



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS  
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PHILADELPHIA, PA 19107-3323

REGION III  
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**August 11, 2014**

**IN RESPONSE, PLEASE REFER TO: 03-13-2081**

Ms. Christine Knouff, President  
Brown Mackie College – Northern Kentucky  
309 Buttermilk Pike  
Fort Mitchell, KY 41017

Dear Ms. Knouff:

This will notify you that the U.S. Department of Education (the Department), Office for Civil Rights (OCR), has reached a determination in the complaint filed against Brown Mackie College (the College), alleging discrimination on the basis of age. Specifically, the Complainant alleged that the College discriminated against xxx on the basis of age by:

1. Assigning xxx a failing grade in a xxxx xxxx xxxxxxxx xxxxx xx xxxxxxxxx xxxxxx (the Course) and
2. Failing to handle the appeal of xxx Course grade in a timely manner.

OCR enforces the Age Discrimination Act of 1975 (the Age Act) 42 U.S.C. 6101 et seq., and its implementing regulation, at 34 C.F.R. Part 110. The Age Act prohibits discrimination on the basis of age by recipients of Federal financial assistance.

OCR applies a preponderance of the evidence standard to determine whether the evidence is sufficient to support a particular conclusion. Specifically, OCR examines the evidence in support of and against a particular conclusion to determine whether the greater weight of the evidence supports the conclusion or whether the evidence is insufficient to support the conclusion.

During the course of our investigation, OCR reviewed all documentation submitted by the Complainant and the College and interviewed the Complainant, College faculty and related parties. Based upon our investigation, OCR has determined that there is insufficient evidence to conclude that the College discriminated against the Complainant on the basis of age when it assigned xxx a failing grade in xxx xxxx xxxxx xx xxxxxxxxx xxxxxx. The reasons for our determination are set forth below. With regard to the Complainant's allegation that the College failed to handle xxx appeal in a timely manner, the College has entered into an agreement with OCR to resolve this matter.

## Legal Standard

The regulation implementing the Age Act, at 34 C.F.R. § 110.10(a), provides that no person shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

In determining whether a recipient has subjected an individual to discrimination on the basis of age, OCR looks at whether there were any apparent differences in the treatment of similarly situated individuals on the basis of age. If different treatment is established, OCR then considers whether the recipient had a legitimate, nondiscriminatory reason for the apparent difference in treatment and whether the reason provided by the recipient was a pretext for discrimination based on age. Additionally, OCR examines whether the recipient treated the individual in a manner that was consistent with established policies and procedures and whether there is any other evidence of age discrimination.

## Findings of Fact

### *Allegation 1 – Assignment of a Failing Grade*

On August 8, 2012, the Complainant, who was xx xxxxx xxx, was dismissed from the College's xxxxxxxxxxxx xxxxxxxx xxxxxxxxxxxx Program (the Program) when xxx failed to successfully complete the OT 2991A and B - Level II Fieldwork courses. The Complainant initially enrolled in the College's xxxxxxxxxxxx xxxxxxxx xxxxxxxxxxxx Program (the Program) in the summer of 2009.

The College informed OCR that the xxxxxxxx xxxxxx xx xxxxxxxxxxxx xxxxxxxx are completed in four, four week phases – xx xxxxxx xxx x, xxx xx xxxxxx xxx x. xx xxxxx x xxx x run consecutively as do xx xxxxx x xxx x. If a student fails to satisfactorily complete the x phase of either course, the student will be required to repeat both sections of the course. Students must pass two out of three attempts at the Fieldwork Courses in order to successfully complete the Program. If a student fails to successfully complete a phase after two attempts, the student will be dismissed from the Program.

The Complainant was unsuccessful at xxx first attempt to complete xx xxxxxx xxx x xxxxxx xx xxxxxxxxxxxx xx xxxxxxxx xxx; however, xxx was successful at her second attempt in xxxx xxxx. The Complainant then proceeded to the xx xxxxxx xxx x xxxxx xx xxxxxxxxxxxx xxxxxxxxxxxx xx xxxxx x, xxxx. Each week the Academic Fieldwork Coordinator (the Coordinator) conducted visits with the Complainant at the fieldwork site. The College stated that after the Complainant's first week at the site it began to receive reports concerning the Complainant's performance. The College received reports from those assigned to supervise the Complainant stating that xxx lacked initiative and had difficulty demonstrating independent thinking. In addition, the site workers supervising the Complainant reported that the Complainant demonstrated "xxxx xxxxxxx xxxxxxx" and provided specific examples of incidents that were deemed inappropriate when the Complainant worked with patients. For example, one of the xxxxxxxxxxxx xxxxxxxxxxxxxxxx xxxxxxxx xxxxxxxxxxxx (xxxx) assigned to supervise the Complainant reported that there was x xxxxxxxx xxx xxx xxxxxxxxxxxx xx

XXXXXXXXXXXX XX XXXXXXX, XXX XXXXXXX XXXXXXX XX XXXXXXX X XXXXXXX. The COTA reported that the Complainant had the patient working on cognitive tasks and although the patient was not doing a good job, xxx was participating so the COTA provided positive encouragement to the patient. According to the COTA, the XXXXXXXXXXX XXXXXXX XX XXX XXXX XXX XXXX XX XXXXX XX XXX XXXXXXX, “XXX XXX XXXXXXX? XXX XX XXXXX XXXXXXX.”

The COTA reported another incident regarding a patient who came to therapy. According to the COTA, the patient was demonstrating difficulty with the therapy session and the Complainant XXXXXXX XX XXX XXXXXXX XXX XXXX XXXXXXX, “XXX XXX XXXXXXX XX XX? XXX XXX XXXXXXX XXX?” The COTA reported that xxx felt the Complainant XXXXXXX XX XXXXXXX XX X XXXXXXXXXXX XXXXXXX.

College staff stated that when given feedback and guidance on performance areas needing improvement, the Complainant would become defensive and insist that xxx was doing what everyone else was doing.

The Coordinator met with the Complainant and discussed with xxx the noted concerns. The College indicated that the Coordinator explained to the Complainant what was expected of xxx concerning taking initiative, as well as the competencies and professional responsibilities xxx should be demonstrating at this stage of the Program. In response to this feedback, the Complainant denied the reports. As a result, staff supervising the Complainant xx xxx XXXXXXXXXXX XXXX were instructed to document the Complainant’s progress and record specific examples of concerns with xxx performance.

The College provided weekly reports dated July 5, July 13, July 20 and August 8, 2013, documenting the Complainant’s progress. Each report stated that the Complainant needed improvement in most, if not all, areas evaluated.

The Coordinator and the DOR met regarding the Complainant’s status. The Coordinator reported that the Complainant had made no improvement in xxx performance since the midterm. The College stated that the DOR advised them that he did not see a reason for the Complainant to continue in the Program because xxx could not successfully complete the requirements xx xxx XXXXX XX XXXXXXXXXXX XXXXXXX.

The DOR and the Coordinator met with the Complainant on XXXXXXX X, XXXX, to discuss the fieldwork site’s plans to terminate her. The College stated that the DOR explained to the Complainant the concerns with xxx performance and the reasons for terminating her from the site. On XXXXXXX XX, XXXX, the College sent the Complainant a letter stating that xxx had been dismissed from the Program due to xxx failure to complete xxx XXXXXXXXXXX XX XXXXXXXXXXX XXXXXXXXXXX.

The Complainant alleged that xxx was discriminated against on the basis of age because the DOR made comments about xxx age; however, the Complainant was unable to provide any information to corroborate the alleged comments. The Complainant said that the DOR never made comments while others were present. The comments the Complainant attributed to the DOR based on xxx age related to the DOR’s belief that the Complainant would not be able to keep up with the fast-

paced environment at the fieldwork site. OCR interviewed the DOR who denied making any derogatory comments regarding the Complainant's age.

OCR also reviewed information regarding other students in xxxxxx x xxx x during 2011 and 2012. There were 17 students, including the Complainant, who were enrolled in these level II fieldwork courses. In looking at the 16 students, other than the Complainant, three students were over the age of 40. OCR notes that these three students passed xx xxxx x xxx x on their first attempt. Seven students did not satisfactorily complete the requirements of either xx xxxx x x x (i.e., overall score below 77); all of these students were under the age of 40.

### **Analysis**

Applying the above referenced standards for different treatment, OCR cannot determine that the Complainant was treated differently than similarly situated younger students. xxx was subjected to the same standards as other students, xxx performance problems were noted, and xxx did not perform at the required level. We also found that younger students also did not successfully complete the course, and students of approximately the same age as the Complainant were successful. We found no evidence of age animus. Based on a preponderance of the evidence, we find that there is insufficient evidence to establish different treatment on the basis of age with regard to this allegation.

### *Allegation 2 – Timely Handling of Appeal*

Under OCR procedures, a complaint may be resolved before the conclusion of an investigation if a recipient asks to resolve the complaint by signing a Voluntary Resolution Agreement. The provisions of the agreement must be aligned with the complaint allegations or the information obtained during the investigation and be consistent with applicable regulations. Such a request does not constitute an admission of liability on the part of a recipient, nor does it constitute a determination by OCR of any violation of our regulations.

Consistent with OCR's procedures, the College requested to resolve this allegation through a Voluntary Resolution Agreement (the Agreement), which was executed by the College on July 23, 2014. A copy of the signed Agreement is enclosed. As is our standard practice, OCR will monitor the College's implementation of the Agreement.

This concludes OCR's investigation of the complaint and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter.

The Complainant has the right, pursuant to the regulation at 34 C.F.R. § 110.39 implementing the Age Act, to file a civil action for injunctive relief in federal court following the exhaustion of administrative remedies. Administrative remedies are exhausted if: (1) 180 days have elapsed since the complainant filed the complaint with OCR, and OCR has made no finding, or (2) OCR issues any finding in favor of the recipient. A civil action can be brought only in a United States

district court for the district in which the recipient is found or transacts business. A complainant prevailing in a civil action has the right to be awarded the costs of the action, including reasonable attorney's fees, but these costs must be demanded in the complaint filed with the court. Before commencing the action, the complainant shall give 30 days notice by registered mail to the Secretary of the Department of Education, the Secretary of the Department of Health and Human Resources, the Attorney General of the United States, and the recipient. The notice shall state the violation of the Age Act, the relief requested, the court in which the action will be brought, and whether or not attorney's fees are demanded in the event the complainant prevails. The complainant may not bring an action if the same alleged violation of the Age Act by the same recipient is the subject of a pending action in any court of the United States.

This letter is a letter of findings issued by OCR to address an individual OCR case. Letters of findings contain fact-specific investigative findings and dispositions of individual cases. Letters of findings are not formal statements of OCR policy and they 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.

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

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we 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.

Thank you for your cooperation in this matter. If you have any questions, please feel free to contact Linda Thomas, of our staff, at (215) 656-8553, or by email at: [Linda.Thomas@ed.gov](mailto:Linda.Thomas@ed.gov).

Sincerely,

/s/

Melissa M. Corbin  
Team Leader

Enclosure