



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION II

32 OLD SLIP, 26th FLOOR
NEW YORK, NY 10005-2500

REGION II
NEW JERSEY
NEW YORK
PUERTO RICO
VIRGIN ISLANDS

November 18, 2013

Alan Kadish, M.D.
President
New York Medical College
40 Sunshine Cottage Road
Valhalla, New York 10595

Re: Case No. 02-13-2014
New York Medical College

Dear Dr. Kadish:

This letter is to notify you of the determination made by the U.S. Department of Education, New York Office for Civil Rights (OCR) regarding the above-referenced complaint filed against the New York Medical College. The complainant alleged that the College discriminated against her on the basis of her disability (XXXXXXXXXXXXXXXXXXXX), or in the alternative retaliated against her for filing a disability discrimination complaint, by placing an XXXXXXXXXXXXXXXXXXXXXXXXXXXX (XXX) grade on her transcript for XXXX XXXX XXXXXXXXXXXX, an XXXXXXXXXXXXXXXXXXXX clerkship (the Clerkship) in spring 2012 (Allegation 1); and delaying its removal of disability-related information from her Medical Student Performance Evaluation (the evaluation) until XXXXXXXXXXXX XX, 2012 (Allegation 2).¹

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs or activities receiving financial assistance from the U.S. Department of Education. The College is a recipient of financial assistance from the Department. Therefore, OCR has jurisdictional authority to investigate this complaint under Section 504.

The regulation implementing Section 504, at 34 C.F.R. § 104.61, incorporates by reference 34 C.F.R. § 100.7(e) of the regulation implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., which provides that:

No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by regulations enforced by OCR or because one has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing held in connection with a complaint.

¹ With respect to Allegation 2, during the course of OCR's investigation, the complainant clarified her allegation as stated above. The complainant originally alleged that the College discriminated against her on the basis of her disability, or in the alternative retaliated against her for filing a disability discrimination complaint, by revealing disability-related information in a recommendation letter to be sent to residency-matching programs.

In analyzing whether retaliation occurred, OCR must first determine whether: (1) the complainant engaged in a protected activity; (2) the recipient was aware of the complainant's protected activity; (3) the complainant suffered an adverse action contemporaneously with, or subsequent to, the recipient's learning of the complainant's involvement in the protected activity; and (4) there is a causal connection between the protected activity and the adverse action from which a retaliatory motivation reasonably may be inferred. When there is evidence of all four elements, OCR then determines whether the recipient has a legitimate, non-retaliatory reason for the challenged action or whether the reason adduced by the recipient is a pretext to hide its retaliatory motivation.

In its investigation, OCR reviewed documentation that the complainant and the College submitted. OCR also interviewed the complainant and College staff. OCR made the following determinations.

OCR determined that the complainant engaged in protected activity by complaining to the XXXXXXXXXX XXXX XXXX XXX XXXXXXXX XXXXXXXXXXXX XXXX XXXX XXXXX, XX X XXXXXXX XXX XXX XXXXXXXXXXXXXXX XXXXXXXX XXXXX XXXX X, 2011, that the College had discriminated against her on the basis of her disability. OCR determined that College staff members were aware of the complainant's protected activity.

OCR determined that the complainant enrolled in the Clerkship for the spring 2011 semester. OCR determined that the Clerkship began on January 3, 2011, and concluded on March 25, 2011, for a total of 58 Clerkship sessions. OCR further determined that on the first day of the Clerkship, the Course Director for the Clerkship learned that the complainant had XXXXXXXX XXXXXXXXXXXX that was in XXXXXXXXXXXX but was subject to XXXXXXXXXXXX.² OCR determined that in the middle of the spring 2011 semester, the Senior Associate Dean for Student Affairs (the Dean) and the Vice Dean met with the complainant to inquire about her absences in the Clerkship. OCR determined that the complainant informed the Dean and Vice Dean that she was having difficulty keeping pace with the Clerkship's attending physician and/or fully attending her rounds due to her disability.

With respect to Allegation 1, the complainant alleged that the College discriminated against her on the basis of her disability, or in the alternative retaliated against her for filing the discrimination complaint, by placing an XXX grade on her transcript for the Clerkship. Specifically, the complainant alleged that the College XXXXXXXX XXX XXX grade specifically for her, to describe her disability-related issues during the spring 2011 semester. The complainant also noted that the XXX grade was not placed on her transcript until the spring of 2012, after her complaint of disability discrimination filed on XXXX X, 2011.

OCR determined that the College gave the complainant a XXXXXXXX grade in the Clerkship at the conclusion of the spring 2011 semester, which was noted as an "X" grade on her transcript. OCR further determined that on XXX XX, 2011, the College dismissed the complainant from its medical program. OCR determined that on or about XXX XX, 2011, the College's Student Academic Performance Review Committee (the Committee) independently reviewed the College's decision to dismiss the complainant from the medical program and overturned the complainant's dismissal.³ The Dean informed OCR that the Committee ultimately overturned the complainant's dismissal because it determined that the complainant's absences in the Clerkship were excused absences resulting from her medical condition, and that because of her absences the Committee was not able to fully assess her performance.

² OCR determined that the complainant never officially requested accommodations for her disability with the College's Section 504 Coordinator; however, OCR determined that the College first became aware of the complainant's disability in or around XXXXXXX XXXX.

³ The Dean, who served as a member of the Committee, informed OCR that the Committee's practice is to review all dismissals to ensure due process, even if an appeal is not filed by the student at issue. She stated that the Committee reviewed the information available in the Student's file, as well as information the Dean, Vice Dean, and the Student's Clerkship Director provided.

OCR determined that in a letter dated XXX XX, 2011, the College advised the complainant that her final grade in the Clerkship should not have been issued, and that the Committee had determined that the complainant should essentially XXXXXXXX the Clerkship, XXXX X XX XXXX XXXXXXXX, XXXX XXXX XX, XXXX XX XXXXXXXX XX, XXXX. OCR determined that the complainant XXXXXXXXXXXX XXX Clerkship on XXXXXXXX XX, 2011, and received a Pass (P) grade.

OCR determined that the complainant sent an electronic mail message (email) to the Dean on XXXXXXXX X, 2012, informing him that her Clerkship grade had still not been changed from an "X." In an email, dated XXXXXXXX XX, 2012, the Dean informed the complainant that the Registrar's office would be making the grade changes.

In an email to the Dean, dated March 21, 2012, the complainant wrote:

[The Clerkship] XXXXXXXX, which was revoked by the committee last year, is still listed in XXXXXXXX 2011. The Passing medicine grade is listed as a XX (XXXXXXXXXXXX X XXXXXXXX) in XXXX of 2011. Not only should the XXXXXXXX be deleted, and the "XX" changed to "X," I argue that the grade should be listed in the XXXXXXXX XX 2011. Listing it in XXXX of 2011 forces me to explain to interviewers why I took my medicine clerkship as part of my XXXXXXXX year. I should not have to explain that I had to do so because of discrimination on the part of one of your professors.

That same day, the Dean responded, stating, "I have this morning sent changes to the Office of the Registrar's office to reflect an "XXXXXXXXXX" for the XXXXXXXX Spring 2011 Clerkship and just a "P" XXX XXX XXXX 2011 XXXXXXXX. You should be getting a new progress report soon." OCR determined that on the same date, the complainant advised the Dean that a grade of "XXXXXXXXXXXX" (XXX) also was inappropriate, because it denoted a temporary grade assignment; and that after she graduated, the grade would not accurately reflect that she had completed the Clerkship.⁴ In response, the Dean informed the complainant that the xxx accurately reflected the complainant's circumstances, and that it would not impede her graduation.

OCR determined that on XXX X, 2012, in response to the complainant's continued concerns about the XXX grade remaining on her transcript permanently, the College changed the complainant's grade on her transcript for the Clerkship for the spring 2011 semester to an XXX. OCR determined that the X grade for the XXXX XXXX semester also remained on the complainant's transcript.

The College acknowledged that it XXXXXXXX XXX XXX grade in response to the complainant's circumstances. The College stated that going forward, it would place the XXX XXXXXXXXXXXXX on a student's transcript when he/she does not complete the requirements of a clerkship by the conclusion of a semester, thus requiring additional work. The Dean stated that this XXXXXXXXXXXXXXX does not affect a student's GPA, class rank, or standing; rather, it serves to catalogue that a student took a certain course during a particular semester. The Dean acknowledged that the College had not used the XXX XXXXXXXXXXXXXXX XXX XXX XXXXXXX XXXXXXXX XXXXXXXX XXX XXXXXXXXXXXXXXX. The Dean added that the XXX XXXXXXXXXXXXXXX was not removed from the complainant's transcript after she received a P grade in the clerkship because this was a way of accurately documenting the fact that the complainant took, XXX XXX XXX XXXXXXXXXXXXXXX, the clerkship during spring 2011.

⁴ The complainant asserted that consistent with the policies of most institutions regarding INCs, the P grade she received during the XXXX 2011 semester should replace the X grade she received in the Clerkship.

The College acknowledged that in similar circumstances, if a student has an excused absence for a discrete period of time, he/she may receive a grade of INC. The College stated that a committee determines the scope and amount of make-up work required when a student receives an INC. The College also acknowledged that after a given period of time, the College will replace a student's INC grade with a permanent grade. The College asserted that an INC grade involved only a limited number (typically 20 percent or less) of excused absences and/or missed assignments, whereas an XXX grade involved significantly more excused absences. The College asserted that it could not replace the complainant's grade after she passed the Clerkship XXXXX XX XXX XXXXXX, as it would for a student who receives a grade of INC, because the complainant had significantly more excused absences than a student who receives an INC.

OCR determined that the number of documented absences by the complainant was less than 20 percent of the total Clerkship, and the majority of these absences were partial absences. Specifically, documentation from the College indicated that between February 28, 2011, and March 21, 2011, the complainant was XXXXX XXXXXX XXX XXXX XXX XXXXXX XXX XXXXXXXXXXX XXXXXX XXX XXXX XXXXXXXXXXX (XXX, XXXXXXXXXXXXXXXX XX XXXXXXXX XX XXX XXXXXXXXXXXXXXXX XX XXXXXXXXXXX).⁵ Moreover, OCR determined that between spring 2009 and fall 2012, the College gave four non-disabled students a grade of INC resulting from excused absences. OCR determined that two of these students (Students 1 and 2)⁶ ultimately completed their coursework and had their initial INC transcript grade changed to a letter grade. OCR learned that two other students (Students 3 and 4) currently have an INC grade on their transcripts after having had XXX XXX XXXX absences, respectively. OCR determined that should these students complete their clerkships by a designated period of time, the INC grade will be replaced with the grades they earn in their clerkships. The College did not provide, nor did OCR find any written policies substantiating the College's explanation regarding the differences between INC and XXX grades, or why in the case of XXX grades, the passing grade does not replace the XXX, as is the case with INC.

On November 12, 2013, the College agreed to implement the enclosed resolution agreement, which addresses the above-mentioned compliance concerns.

With respect to the portion of Allegation 1 alleging retaliation, OCR determined that there was no causal connection between the complainant's complaint of disability discrimination filed on XXXX X, 2011, and the placement of the XXX grade on the complainant's transcript on XXX X, 2012. Specifically, subsequent to the complainant's complaint filed on XXXX X, 2011, she XXXXXX the Clerkship and received a passing grade; the XXX grade XXXXXXXXXXX came only after the College determined in May 2012 that it had to somehow document that she had XXX XXXXXXXXXXX the Clerkship during the spring 2011 semester. Absent a determination that there was a causal connection between the protected activity and the alleged adverse action, OCR does not proceed further with a retaliation analysis.

With respect to Allegation 2, the complainant alleged that the College discriminated against her on the basis of her disability, or in the alternative retaliated against her for filing a discrimination complaint, by delaying its removal of disability-related information from her evaluation until XXXXXXXXXXX XX, 2012. The complainant asserted that she originally raised concerns with disability-related language included in the evaluation in XXXXXXXX 2012, but the College delayed implementing the changes for almost two months. The complainant alleged that by not revising the evaluation until XXXXXXXX, she was put at a competitive disadvantage compared to other students applying for residency-matching programs because the interview process had already begun.

⁵ While the College asserted that the complainant likely was absent on other dates, the College was not able to provide, nor did OCR find any documentation to support this assertion.

⁶ OCR determined that Student 1 missed her final exam, and Student 2 missed XXX XXXXX (XXXX., XXXXXXXXXXXXXXXX XX XXXX) of her clerkship.

OCR determined that in an email, dated XXXXXXXXXX XX, 2012, the Dean provided the complainant with a draft version of her evaluation “for review.” OCR determined that the draft evaluation included references to “challenges to [the complainant’s] health” and “medical issues.” In an email, dated XXXXXXXX X, 2012, the complainant informed the Dean that she would submit this draft XX XXX XXXXXXX, XXX XXXXX “XXXXXX XXX XXXXXXXXXXXX XXXX XXXX XXXXX XXX XXX XXXXXXXXXXXX XXXXX XXXXXXXXXXXX XXXXXXXXXXXX XXX XXXXX XXXXX XX XXXX XXXXXXXXXXXX XXX XXXXXXXXXXXX XXXXXXXXXXXX.”

OCR determined that the complainant’s XXXXXXXX did not thereafter contact the Dean until XXXXXXXX XX, 2012.⁷ Specifically, on that date, the complainant’s XXXXXXXX sent a letter to the Dean asserting that the Dean improperly disclosed the complainant’s medical illness in the evaluation without her consent, and suggested she have a conversation with the XXXXXXXX XXXXXXXX about “specific revisions to the letter.” OCR determined that the XXXXXXXX XXXXXXXX responded to the complainant’s XXXXXXXX in an email dated XXXXXXXX XX, 2012, and asked that she provide suggested revisions to the evaluation for the College’s review. OCR determined that between XXXXXXXX XX, 2012, and XXXXXXXX XX, 2012, the XXXXXXXX XXXXXXXX and the complainant’s XXXXXXXX discussed proposed revisions to language in the evaluation.⁸ OCR determined that the language in the final draft of the evaluation was acceptable to the complainant, and that it was uploaded into the Electronic Residency Application Service on XXXXXXXX XX, 2012.

Based on the above, OCR determined that the College did not delay removal of disability-related information from the complainant’s evaluation. Specifically, after the complainant’s XXXXXXXX contacted the XXXXXXXX XXXXXXXX on XXXXXXXX XX, 2012, the XXXXXXXX XXXXXXXX immediately entered into negotiations with the complainant’s XXXXXXXX. As soon as the negotiations were completed approximately one month later, the College uploaded a final evaluation into the Electronic Residency Application Service. Accordingly, OCR determined that there was insufficient evidence to substantiate the complainant’s allegation that the College discriminated against her, on the basis of her disability, by delaying its removal of disability-related information from her evaluation until XXXXXXXX XX, 2012. Additionally, OCR determined that there was no adverse action to support an allegation of retaliation. Absent an adverse action, OCR will not proceed further with retaliation analysis. Accordingly, OCR will take no further action regarding Allegation 2.

As stated above, however, the attached resolution agreement addresses OCR’s concerns regarding Allegation 1. OCR will monitor implementation of the resolution agreement. If the College fails to implement the terms of the resolution agreement, OCR will resume its investigation.

This letter should not be interpreted to address the College’s compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR’s determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR’s formal policy statements are approved by a duly authorized OCR official and

⁷ The complainant asserted that her XXXXXXXX attempted to contact the XXXXXXXX XXXXXXXX “a few times” between XXXXXXXX X, 2012 and XXXXXXXX XX, 2012, but did not receive a response. In support of her assertion, the complainant provided to OCR an email, dated XXXXXXXX XX, 2012, in which the complainant’s XXXXXXXX informed the College’s XXXXXXXX that “[m]y previous attempts to contact you have gone unanswered.” The complainant, however, did not provide, nor did OCR find any documentation confirming that either the complainant XX XXX XXXXXXXX contacted the College prior to XXXXXXXX XX, 2012.

⁸ OCR determined that this included email correspondence between complainant’s XXXXXXXX and the XXXXXXXX XXXXXXXX on XXXXXXXX XX, XXXXXXXX X, XXXXXXXX X, XXXXXXXX X, XXXXXXXX XX, and XXXXXXXX XX, 2012.

made available to the public. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the College may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the complainant may file another complaint alleging such treatment

Under the Freedom of Information Act, 5 U.S.C. § 552, it may be necessary to release this letter and related correspondence and records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have questions about OCR's determination, please contact Gina Damasco, Compliance Team Attorney, at (646) 428-3924 or gina.damasco@ed.gov; David Hensel, Compliance Team Attorney, at (646) 428-3778 or david.hensel@ed.gov; or Nadja Allen Gill, Compliance Team Leader, at (646) 428-3801 or nadja.r.allen.gill@ed.gov.

Sincerely,

Timothy C.J. Blanchard

Encl.

cc: XXXXXXXXXXX XXXXX, XXX.