



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

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September 25, 2015

J. Francis Manning
District Superintendent and Chief Executive Officer
Onandaga-Cortland-Madison Board of Cooperative Educational Services
6820 Thompson Road
Syracuse, New York 13211

Re: Case No. 02-15-1141
Onandaga-Cortland-Madison Board of Cooperative Educational Services

Dear Superintendent Manning:

This letter is to notify you of the determination made by the U. S. Department of Education, New York Office for Civil Rights (OCR) in the above-referenced complaint filed against the Onandaga-Cortland-Madison Board of Cooperative Educational Services (BOCES). The complainant alleged that her Licensed Practical Nursing (LPN) clinical course instructor (the instructor) harassed her on the basis of her disability, when in or around xxxxxxxx xxxx, she commented to the complainant that she “should not even be in the [LPN Program] with [her] disability” and that she did not know how the complainant was going to perform her duties in the Program, or words to that effect (Allegation 1). The complainant also alleged that the Instructor harassed her on the basis of national origin (xxxxxxxxxxxx) by asking whether her children went to school by xxxx and referred to them as “xxxx xxxxxx,” or words to that effect, in or around xxxxxxxx xxxx (Allegation 2).

OCR is responsible for enforcing Title VI of the Civil Rights Act of 1964 (Title VI), as amended, 42 U.S.C. § 2000d *et seq.*, and its implementing regulation at 34 C.F.R. Part 100, which prohibit discrimination on the basis of race, color or national origin in programs and activities receiving financial assistance from the U.S. Department of Education (the Department). OCR is also 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 Department. In addition, OCR is responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35. Under the ADA, OCR has jurisdiction over complaints alleging discrimination on the basis of disability that are filed against certain public entities. BOCES is a recipient of financial assistance from the Department, and is a public education system. Therefore, OCR has jurisdictional authority to investigate this complaint under Title VI, Section 504 and the ADA.

Disability harassment is a form of discrimination prohibited by Section 504, the ADA, and their implementing regulations. Additionally, national origin harassment is a form of discrimination prohibited by Title VI and its implementing regulation. Harassing conduct by an employee, a student, or a third party can include verbal,

written, graphic, physical or other conduct; or, conduct that is physically threatening, harmful or humiliating. Harassment can create a hostile environment if it is sufficiently serious to interfere with or deny a student's participation in or receipt of benefits, services or opportunities in the institution's program. If OCR determines that harassing conduct occurred, and that the recipient had actual or constructive notice of the harassment, OCR will examine additional factors to determine whether a hostile environment existed and whether the recipient took prompt and effective action that was reasonably calculated to stop the harassment, prevent its recurrence, and as appropriate, remedy its effects.

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

During the xxxx xxxx semester, the complainant was enrolled in the BOCES' LPN Adult Education Program. The complainant was taking a course entitled "xxxxxxxx xxxxxxxx in xxxx-xxxx xxxx" (the Course) with the instructor.

The complainant alleged that the BOCES failed to respond to her complaints that the instructor harassed her on the basis of her disability and national origin (xxxxxxxxxxxx). OCR determined that in a letter delivered to BOCES' Coordinator of Career Training (the coordinator) on xxxxxxxx x, xxxx, the complainant reported that the instructor stated the following in front of the class in xxxxxxxxxx xxxx, "I don't even know why you're in nursing school if you're handicap[sic]"; "[You're] not going to be able to do nursing duties with a handicap"; "I feel if you're handicap[sic], you shouldn't be in nursing school," or similar words to that effect. In the letter, the complainant also expressed concern that the instructor may have tampered with her test grades. The complainant stated that she "may have" also orally complained to BOCES staff members in the financial aid office in xxxxxxxxxx xxxx, that the instructor asked her in front of the class if her children went to school on a xxxx, and referred to her children as "xxxx xxxxx" or words to that effect in or around xxxxxxxxxx xxxx.¹ The complainant also alleged that she made a third complaint on xxxxxxxxxx xx, xxxx; however, she subsequently acknowledged to OCR that the complaint did not include any specific allegations of disability or national origin harassment.² BOCES acknowledged that the complainant made a complaint regarding disability harassment, but denied that the complainant reported any incidents of national origin harassment.

In response to the complainant's letter of xxxxxxxxxx x, xxxx, the coordinator and the assistant director attempted to speak with the instructor, and scheduled a meeting for xxxxxxxxxx xx, xxxx. The instructor did not respond to the electronic mail (email) notification, and on the morning of xxxxxxxxxx xx, xxxx, the assistant director contacted the instructor by telephone. During that telephone conversation, the instructor proffered her resignation. BOCES accepted the instructor's resignation, effective immediately. The assistant director advised OCR that she reviewed all of the complainant's unit tests from the LPN program and confirmed that there were no errors in the scoring.³

OCR determined that BOCES concluded its inquiry once the instructor resigned from her position, and did not interview students and/or BOCES staff to investigate the complaint. OCR's investigation confirmed that two

¹ The complainant stated that she also complained about another instructor at that time, but was unsure whether her complaint specifically referred to national origin harassment.

² On xxxxxxxxxx xx, xxxx, the complainant faxed a letter to BOCES in which she reported general misconduct by the instructor (who had since resigned) as well as other instructors. Specifically, the complainant reported "bullying" behavior and inappropriate comments made to her and to other students in front of the class and other BOCES staff members at clinical sites.

³ On or about xxxxxxxxxx xx, xxxx, the complainant was dismissed from the LPN Program for unsatisfactory academic performance. The program's policy provided for the dismissal of any student who failed more than 11 unit tests. During her enrollment in the LPN Program, the complainant earned failing grades on at least xx unit tests. The complainant did not contest her dismissal from the program in the instant OCR complaint.

other students in the course corroborated the complainant's account of the instructor's conduct.⁴ Both witnesses reported that the instructor made derogatory comments about the complainant's having a disability and not being qualified to be a nurse, and one witness heard the instructor refer to the complainant's family as "xxxx xxxxxx."

BOCES acknowledged to OCR that it did not investigate whether the instructor made derogatory comments about the complainant's national origin; and did not make a finding as to whether the instructor subjected the complainant to disability-based harassment.⁵ OCR further determined that BOCES failed to notify the complainant, either orally or in writing, of the outcome of her complaint.

Based on the foregoing, OCR determined BOCES actions were insufficient to determine whether harassing conduct occurred that resulted in creating a hostile environment. Moreover, BOCES did not take effective action that was reasonably calculated to remedy the effects of the harassment.

During the course of OCR's investigation, OCR reviewed BOCES' grievance procedures.⁶ The regulations implementing Section 504, at 34 C.F.R. § 104.7(b), and the ADA, at 28 C.F.R. § 35.107(b), provide that recipients shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by Section 504/the ADA and their implementing regulations.

In accordance with OCR policy, elements for determining if procedures are prompt and equitable include whether the procedures: (a) provide for notice to students and employees of procedures, including where complaints can be filed; (b) apply to harassment by employees, students, and third parties; (c) provide for adequate, reliable and impartial investigation, including an opportunity to present witnesses and evidence; (d) have reasonably prompt timeframes for major stages of the grievance process; (e) provide for notice to the parties of the outcome; and (f) provide assurance that the institution will take steps to prevent further harassment and to correct its effects if appropriate.

OCR determined that the BOCES has a "Discrimination/Harassment Complaint Procedure" (the procedure) that is published on its website, which prohibits all forms of discrimination and harassment, including on the basis of disability.⁷ Pursuant to the procedure, students (or parents on behalf of those students) or employees who believe they have been subjected to discrimination/harassment, are encouraged to file a written complaint with the BOCES' Civil Rights Compliance Officer (the compliance officer); however, the procedures do not otherwise provide contact information for the compliance officer.⁸ Accordingly, OCR determined that BOCES provides adequate notice to students and employees of the procedures; however, the procedures do not provide adequate notice of where complaints may be filed, and the procedures do not specify that complaints can be filed against students, employees, or third parties.

⁴ OCR contacted five student witnesses the complainant identified; only two responded.

⁵ Prior to the filing of the complainant's complaint, the Assistant Director and its Supervisor of Student Services conducted an unrelated inquiry into the alleged misconduct of the instructor, as well as other instructors, on or about xxxxxx xx, xxxx. Such misconduct included socializing with students outside of the BOCES; "Facebooking" and text messaging students regarding personal matters; and talking on cellular telephones during clinical instruction time.

⁶ OCR did not review BOCES' non-discrimination notice or whether BOCES had designated a Section 504/ADA coordinator as required by the regulations implementing Section 504 and the ADA, because these issues are covered in a resolution agreement OCR obtained in Case No. 02-14-1187, which OCR is currently monitoring.

⁷ <http://www.ocmboces.org/tfiles/folder2639/DISCRIMINATION%20PROCEDURE%20DRAFT.pdf>

⁸ At a minimum, the written complaint must contain the following information: date(s), time(s), place(s) of alleged incident(s); alleged perpetrators of the discrimination or harassment (names, identifiers, etc.); description of each incident, by date; witnesses, if any (names and identifying information); other relevant information; and desired resolution. If unable to make a written complaint, students are encouraged to contact a teacher, counselor, administrator or the compliance officer to assist with putting the complaint in writing.

The procedures generally provide that the investigation will be “prompt” and “equitable” and the procedures allow for witnesses to be identified; however, the procedures do not otherwise describe the investigative process or mention the presentation of evidence. The procedures state that any reported instances of discrimination/harassment will be referred to the compliance officer or to the administrative department head assisting the individual making the complaint. OCR determined that the procedures have reasonably prompt timeframes for major stages of the grievance process.⁹

The procedures also state that the complainant has a right to appeal the compliance officer’s (or his/her designee’s decision). The procedures state that the complainant has one (1) week from the date s/he receives the compliance officer’s decision to appeal the decision to the Superintendent. The Superintendent or his/her designee is then required to schedule a meeting with the parties within two (2) weeks of receipt of the request for review/appeal and present his/her decision in writing to both parties within three (3) weeks after the meeting.¹⁰ Although the procedures state that the complainant has one (1) week to accept or appeal the Superintendent-level decision, they do not state who that appeal should be directed to. OCR determined that the procedures do not provide that the accused has the right to appeal the compliance officer’s decision; do not specifically provide that the accused will be notified of the outcome of the investigation; and do not contain an assurance that the BOCES will take steps to correct the discriminatory effects of any harassment on the complainant and others, if appropriate.

Based on the foregoing, OCR determined that the BOCES failed to adopt and publish grievance procedures for the prompt and equitable resolution of complaints of disability discrimination/harassment. Specifically, OCR determined that the procedures do not provide adequate notice of where complaints may be filed; do not specify that complaints can be filed against students, employees, or third parties; do not provide that the accused has the right to appeal the compliance officer’s decision; do not specifically provide that the accused will be notified of the outcome of the investigation; and do not contain an assurance that the BOCES will take steps to correct the discriminatory effects of any harassment on the complainant and others, if appropriate.

On September 17, 2015, the BOCES agreed to implement the enclosed resolution agreement to address the above-referenced compliance concerns. OCR will monitor the implementation of the enclosed resolution agreement. If BOCES fails to comply with the terms of the resolution agreement, OCR will resume its investigation.

This letter sets forth OCR’s determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR’s formal policy statements are approved by a duly authorized OCR official and made available to the public. The complainant may file a private suit in federal court whether or not OCR finds a violation.

Please be advised that BOCES 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, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, it will seek to protect,

⁹ The procedures state that within two weeks of receiving the complaint, the results of the investigation will be provided to the complainant and to others who need to be advised of the decision (which may or may not include the accused).

¹⁰ The procedures state that in consideration of the appeal, the Superintendent (or his/her designee) shall conduct a prompt, impartial, equitable and thorough review of the materials related to the compliance officer’s stage of review and the appeal request and shall have the right to re-interview witnesses, if necessary.

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 any questions regarding OCR's determination, please contact Jonathon LeBeau, Compliance Team Investigator, at (646) 428-3790 or jonathon.lebeau@ed.gov Ronald Scott, Compliance Team Attorney, at (646) 428-3820 or ronald.scott@ed.gov; or Felice Bowen, Compliance Team Leader, at (646) 428-3806 or felice.bowen@ed.gov.

Very truly yours,

Timothy C.J. Blanchard

Encl.

cc: xxxxx xxxxx xxx