

November 10, 2015

Sharon McCollum
Commissioner of Education
Virgin Islands Department of Education
1834 Kongens Gade
St. Thomas, Virgin Islands 00802

Re: Case No. 02-15-1307
Virgin Islands Department of Education

Dear Commissioner McCollum:

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 Virgin Islands Department of Education (the VIDOE). The complainant alleged that the VIDOE failed to respond appropriately to her complaints made during academic year 2014-2015 that students enrolled in the Clinical Medical Assistant program (the Program) at the Raphael O. Wheatley Skill Center (the Skill Center) and the instructor of her Clinical Medical Assistant course (the Instructor) subjected her to harassment because of her disability (learning disabilities) and/or race (XXXXXX) (Allegation 1). The complainant also alleged that the Instructor subjected her to retaliatory harassment from September 2014 through April 2015, because of complaints she made to VIDOE personnel alleging that the Instructor discriminated against her on the bases of her race and disability (Allegation 2). In addition, the complainant alleged that the VIDOE discriminated against her on the bases of her disability and/or race, or in the alternative retaliated for her advocacy, by indefinitely suspending her from the Program on or around April 20, 2015 (Allegation 3).

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. The VIDOE is a recipient of financial assistance from the Department and is a public elementary, secondary, and post-secondary education system. Therefore, OCR has jurisdictional authority to investigate this complaint under Title VI, Section 504 and the ADA.

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, 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.

The regulation implementing the ADA contains a similar provision at 28 C.F.R. § 35.134.

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

OCR determined that the Program is a two-year program designed to enable students to work in a variety of administrative, clinical, and laboratory positions within the healthcare field. The complainant enrolled in the Program in September 2014. The Instructor was the only teacher who taught courses in the Program. The complainant enrolled in a Clinical Medical Assistant course (the Course). OCR determined that there were approximately thirteen students enrolled in the Program and the Course.

With respect to Allegation 1, the complainant alleged that the VIDOE failed to respond appropriately to her complaints made during academic year 2014-2015 that students enrolled in the Program and the Instructor subjected her to harassment because of her disability and/or race. The complainant asserted that she complained about the Instructor's behavior to the Skill Center Supervisor (the Supervisor) on September 26, 2014, and also complained to the Instructor and a VIDOE social worker about the students' behavior, but no action was taken.

Racial harassment is a form of discrimination prohibited by Title VI and its implementing regulation. Disability harassment is a form of discrimination prohibited by Section 504, the ADA, and their implementing regulations. 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 recipient'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 make a determination as to 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.

The regulation implementing Title VI, at 34 CFR 100.3, states that no individual may be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination on the ground of race, color or national origin under any program or activity that receives financial assistance from the Department. Racially based conduct that has such an effect and that consists of different treatment of students on the basis of race by recipients' agents or employees, acting within the scope of their official duties, violates Title VI. In addition, the existence of a racially hostile environment that is created, encouraged, accepted, tolerated or left uncorrected by a recipient also constitutes different treatment on the basis of race in violation of Title VI.

Similarly, the regulation implementing Section 504, at 34 C.F.R. § 104.4, states that no qualified individual with a disability 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 financial assistance from the Department. The regulation implementing the ADA contains a similar provision at 28 C.F.R. § 35.130. The regulation implementing Section 504, at § 104.7(b), requires a recipient to adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of disability discrimination complaints, including complaints of disability harassment. The regulation implementing the ADA, at 28 C.F.R. § 35.107(b), similarly requires a public entity that employs 50 or more persons to adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by the ADA.

The complainant identified the VIDOE social worker to whom she allegedly complained about the alleged harassment; however, the VIDOE asserted to OCR that it had no record of employing such individual. OCR attempted to acquire from the complainant further identifying details about this individual, but to date the complainant has not responded. In addition, the complainant did not indicate the date on which she allegedly complained to the social worker. OCR was unable to identify this social worker or corroborate that the complainant made a complaint to a VIDOE social worker about alleged harassment on the bases of her race and disability.

OCR reviewed a copy of the written complaint the complainant made to the Supervisor on or about September 26, 2014. In the complaint, the complainant alleges that the Instructor humiliated her in front of her peers by saying to her in the classroom that she did not belong in the class and threatening to “kick her out”. The complainant does not specifically state in this complaint that the Instructor’s actions constituted harassment on the basis of her race or disability; however, the complainant states that she has a disability, that the Instructor’s actions exacerbated her disability, and that she should not be discriminated against because of her disability.

Documentation provided by the VIDOE indicates that the Supervisor investigated this complaint by talking with the Instructor. In a memorandum provided to the Supervisor in response, the Instructor acknowledged that she told the class that “if anyone does not want to do what I say... there is the door, you can leave”. The Instructor stated that this comment was not specifically

directed to the complainant, but was directed to the entire class. There is no indication that the Supervisor conducted any further investigation regarding this complaint, such as interviewing student witnesses.

OCR determined that on November 25, 2014, a meeting was held that included the Supervisor, the complainant, and the complainant's advocate. A memorandum drafted by the complainant's advocate to the Supervisor, also dated November 25, 2014, summarizes what occurred during the meeting. It was agreed that the complainant would raise her hand when she had a question; she would address the Instructor by name; and she would not interrupt the Instructor. During that meeting, it was also discussed that the Instructor would "do her best to soften her voice when speaking with [the complainant]". In addition, the memorandum stated that the Instructor "now better understands the nature of [the complainant's] disabilities and will do her best to work with [the complainant] and not take [the complainant's] behavior personally." In addition, it was discussed that the Instructor and the complainant could agree to meet with one another, and if necessary the two of them could meet with the Supervisor to address any future concerns.

Although the complainant did not advise OCR of any other complaints she allegedly made to the VIDOE regarding alleged harassment on the basis of her race or disability, OCR determined that on April 27, 2015, the complainant forwarded a complaint via facsimile to several individuals, including the Supervisor, her advocate, a social worker at the VIDOE, and to the District Manager for the Division of Disabilities and Rehabilitation Services of the Department of Human Services (the District Manager). The Supervisor acknowledged to OCR that she received that facsimile on or around that day, April 27, 2015. In the facsimile, the complainant stated that she had been subjected to harassment based on her disability, and made the following allegations:

- Two unnamed students called her "shit" and then bumped into her chair (Incident A);
- She was reminded frequently that she was the only XXXXXX student in the class with references to her hairstyles (Incident B)¹;
- The Instructor insisted that she stop writing details of interactions in the classroom (Incident C); and,
- The Instructor stated to her "when in doubt, kick her out" (Incident D).²

OCR determined that the VIDOE did not engage in any inquiry or investigation regarding the complainant's concerns raised in this complaint. The VIDOE acknowledged to OCR that it did not investigate whether the complainant was subjected to harassment by either the Instructor or any of her peers, as alleged in the complaint.

¹ Although the complainant's complaint only stated that she had been subjected to harassment because of her disability, this allegation indicates that the complainant may have also been alleging harassment based on her race.

² This appears to be the same allegation raised in the complainant's complaint to the Supervisor dated September 26, 2014.

Once a recipient has actual or constructive notice of alleged harassment, the recipient has an obligation to investigate the allegations and take prompt and effective action that is reasonably calculated to stop the harassment, prevent its recurrence, and as appropriate, remedy its effects. The VIDOE violated the regulation implementing Section 504, at 34 C.F.R. § 104.7(b), and the regulation implementing the ADA, at 28 C.F.R. § 35.107(b), by failing to investigate the complainant's complaint of alleged harassment on the basis of her disability. OCR will obtain a resolution agreement to address this compliance issue.

OCR sought to conduct its own investigation into the complainant's allegations of harassment on the bases of her race and disability. In her complaint filed with OCR, the complainant identified the following incidents:

- During class, in or around February 2015, a student (Student 1) stated loudly, "she makes me sick" [referring to her], while pushing her desk into the complainant's desk. In addition, the complainant alleged that around this time Student 1 referred to her as a "XXXXXX mother's cunt"³ (Incident 1).
- In or around February 2015, while preparing for a test, Student 1 instructed another student (Student 3) that she should not speak to the complainant because she is XXXXX. (Incident 2).
- In or around February 2015, during class, Student 1 referred to the complainant as "shit" and bumped into her desk; and then referred to her as a "XXXXX mother's cunt," "retarded," and "stupid." The complainant stated that Student 1 also threatened to fight her outside of the classroom. The complainant alleged that when she approached the Instructor after class and asked her what actions could be taken to address the comments; the complainant stated that the Instructor was nonresponsive to her (Incident 3).⁴
- On or about May 15, 2015, during class, a student (Student 4) removed a piece of paper from her desk prior to an exam, causing the entire class, including the Instructor, to laugh at her. The complainant indicated that the piece of paper was an academic adjustment for which she had received approval due to her disability. The complainant alleged that at some point during the class, the Instructor observed the piece of paper and commented, "she doesn't need that," or words to that effect. Shortly thereafter, Student 4 assisted the Instructor by distributing the exams to the class and when he got to the complainant's desk, Student 4 commented about the complainant's use of the piece of paper by reiterating "you don't need that" or similar words to that effect (Incident 4).

The complainant identified several students, in addition to the Instructor, as witnesses. OCR attempted to contact all students in the Program and was able to interview three students who had been enrolled in the Course.

With respect to Incidents 1-3, neither the Instructor nor any of the student witnesses corroborated that the conduct occurred. The Instructor advised OCR that at no time did the complainant

³ The complainant described this term as an "extremely derogatory insult in local parlance."

⁴ This appears to be the same as Incident A raised in the complainant's complaint dated April 27, 2015.

approach her about Incidents 1-3 or otherwise express any concerns that she had regarding other students in the class.

With respect to Incident 4, none of the student witnesses reported observing Student 4 remove a piece of paper from the complainant's desk and/or hearing students laugh at her during such an instance. The Instructor denied ever stating, "she doesn't really need that" or any words to that effect, but recalled that Student 4 told the complainant that she did not need the extra piece of paper, as the assignment was only one page.⁵ The Instructor denied that any student in the class laughed at the complainant when Student 4 made that statement; however, she acknowledged that some students may have chuckled reacting to the comical manner in which Student 4 took the paper from the complainant's desk.

OCR must often weigh conflicting evidence in light of the facts and circumstances of each case and determine whether the preponderance of the evidence substantiates the allegation. Here, OCR did not find that the complainant's assertions that students in the Program acted in the alleged inappropriate ways, on the bases of her disability and/or race, with respect to Incidents 1-4 were supported by a preponderance of the evidence.

Based on the foregoing, OCR determined that there was insufficient evidence to substantiate the complainant's allegation that students enrolled in the Program at the Skill Center subjected her to harassment on the bases of her disability and/or race, from January 2015 through April 2015.

With respect to Allegation 2, the complainant alleged that the Instructor subjected her to retaliatory harassment from September 2014 through April 2015, because of complaints she made to VIDOE personnel alleging that the Instructor discriminated against her on the bases of her race and disability. In analyzing whether retaliation occurred, OCR must first determine: (1) whether the complainant engaged in a protected activity; (2) whether the recipient was aware of the complainant's protected activity; (3) whether the complainant was subjected to an adverse action contemporaneous with, or subsequent to, the recipient's learning of the complainant's involvement in the protected activity; and, (4) whether 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.

As stated above, OCR determined that the complainant complained to the Supervisor via a letter dated September 26, 2014, that she had been subjected to verbal acts of harassment. In the complaint, the complainant alleges that the Instructor humiliated her in front of her peers by saying to her in the classroom that she did not belong in the class and threatening to "kick her out". The complainant does not specifically state in this complaint that the Instructor's actions constituted harassment on the basis of her race or disability; however, the complainant states that she has a disability, that the Instructor's actions exacerbated her disability, and that she should not be discriminated against because of her disability. Accordingly, OCR determined that the

⁵ The Instructor acknowledged that the complainant was approved for the academic adjustment of being provided with a scratch sheet of paper to assist her in taking exams.

complainant participated in protected activity by filing this complaint on September 26, 2014. OCR determined that the Supervisor and the Instructor were aware of the complainant's protected activity.

The complainant alleged that the Instructor subjected her to retaliatory harassment on five occasions from September 2014 through April 2015; Incidents 1-6.

Incident 1

With respect to Incident 1, the complainant alleged that in or around December 2014, during class, the Instructor directed her not to take any notes about classroom incidents involving the complainant and other students. Specifically, the complainant alleged that the Instructor told her that she could not take observation notes or otherwise document the comments that were being made in class. The complainant further alleged that the Instructor took all of the notes that she had previously recorded and placed them in a folder, which the complainant cannot access.⁶

The Instructor acknowledged that on an ongoing basis, she would direct the complainant to “stop writing and pay attention, look at what I am showing you”; however, the complainant would typically disregard her instructions. She stated that she did so because the complainant was constantly writing extraneous notes in class at her desk and she would not pay attention to the classroom instruction that was provided regarding various medical procedures. The Instructor stated that the complainant's excessive notetaking was a distraction in the class because the complainant frequently asked her to repeat information that had already been provided. The Instructor also stated that it was not necessary for any student to write excessively, given that much of the instruction in the course was based on observing how different procedures were performed in a clinical medical setting. The Instructor stated that she gave similar instructions to other students, when applicable, such as to put their cellular telephones away and to pay attention during instruction. The Instructor denied that she ever confiscated any notes from the complainant. Documentation OCR reviewed indicated that between October 2014 and April 2015, three students in the Course complained to the Program supervisor that the complainant's practice of taking notes and then asking the Instructor to repeat information was disruptive and slowed the process of instruction for the entire class.

Based on the foregoing, OCR determined that the Instructor had a legitimate, non-retaliatory reason for directing the complainant stop taking excessive notes; namely, the complainant's notetaking caused her to miss instruction, and her frequent requests to have the Instructor repeat information were disruptive. OCR determined that the proffered reason was not a pretext for retaliation, as documentation and testimony corroborated that the complainant's conduct was disruptive and the Instructor treated other similarly students in the same manner.

Incident 2

With respect to Incident 2, the complainant alleged that in or around January 2015, the Instructor approached her and told her, “I don't feel comfortable with what you wrote on your class evaluation,” or similar words that effect. The complainant advised OCR that she could not recall

⁶ This appears to be the same as Incident C raised in the complainant's complaint dated April 27, 2015.

whether this document was an evaluation or a class survey, or some other document, but it was a form that contained the VIDOE contact information at the bottom of it and it indicated, “[p]lease let [the VIDOE] know if you have any concerns, complaints, etc.” The complainant stated that the top portion of the form included questions regarding students’ experiences with the Instructor. The complainant stated that she commented that she was concerned about the Instructor’s “commitment to the class” and whether she would cease to be the Instructor (i.e., retire or voluntarily leave) before completion of the two-year Program. The complainant further stated that she commented that students were not provided with all of the necessary materials in the Course, including surgical instruments; and students received a broken scale for measuring baby weight.

The Instructor denied ever telling the complainant, “I don’t feel comfortable with what you wrote on your class evaluation,” or any similar words to that effect. In addition, the Instructor stated that she had no recollection of any survey form ever given to the complainant about concerns/complaints regarding the Course. The Instructor asserted to OCR that if and when survey forms were given to students to complete, it was the practice of the Skill Center that the Instructor must leave the classroom while office personnel distributed and administered the surveys to the students, so that student comments remained anonymous (unless disclosed by the students themselves).

The Supervisor provided OCR with all of the survey forms that the Skills Center distributed to students in the Program. Those surveys are entitled Employer Survey, Student Survey-internship, and Student survey-all CTE. These surveys were all given to students at the end of the academic year to obtain feedback on the programs. The VIDOE advised OCR that it is not the Skill Center’s practice to give students the survey mid-school year, which would be the January 2015 timeframe alleged by the complainant, unless they are completing the program. The VIDOE further advised OCR that it is very unlikely that the complainant would have been given any of these surveys. The VIDOE stated that the general survey for all students, labeled “Student Survey-All CTE”, is most likely the one that the complainant is referring to, but the Supervisor stated that this would not have been given to the complainant in January 2015 as she had not completed the Program at that time. The other surveys were for students who completed externships/internships, which would not be applicable to the complainant because she did not complete any externships/internships for the Program.

Based on the foregoing, OCR could not substantiate that the Instructor approached her and told her, “I don’t feel comfortable with what you wrote on your class evaluation,” or similar words that effect, as alleged. Absent an adverse action, OCR does not proceed further with the retaliation analysis.

Incident 3

The complainant alleged that in or around February 2015, during class, the Instructor told a student who is XXXXXX, “why are you wearing your hair like a XXXXXX lady,” or similar words to that effect.⁷ The complainant stated that the comment “set a racial tone in the class,” and she believed it constituted retaliatory harassment because she was the only XXXXX student

⁷ This appears to be the same as Incident B raised in the complainant’s complaint dated April 27, 2015.

in the class. None of the Students whom OCR interviewed indicated hearing the above comment, or any similar words, from the Instructor or any other person in the class. The Instructor denied making any such comment, or any similar words.

Based on the foregoing, OCR could not substantiate that the Instructor told a student who is XXXXXX, “why are you wearing your hair like a XXXXXX lady,” or similar words to that effect, as alleged. Absent an adverse action, OCR does not proceed further with the retaliation analysis.

Incident 4

The complainant alleged that on or about February 5 and 9, 2015, during class, the Instructor refused to repeat questions she asked the class when the complainant requested that she do so. The complainant asserted that when she was attempting to ask questions, two XXXXXX students (Student 4 and Student 5) commented to the effect “stop asking questions” and the complainant alleged that the Instructor heard these comments but did not respond. The complainant alleged that another student left the classroom and returned with a security guard who stood at the door, telling the complainant that she needed to stop asking questions. The complainant alleged that, nevertheless, two XXXXXX students were allowed to continue to ask questions.

The complainant asserted that similarly, on February 9, 2015, she attempted to obtain clarification from the Instructor regarding how white blood cells assisted in infection control, which was a subject that was going to be covered on the exam on the following day. The complainant alleged that around that time, the Instructor stated that she was not going to answer any more questions.

The Instructor advised OCR that she could not confirm the specific date of February 5, 2015; however, she recalled an incident wherein the complainant disrupted her lesson to the extent that security had to be contacted. The Instructor indicated that on the day in question, she was explaining the processes related to lymph vessels, blood, antibodies and antigens to the class. The Instructor recalled answering the complainant’s repeated questions multiple times. The Instructor acknowledged that she refused to answer the complainant’s questions after a certain point, but that this was after an exchange of questions and answers extending more than half an hour; specifically, the Instructor stated that the complainant was asking a “non-stop series of questions”. The Instructor stated that despite her efforts to answer the complainant’s questions, the complainant referred to some other chapter in the textbook, which was unrelated to the lesson then being explained. The Instructor stated that this series of questioning and answering lasted for more than half an hour, causing substantial disruption to the class to the point that students began to leave the classroom. The Instructor stated that she contacted a security officer at the Skill Center, and he and the Skill Center Supervisor (the Supervisor) arrived. Afterwards, the disruption dissipated. One of the students OCR interviewed stated that the complainant would typically interrupt class instruction by asking an excessive number of questions.

Regarding what occurred on February 9, 2015, the Instructor advised OCR that during a classroom discussion, the complainant was once again interrupting her and talking over her as

she was attempting to provide a demonstration to the class. The Instructor stated that the complainant asked questions about the Course material/demonstration of information, and she provided responses to her questions. The Instructor recalled that the exchange lasted for approximately 45 minutes, as she repeated herself attempting to explain the same information. The Instructor denied ever ignoring or being non-responsive to a question that the complainant directed to her.

Based on the foregoing, with respect to the complainant's assertions concerning February 5 and 9, 2015, the Instructor had a legitimate, non-retaliatory reason for refusing to answer the complainant's questions after a certain point; specifically, the Instructor stated that the complainant was asking a "non-stop series of questions," which she had already responded to. OCR determined that the proffered reason was not a pretext for retaliation as other students in the Course corroborated that the Instructor never refused to answer relevant questions raised by the complainant that there were not repetitive.

Incident 5

The complainant alleged that on or about February 12, 2015, on the day of a presentation in class, the Instructor directed her to use the classroom microscope, instead of the microscope the complainant requested to use. Specifically, the complainant stated that on said date she asked the Instructor if she could use her personal microscope for her presentation as she was not familiar with the classroom microscopes; however, the Instructor refused her request by stating that the classroom microscopes were available. The complainant further alleged that she was scheduled to present from 9:20 a.m. to 9:40 a.m., and points were deducted from her presentation because the Instructor allowed Student 1 to ask too many questions. The complainant also alleged that during her presentation, the Instructor allowed Student 1 to come to the front of the class and demonstrate how to use the classroom microscope in an effort to embarrass her.

Regarding use of a microscope, the Instructor advised OCR that the complainant asked and was allowed to use a microscope that she brought into class. The Instructor advised OCR that she deducted points from all students' presentations if they exceeded 10 minutes in length. The Instructor described the complainant's presentation as "a little too long," and stated that, as was her practice, she deducted one point for every minute over the 10 minute presentation timeframe. In addition, the Instructor stated that she did not deduct any points from the complainant's presentation for the time that Student 1 assisted the complainant or for the time that was taken during questions raised and answers provided. The Instructor advised OCR that the complainant began her presentation at 10:25 a.m. and finished at 10:42 a.m., extending beyond the allotted timeframe by seven minutes; however, the Instructor advised OCR that instead of deducting seven points from the complainant's grade, she only deducted three points. The complainant earned a score of 97% out of 100% on her presentation. OCR reviewed the scoring rubric and verified the scoring for the complainant's presentation.

Student 2 stated that the day before the class presentations, the complainant asked the Instructor if she could bring in her own microscope and the Instructor approved that request. Student 2 stated that on the day of the presentation, the complainant brought her own microscope to class and used it during her presentation. Student 2 stated that prior to the presentations, the Instructor

provided instructions about what information each student would be responsible for covering. With respect to the length of the complainant's presentation, Student 2 stated that the presentations were expected to last between 10 to 15 minutes; however, the complainant's presentation was over 30 minutes. Student 2 stated that based on her observation, the length of the complainant's presentation was not attributable to questions asked during the presentation; rather, it was longer than the expected timeframe because the complainant covered material beyond that which had been assigned to her. Student 2 confirmed that students were allowed to ask questions during the presentations of other students.

Based on the foregoing, OCR could not substantiate that the Instructor refused to allow the complainant to use the microscope she requested to use, as alleged. Both the Instructor and Student 2 informed OCR that the complainant was allowed to use the microscope of her choice. Absent an adverse action, OCR does not proceed further with the retaliation analysis. In addition, OCR determined that the Instructor had a legitimate, non-retaliatory reason for deducting points from the complainant's presentation; specifically, the Instructor advised OCR that (even discounting time spent for questions and responses), the complainant's presentation extended beyond the allotted timeframe by seven minutes. OCR determined that the proffered reason was not a pretext for retaliation as the Instructor's account of the events was supported by testimony and documentary evidence.

Incident 6

The complainant alleged that on or about April 12, 2015, during class, after making a mistake while filling out a mock medical chart for an assignment, the Instructor refused to allow her to retrieve another chart. The complainant alleged that the Instructor "mocked" her for making a mistake, by stating "[w]ell everyone else is understanding it, why can't you understand it?"

The Instructor denied that on the day in question she ever told the complainant "[w]ell everyone else is understanding it, why can't you understand it," or otherwise belittled the complainant in any way. The Instructor further explained that students in the Course were given an opportunity to perform certain skills on each other, such as assessing vital signs and drawing blood. The information recorded from assessments, measurements, and observations were documented on mock medical charts. The Instructor stated that she advised the class beforehand that if they made any errors, starting over on a new chart would not be an option. She advised the class that if mistakes were made they should be crossed out and "error" should be written next to the improper/incorrect notation. The Instructor stated that the complainant was not the only student who worked on the mock medical chart in question; and had she been allowed to retrieve another chart in replacement of the existing chart, all the documentation that the other students made would have been discarded. The Instructor further explained that retrieving a new chart to correct an error would also be contrary to the correct practice in the medical field. The Instructor acknowledged that she did not allow the complainant to retrieve a new chart.⁸ The Instructor

⁸ The Instructor informed OCR that when she attempted to correct the complainant's errors on the chart, the complainant responded "I don't want any drama," or similar words to that effect. The Instructor stated that she replied, "[w]hat drama when I'm trying to show and explain your errors made," or similar words to that effect. The Instructor stated that after being told that she could not retrieve a new chart, the complainant took her chart, held it

stated that no other student in the class attempted to retrieve a new chart when a mistake was made.

Similar to the Instructor's recollection, Student 2 explained that the Instructor informed students in the class at the beginning of the semester that if a student made a mistake on a mock medical chart, another chart could not be retrieved. Rather, the student was required to draw a line through the mistake and continue writing. Student 2 explained that every day student charts were updated and different students included information on their charts, such as vital signs; blood pressure; height; and weight. Therefore, if a chart were discarded, it would be discard all of the previous notes that were included on the chart by different students. Student 2 confirmed that no students received new charts, and the practice was that mistakes were crossed out and all charts were retained.

Based on the foregoing, OCR determined that the Instructor had a legitimate, non-retaliatory reason for not allowing the complainant to obtain another mock medical chart; namely, it was not the Instructor's practice; she advised students beforehand how to address mistakes made on the chart; and had the complainant been allowed to obtain a new chart the work of other students would have been discarded. OCR determined that the proffered reasons were not a pretext for retaliation, as testimony corroborated the Instructor's account of her practice and prior instructions to the class.

In conclusion, OCR determined that the VIDOE had legitimate non-retaliatory reasons for the actions complained of with respect to Incidents 1, 4, a portion of 5, and 6; and, OCR could not substantiate that the alleged adverse actions occurred with respect to Incidents 2, 3, and the other portion of 5. Therefore, OCR determined that there was insufficient evidence to substantiate the complainant's allegation that the Instructor subjected her to retaliatory harassment from September 2014 through April 2015, because of complaints she made to VIDOE personnel alleging that the Instructor discriminated against her on the bases of her race and disability.

With respect to Allegation 3, the complainant alleged that the VIDOE discriminated against her on the bases of her disability and/or race, or in the alternative retaliated for her advocacy, by indefinitely suspending her from the Program on or around April 20, 2015. OCR determined that the complainant was suspended from the Program on April 20, 2015, and ultimately dismissed from the Program on April 27, 2015.

The VIDOE advised OCR that the complainant was suspended from the Program on April 20, 2015, due to multiple incidents during which the complainant disrupted the educational environment, particularly with respect to the spring 2015 semester. Specifically, the Instructor and/or the Supervisor relayed to OCR the following incidents.

above her head, and walked back to her seat in a disruptive manner saying "see, this is the drama, this is what I'm talking about," or similar words to that effect.

On or about February 12, 2015, during class, the complainant became agitated and refused to listen⁹ to the Instructor when she attempted to provide needed corrections on her work. The Instructor stated that the incident was so disruptive that several students complained to the Supervisor; and eventually, the Supervisor and a classroom monitor came to the classroom to address the disruption.

On or around March 17, 2015, during a group activity in class, the complainant was assigned to work with another student; however, the complainant refused to work with that student (even though the other student was willing to work with her). Student 2 corroborated this incident.

On or around April 9, 2015, during a class assignment, the Instructor attempted to correct errors in the complainant's work product and she gave her a new form to fill out. In response, the complainant indicated that "she did not want any drama" or similar words to that effect. The Instructor advised OCR that the complainant then raised a folder in front of the entire class and said "see this drama" and indicated to the Instructor that she made the students laugh. The Instructor stated that the complainant sat down and continued showing her folder to the other students in the class, exclaiming "this is the drama I'm talking about," or similar words to that effect. OCR reviewed letters from at least two students who complained to the Supervisor regarding the above-described incident.

On or around April 16, 2015, a special education teacher (the Teacher) at a nearby high school (the School) informed the Supervisor that on multiple occasions during the spring 2015 academic semester the complainant left the Skill Center and went to the School's campus, without first obtaining a visitor's pass from the School's main office. The Teacher informed the Supervisor that on multiple occasions the complainant had asked School staff to distribute certain fliers to special education students; the Teacher advised the complainant that she should not be on campus and she did not have permission to approach students.¹⁰ Documentation supports that the Teacher informed the Supervisor that the complainant had spoken with at least one student while she was on campus; this student did not know the complainant.

On or around April 20, 2015, the Supervisor came to the Instructor's classroom because the students were "in an uproar" because the complainant was disrupting the class by talking over the Instructor and otherwise not following her instructions. Once in the classroom, the Supervisor stated that she observed the complainant question the Instructor; and, although the Instructor responded, the complainant would repeat her same line of questioning for several

⁹ Specifically, the Instructor stated that the complainant was "speaking over her" and "cutting [her] off". She stated that their exchange lasted for approximately 30 minutes.

¹⁰ OCR determined that on or around April 21, 2015, the Supervisor received a letter from an assistant principal (the Assistant Principal) at the School, who reported that on April 16, 2015, the complainant came to the School acting in an "irate" manner, "chastising [a] [School] telephone operator" about the delivery of a package. In that letter, the Assistant Principal also stated that the complainant "scream[ed]" at her and "pushed a paper in [her] face," regarding a matter about which she had no knowledge. The Assistant Principal stated that the complainant continued to "mak[e] a scene" in the School's main office and "shout[ing]" to at least one other employee along her way down a hallway. In the letter, the Assistant Principal stated that the complainant's behavior was so concerning that she considered contacting the police for assistance. Prior to the complainant leaving the School, school monitors came to assist the Assistant Principal. It was reported to the Supervisor that the complainant exited through the Skill Center, even though she had been told that she must exit through the School's front gate.

minutes. The Supervisor stated that she was forced to intervene and ask the complainant to let the Instructor proceed with the class; and that if she had any questions she should address them after class.

On or around April 20, 2015, the Supervisor informed the complainant, in-person and via a letter (Letter A) dated the same day, that there had been several incidents concerning her behavior on and off campus. Letter A advised the complainant that she would be suspended from the Program from April 20, 2015, through April 23, 2015. Letter A further advised the complainant that upon conclusion of an investigation, a determination would be made as to whether she could continue in the Program or be dismissed.¹¹

On or around April 27, 2015, the Supervisor provided the complainant with a second letter (Letter B) indicating that she had conducted an investigation into several incidents in which the complainant had been involved through academic year 2014-2015; and as a result of the investigation, the complainant was being dismissed from the Program as of that date. In Letter B, the Supervisor also advised the complainant that suspension at that point was not an option, as she had previously been assigned a three-day suspension that semester and the penalties she had committed would have required a minimum of a five-day suspension.¹² As justification for her dismissal decision, the Supervisor referenced the provisions in the Skill Center's Student Handbook (the Handbook) regarding "[r]espect"; "[i]nsubordination"; "[g]ross [m]isconduct"; "[i]nciting/[d]isruptive behavior"; and "[t]respassing."¹³ The VIDOE advised OCR that during academic year 2014-2015, two other students were dismissed from the Program for violating the Handbook; specifically, for fighting. Both of these students are XXXXXX and had not previously engaged in protected activities.

OCR determined that the Handbook in effect during academic year 2014-2015 sets forth rules related to insubordination; specifically, "[s]tudents should obey proper and reasonable orders and instructions given them by administrators, teachers, monitors, security officers, and all other authorized personnel in all school-related circumstances." The Handbook further prohibits inciting/disruptive behavior, stating that students must not "participat[e] in any disruption or other acts which interfere with the education process, or which can result in damage or destruction to public or private property, or cause personal injury to participants and others, or otherwise pose a threat to the health, safety, and /or welfare of students, staff, or others." The Handbook also states that "students are subject to discipline . . . for misconduct even if such misconduct occurs off school property and during non-school time. Dismissal may result if the off school grounds conduct is seriously disruptive of the

¹¹ OCR determined that during their meeting, the Supervisor directed the complainant to contact the District Manager to set up an appointment to further discuss her suspension.

¹² In Letter B, the Supervisor further explained that pursuant to the Course attendance policy (Attendance Policy) a student could miss only five days of classes before being dismissed from the Program; an additional suspension would have been in excess of the allowed absences from the Course and for the Program. OCR determined that the Attendance Policy in effect during the spring 2015 academic semester states that effective February 9, 2015, any student who accumulated six absences or more in a term will be dismissed from the Program. OCR determined that absences accumulated as a result of serving a suspension were considered unexcused.

¹³ In Letter B, the Supervisor stated that "although [trespassing] was not a direct violation on [the complainant's] behalf to [the Skill Center's] rules, [the complainant] traversed to [the School] through [the Skill Center's] gate without permission and without following the proper protocol for visitors on their campus."

educational process by markedly interrupting or severely impeding the day to day operation of the school.”

OCR further determined that the Course Policy (the Policy) states that a student may be withdrawn from a course or the Program for “just cause,” which may include: inappropriate classroom/lab or other disruptive behavior; unprofessional behavior; and not adhering to the rules/requirement(s) in the Program. The Policy states that the classroom instructor reserves the right to give a student a verbal warning; to place a warning letter in a student’s file; and to send a student to the administrative office. The Policy states that the administrative office (including the Supervisor) has the right to allow a student back in class or may dismiss that student from the Program. The Policy further states that the classroom instructor (or any other faculty member) may ask a student to leave a class or lab session if the student’s behavior interferes with the learning process or in any way jeopardizes the safe environment of the classroom.

Based on the foregoing, OCR determined that the VIDOE provided legitimate, non-discriminatory and non-retaliatory reasons for suspending and subsequently dismissing the complainant from the Program; namely, the VIDOE determined that the complainant committed several infractions specified in the Handbook during her tenure in the Program, and in particular during the spring 2015 academic semester. OCR determined that the VIDOE’s proffered reasons were not pretextual, as several students and other witnesses corroborated the above-described conduct on the part of the complainant that constituted infractions of the Handbook. Moreover, OCR determined that the Skill Center has imposed dismissals on similarly-situated non-disabled, non-XXXXX students, who had not engaged in protected activities. Therefore, OCR determined that there was insufficient evidence to substantiate the complainant’s allegation that the VIDOE discriminated against her on the bases of her disability and/or race, or in the alternative retaliated for her advocacy, by indefinitely suspending her from the Program. Accordingly, OCR will take no further action regarding Allegation 3.

On November 9, 2015, the VIDOE agreed to implement the enclosed resolution agreement to address the compliance issues identified with regard to Allegation 1. OCR will monitor the implementation of the enclosed resolution agreement. If VIDOE 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 the VIDOE 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, 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: Amanda Warner, Esq