, the student's plan of improvement is carefully reviewed in determining whether to grant the request.

OCR evaluated evidence to determine whether the instructor's refusal to recommend the complainant for retention was retaliatory based on his allegations of discrimination in his complaint for the grade appeal or with the University's HR office. However, OCR found an email from the instructor to the Department Chair dated September 28, 2006. In that email, the instructor recommended to the Department Chair: "I hope you will strongly encourage him not to come back." Therefore, the instructor was not recommending the complainant for retention before he first submitted his 13-page written complaint for his grade appeal, which included his allegations of discrimination, and a couple months before his instructor became aware of his complaint with the Human Resources Office.

In summary, based on a preponderance of the evidence, OCR finds no evidence of retaliation. There is insufficient evidence to establish that University officials retaliated against the complainant after he filed a complaint of sex and disability discrimination with the University's Human Resource Office by denying him the opportunity to retake the clinical. Therefore, allegation four is closed effective the date of this letter.

#### Conclusion

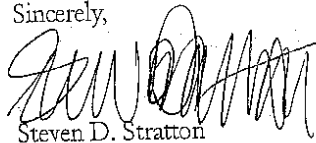
The evidence obtained during OCR's investigation was insufficient to support a conclusion the University harassed the complainant on the basis of sex and disability during his clinical,

Page 37 - Aaron M. Podolefsky, President - 07072024

or treated him less favorably than a female student when the University failed him in his clinical. In addition, OCR found insufficient evidence to support a conclusion the University retaliated against the complainant. Therefore, OCR is closing this complaint as of the date of this letter.

OCR is committed to prompt and effective service. If you have any questions, please contact James D. Weston, Equal Opportunity Specialist, at (816) 268-0592 or (877) 521-2172 (telecommunications device for the deaf), or by email at [james.weston@ed.gov](mailto:james.weston@ed.gov).

Sincerely,



Steven D. Stratton  
Program Manager