

June 28, 2019

Dr. Dawood Farahi
President
Kean University
1000 Morris Avenue
Union, New Jersey 07083

Re: Case No. 02-19-2067
Kean University

Dear Dr. Farahi:

This letter is to notify you of the determination made by the U.S. Department of Education, Office for Civil Rights (OCR), with respect to the above-referenced complaint filed against Kean University (the University). The complainant alleged that the University discriminated against him, on the basis of his disability, by failing to respond to his complaint that his clinical instructor subjected him to harassment because of his disability during his clinical rotation at a physical therapy clinic (the clinic), from May 29, 2018 through August 18, 2018.¹

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 and activities receiving financial assistance from the U.S. Department of Education (the Department). OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (the 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 University is a recipient of financial assistance from the Department and is a public postsecondary educational institution. Therefore, OCR has jurisdictional authority to investigate this complaint under both Section 504 and the ADA.

The regulation implementing Section 504, at 34 C.F.R. § 104.4(a), states that no qualified individual with a disability shall, on the basis of disability, be subjected to discrimination under

¹ OCR notified the parties on February 11, 2019, that the issue OCR would be investigating was whether a University employee had subjected the complainant to harassment because of his disability. During the course of the investigation, OCR determined that the clinical instructor was not an employee of the University; and, that the complainant's allegation was that the University failed to investigate his complaint that the clinical instructor subjected him to harassment because of his disability.

any program or activity which receives or benefits from federal financial assistance. Further, the regulation implementing Section 504, at 34 C.F.R. § 104.4(b)(1)(v), states that a recipient, in providing any aid, benefit, or service, may not directly or through other arrangements, on the basis of disability, aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the recipient's program. The regulation implementing the ADA, at 28 C.F.R. § 35.130(a) and § 35.130 (b)(3), contain similar provisions.

The regulation implementing Section 504, at 34 C.F.R. § 104.43(a), states that no qualified disabled student shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, occupational training, or other postsecondary education program or activity. Further, the regulation implementing Section 504, at 34 C.F.R. § 104.43(b), states that a recipient that considers participation by students in education programs or activities not operated wholly by the recipient as part of, or equivalent to, an education program or activity operated by the recipient shall assure itself that the other education program or activity, as a whole, provides an equal opportunity for the participation of qualified individuals with disabilities.

Disability harassment that creates a hostile environment is a form of discrimination prohibited by Section 504, the ADA, and their implementing regulations, at 34 C.F.R. § 104.4 and 28 C.F.R. § 35.130, respectively. 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 severe, persistent, or pervasive to interfere with or deny a student's participation in or receipt of benefits, services or opportunities in the institution's program. The regulation implementing Section 504, at 34 C.F.R. § 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 complaints alleging any action prohibited by the regulation. The regulation implementing the ADA has similar provisions, at 28 C.F.R. §§ 35.106 and 35.107.

OCR interviewed University staff during the course of its investigation. OCR also reviewed information and documentation that the complainant and the University provided. OCR made the following determinations.

OCR determined that the complainant first enrolled in the University's School of Physical Therapy (the School) in the XXXXXX XXXX semester. The complainant was registered with the University as a student with a disability and approved to receive academic adjustments for his courses.² During the summer 2018 semester, the complainant was placed in a full-time clinical rotation at the clinic, under the supervision of a private physical therapist who served as the complainant's clinical instructor, from May 29 through August 17, 2018. The clinical instructor was not an employee of the University. The complainant was the first and only student from the University to be placed at the clinic; he had requested this placement due to the clinic's proximity

² A University employee informed OCR that the University does not provide disability-related accommodations in clinical placements. OCR provided technical assistance to the University regarding its obligations to ensure that academic adjustments and other accommodations are provided in clinical placements, if appropriate.

to his home. The complainant passed the clinical rotation and remained in the School until he was dismissed on XXXXXXXX XX, XXXX, for exceeding the maximum number of remediation attempts in a course during the XXXX XXXX semester. As stated in the School’s dismissal letter to the complainant on XXXXXXXX XX, XXXX, he was dismissed for using more remediation attempts on exams than allowed in his XX XXXXXXXXXXXX XX XXX XXXXXXXXXXXXXXXXXXXX XXXXXX course, taken during the XXXX XXXX semester.³

The complainant stated that after he was dismissed from the School, he filed a written academic appeal on XXXXXXXX XX, XXXX, in which he described the allegedly hostile environment that he experienced at the clinic. The complainant alleged that the University discriminated against him, on the basis of his disability, by failing to respond to his complaint that his clinical instructor subjected him to harassment because of his disability during his clinical rotation at the clinic, from May 29, 2018, through August 18, 2018.

OCR determined that the University maintains a policy for addressing students’ complaints of discrimination (the complaint policy).⁴ The complaint policy provides that all complaints of discrimination must be reported to the University’s Affirmative Action Officer (AAO); and, that any individual who has knowledge of harassment or receives a complaint of harassment should immediately inform the AAO. Upon receipt of such a complaint, the AAO has discretion to attempt an informal resolution or proceed with a formal complaint investigation; the complainant may proceed with a formal written complaint at any time. The complaint policy also provides that, in the event a formal complaint is initiated, the AAO will contact the respondent and provide the respondent with an opportunity to respond to the complaint. The complaint policy further states that the AAO will conduct a prompt investigation and submit an investigative report to the University president, who will then issue a final determination letter to the complainant and the respondent.⁵

OCR determined that throughout the clinical placement, the complainant, the clinical director, and the clinical instructor discussed the complainant’s progress; including certain difficulties he encountered. On June 13, 2018, at the clinical director’s regularly scheduled “two-week check-in”⁶ with the clinical instructor, the clinical instructor reported some issues with the complainant’s XXXXXXXXXXXXXXXXXXXX XXXXXX; including patients’ complaints that the complainant made them feel uncomfortable. Because of this feedback, the clinical director thereafter spoke with the clinical instructor approximately every two weeks to obtain updates on the complainant’s progress.

³ OCR is currently investigating the complainant’s allegation of disability discrimination in this course in OCR Case Number 02-19-2170.

⁴ The complaint policy is available on the University’s website, at <https://www.kean.edu/media/student-complaint-form> (last visited on May 21, 2019).

⁵ The complaint policy does not set forth a time period for resolving complaints. OCR provided technical assistance to the University regarding providing prompt timeframes for the major stages of the grievance process.

⁶ The clinical director informed OCR that either she or another faculty member typically conducts a “two-week check-in” for each student who is in a clinical placement. She explained that the School uses a Clinical Performance Instrument (CPI) to assess students’ competency in various areas; and, that the purpose of the “two-week check-in” is to allow for the early identification of any concerns that may be “red flag issues” per the CPI. The two-week check-in entails a telephone call with the student’s clinical instructor. If the student does not exhibit any “red flag issues,” the School’s next evaluation of the student’s performance would occur at a site visit. The clinical director informed OCR that either she or another faculty member typically conducts a site visit for each student approximately midway through the student’s clinical placement.

In addition, on July 11, 2018, the clinical director met separately with the clinical instructor and the complainant at her regularly scheduled site visit. At the site visit, the clinical instructor and the complainant each discussed with the clinical director the complainant's XXXXXXXXXXXXXXX XXXXXX, among other areas of feedback. Following the site visit, on July 13, 2018, the School implemented a learning contract to address the complainant's difficulties with XXXXXXXXXXXXXXX; pursuant to the learning contract, the complainant submitted written self-assessments of his specified goals each week. At the conclusion of the clinical rotation, on or about August 23, 2018, the clinical instructor and the complainant each completed a written assessment of their clinical experience. OCR determined that the complainant did not report his concerns about the clinical instructor's alleged harassment during the time he was placed in the clinic; and, the University did not otherwise have notice of the clinical instructor's alleged harassment of the complainant during this time.⁷

On XXXXXXXXXXX X, 2018, the School held a Student Progress Committee meeting with the complainant, to discuss his performance in the clinic.⁸ OCR determined that during the meeting, the complainant did not raise any allegations of discrimination or harassment by the clinical instructor. The clinical director asserted that, consistent with the Student Progress Committee's practice, the complainant was given an opportunity to state whatever he wished to state at the outset of the meeting; however, he did not raise any concerns about discrimination at that time. The complainant acknowledged to OCR that the University administrators asked him "how it was going" at the clinic; however, he asserted that although he responded by saying, "not well," the University administrators did not ask any follow up questions. The complainant informed OCR that because he felt the University did not care, he did not share details about the alleged harassment. In addition, he asserted that he later attempted to raise his concerns in a meeting with the clinical director on September 23, 2018, but that the clinical director stated, "it's done, it's over," and would not allow him to speak further.⁹

As stated previously, for reasons related to another course, the complainant was dismissed from the School on XXXXXXXXXXX XX, XXXX. On XXXXXXXXXXX XX, XXXX, the complainant filed an appeal of his dismissal with the School's Executive Director, in which he detailed his allegations about the clinical instructor's alleged discrimination against him. The complainant asserted that the clinical instructor told him that he was "strange" and XXXXX "silly"; criticized his XXXXXXXXXXXXXXX abilities; and, asked him specific questions about his disability. The complainant also asserted that the clinical instructor told a patient that the complainant had "special

⁷ The complainant informed OCR that on July 12, 2018, the clinical director asked him if he would recommend the clinic as a clinical placement for others; and that although he responded "no," the clinical director did not ask him why not, and because he did not trust her, he did not elaborate.

⁸ OCR determined that the University held a total of four Student Progress Committee meetings regarding the complainant between XXXXXX and XXXXXXXXXXX XXXX, as follows: XXXXXX X, XXXXXXXXXXX X, XXXXXXXXXXX X, and XXXXXXXXXXX XX, XXXX. OCR reviewed the University's notes from these meetings. The meetings that took place on XXXXXX X and XXXXXXXXXXX X, XXXX, concerned the clinical placement, and the complainant attended the latter. The University's notes for this meeting, which the chair of the Student Progress Committee submitted to the executive director on XXXXXXXXXXX X, XXXX, consist only of notes that the clinical director prepared in advance of the meeting as talking points for herself.

⁹ The complainant asserted to OCR that he was placed on probation based on his clinical performance; however, the University informed OCR that although the Student Progress Committee recommended that he be placed on probation on XXXXXXXXXXX X, XXXX, this did not occur because the executive director, whose approval was required, did not proceed with placing the complainant on probation.

needs,” and that such comments caused patients to refuse to work with him. In addition, the complainant asserted that the clinical director told the clinical instructor that the complainant had a XXXXXXXX disability and that his “mind is like a ping pong ball.” The complainant further asserted that when he attempted to raise his concerns about the clinical instructor at a meeting with University faculty and administrators on XXXXXXXXXX X, 2018, he was not permitted to speak further.¹⁰

Because the Executive Director was on leave at the time the complainant filed his appeal, the clinical director was responsible for responding to the appeal.¹¹ On XXXXXXXX XX, XXXX, the clinical director issued her determination, in which she upheld the complainant’s dismissal; however, the clinical director did not address the complainant’s allegations about the clinical instructor in her response to the complainant’s appeal.¹²

The clinical director informed OCR that if a student raises any concerns with respect to his/her clinical placement, including but not limited to discrimination, the School’s practice is to transfer that student to another clinical site immediately, without investigation or further reporting to any University administrator. The clinical director stated that in some cases, the School will also discontinue its relationship with the clinical site at issue. The clinical director provided OCR with examples of three such students whom she had transferred to a new clinical site without further investigation or reporting. One of these students had raised a concern about a private physical therapist’s making racial comments about a patient at her clinical site (clinic A); in this instance, the clinical director transferred the student to a new clinical site, and discontinued placing students at clinic A.¹³

The clinical director denied the complainant’s assertion that she divulged information about the complainant’s disability to the clinical instructor. The clinical director further asserted that she did not know the nature of the complainant’s disability; therefore, she could not have shared such information.¹⁴ The clinical director acknowledged informing the clinical instructor that the complainant’s mind “bounced around”; however, she stated that this comment was based only on her prior observations of the complainant in labs, where she saw that his thoughts and communication became disorganized when he was nervous about performing a practical examination. The clinical director asserted that she did not further discuss with the clinical instructor why the complainant’s mind “bounced around.”

¹⁰ The clinical director informed OCR that at some point in the meeting on XXXXXXXXXX X, 2018, the complainant might have interrupted someone who was speaking and been told to wait until the other person was finished.

¹¹ The University was closed for XXXXXX XXXXX at the time that the complainant filed his academic appeal on XXXXXXXXXX XX, XXXX. The University reopened for the XXXXX semester on XXXXXXXXXX XX, XXXX.

¹² The clinical director informed OCR that she did not address the complainant’s assertions about the clinical instructor in her determination of his appeal because the clinical placement was not relevant to the reasons for the complainant’s dismissal from the program.

¹³ The other two examples did not involve allegations of discrimination or harassment. In one instance, a student reported that the owner of her clinical site made her feel uncomfortable because she worked for a competitor’s practice. In the other instance, a student reported that her clinical instructor made her feel uncomfortable by asking her questions, though the questions were related to physical therapy.

¹⁴ The clinical director informed OCR that she had previously taught the complainant in other courses, in which he received academic adjustments; however, although she was aware that he received academic adjustments, she did not know his diagnosis or any other details about his disability. She further informed OCR that in her role as clinical director, she would not have had access to information about whether a student had a disability.

In or around XXXXXXXX XXXX, the clinical director spoke with the Dean of the University's Graduate College (the dean) about the complainant's appeal, including his allegations about the clinical instructor.¹⁵ The dean instructed the clinical director to discontinue placing students at the clinic because a complaint had been filed.

On XXXXXXXX X, XXXX, the dean contacted the University's Human Resources department regarding the complainant's allegations, as the Human Resources department was designated to receive discrimination complaints while the Director of the University's Office of Affirmative Action (OAA director) was on leave.¹⁶ On or about XXXXX X, XXXX, the Managing Assistant Director of the University's Office of Affirmative Action Programs (the assistant director) called the complainant to discuss his complaint; however, the complainant declined to speak with her at that time due to his pending complaint with OCR.¹⁷ On XXXXX X, XXXX, the assistant director sent an email to the complainant, memorializing that the complainant had declined to speak with her, providing her contact information in case the complainant wished to speak with her at a later date, and stating that the complainant was protected against retaliation.¹⁸ At that time, the assistant director determined that due to the complainant's response, OCR's ongoing investigation, and the OAA director's absence, the University would wait to proceed with the complainant's complaint until the OAA director returned. To date, the OAA director remains on leave. In his absence, the University has not investigated the complainant's allegations concerning the clinical instructor or taken steps to remedy the effects of any harassment that may have occurred, although the University has discontinued placing students at the clinic.¹⁹

Based on the foregoing, OCR determined that as of XXXXXXXX XX, XXXX, when the complainant filed his academic appeal, the University was on notice of the clinical instructor's alleged harassment of the complainant; however, the University did not promptly investigate or seek to remedy the effects of the alleged harassment. Although the University discontinued future placements at the clinic in or around XXXXXXXX XXXX and made initial contact with the complainant about his complaint on or about XXXXX X, XXXX, the University placed its response to the complainant's individual allegations on indefinite hold, pending the OAA director's return from leave. To date, the University has not investigated the complainant's claims of disability-based harassment, despite its knowledge of the details of his allegations, including the identity of relevant witnesses. In addition, OCR determined that the School's clinical program lacks an adequate process for reporting or responding to complaints of discrimination or harassment that arise in clinical placements. Therefore, OCR determined that there was sufficient evidence to substantiate the complainant's allegation that the University discriminated against him, on the basis of his disability, by failing to respond to his complaint that his clinical instructor

¹⁵ It is unclear whether this meeting with dean occurred before or after the clinical director issued her determination regarding the complainant's appeal.

¹⁶ The dean also forwarded to the Human Resources department copies of the complainant's two-week check-in forms, learning contract, and site visit form.

¹⁷ The University informed OCR that, prior to calling the complainant, the assistant director had interviewed the University's Managing Assistant Director for Disability Services.

¹⁸ The assistant director also attached to her email the University's complaint policy, as well as the New Jersey State Policy Prohibiting Discrimination in the Workplace.

¹⁹ As noted above, the clinical instructor was not a University employee and declined OCR's request for an interview.

subjected him to harassment because of his disability during his clinical rotation at the clinic, from May 29, 2018, through August 18, 2018.

On June 27, 2019, the University signed the enclosed resolution agreement (the Agreement) to remedy the compliance issues identified in this investigation. OCR will monitor the implementation of the Agreement. Upon the University's satisfaction of the commitments made under the Agreement, OCR will close the case.

This letter should not be interpreted to address the University'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 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 University 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 individual may file a 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 that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions regarding this matter, please contact Aditi Shah, Compliance Team Attorney, at (646) 428-3897 or Aditi.Shah@ed.gov.

Sincerely,

/s/

Timothy C. J. Blanchard

Encl.

cc: Marie Suozzo, Esq. (via email)