



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

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May 4, 2015

XXXXXXXXXX
XXXXXXXXXX

Auburn University Montgomery
School of Nursing Administration
P.O. Box 244023
Montgomery, AL 36124

Re: OCR Complaint # 04-15-2035

Dear XXXXXXXX:

On October 31, 2014, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received a complaint filed by the Complainant against Auburn University-Montgomery School of Nursing (University), alleging discrimination on the basis of disability and retaliation. Specifically the Complainant alleged the following:

1. During the Complainant's tenure as a nursing student, both students and faculty subjected her to harassment on the basis of her disability, including¹ as follows:
 - (a) Fall XXXX: In October XXXX, the Instructor for NURS XXXX told the Complainant to speak up, and she was having a hard time understanding her.
 - (b) Spring XXXX: There were times the Instructor for NURS XXXX asked her to speak up when she asked a question. One of her classmates told her she "came off as weird."
 - (c) Fall XXXX: There were times one of the Instructors for NURS XXXX asked her to speak up when she asked a question.
 - (d) Spring XXXX: During NURS XXXX, the Instructor (NURS XXXX Professor) asked her to speak up when she asked a question. During the first week of classes for NURS XXXX, the Instructor (NURS XXXX Professor) asked her to speak up when she asked a question during class. During the first week of January XXXX, the Complainant asked Instructor #1 (NURS XXXX Professor) for an upcoming course for the study guides for the upcoming course; the Instructor gave her a "harsh look." Another employee told the Complainant the Instructor reacted this way because she wanted students to focus on one class at a time.

¹ According to the Complainant incidents related to her actual or perceived disability (which related to her voice) occurred in every class throughout her tenure.

- (e) March XXXX: NURS XXXX Professor asked the Complainant if she had ever had any problems with her XXXXX, and whether she did any XXXXXXXXXXXXXXXXXXXX. NURS XXXX Professor also asked if she had been to the XXXX clinic on campus and to let her know about her visit to the XXXX clinic. NURS XXXX Professor asked the Complainant if she was afraid of her because she seemed to avoid her whenever they are in the hallways. The Complainant asked two other faculty members if there was something wrong with her XXXX, and they stated she had a XXXXX.
 - (f) April XXXX: The Complainant informed an employee that she was “scared” of taking a course from NURS XXXX Professor because of the “harsh look” she gave her the first week of January 2014 and what she had heard about how she treats students.
 - (g) May XXXX: On the first day of her NURS XXXX class, she asked the NURS XXXX Professor a question, and she gave her a “dirty look.” Later in the class, the NURS XXXX Professor “rolled her eyes”, said “okay”, and moved on to the next student when the Complainant answered a question. The NURS XXXX Professor asked the other students who responded to the same question, additional questions. Throughout the first week of class, when the Complainant asked a question the NURS XXXX Professor would be dismissive and not fully answer her question or ask her to repeat the question. A week before final exams, an employee asked if she had “test anxiety” since she was often asking questions. After completion of group presentations and the final exam, the Complainant, her mother, the Associate Dean, and the NURS XXXX Professor met regarding the rubric used to grade her for the group presentation. The Complainant asked the Instructor about the XXXXX or XXXXX issues noted on the rubric. The Instructor informed her that she did not look out into the audience enough, and she let her group members speak for her.
2. The University retaliated against the Complainant for complaining against the discrimination/hostile environment at the University by: (a) On June XXXX, a female security guard blatantly disregarded her privacy and privilege to be engaged in a conversation without disruption and followed her and her mother around the campus; and (b) the Complainant’s grades were withheld until May XXXX, which was after final grades were posted, the grades were not representative of all her tests and quizzes, and the NURS XXXX Professor would not show her the math used to achieve her grade.

OCR investigated the complaint pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504), and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 (Title II), and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance from the Department and a public entity, the University is subject to these laws.

OCR investigated the following legal issues:

1. Whether the Student was subjected to a hostile environment as a result of harassment based on a perceived disability and whether the University failed to take prompt and equitable steps to investigate and respond to the alleged harassment, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. §§ 104.4, 104.7, and 104.43 (a), and the Title II implementing regulation at 28 C.F.R. §§ 35.130 (a) and 35.107.
2. Whether the University retaliated against the Complainant, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.61, and the Title II implementing regulation at 28 C.F.R. § 35.134.

OCR's investigation of the complaint included an analysis of the data provided by both parties and interviews with the Complainant and University administrators, faculty and staff. OCR reviewed the evidence under the preponderance of the evidence standard. Under a preponderance of the evidence standard, OCR evaluates evidence obtained during an investigation to determine whether the greater weight of the evidence is sufficient to support a conclusion that the University failed to comply with a law or regulation enforced by OCR or whether the evidence is insufficient to support such a conclusion.

After a thorough review of all of the evidence, OCR found insufficient evidence to support a finding of noncompliance with Section 504 and Title II, as alleged. However, OCR did find sufficient evidence to support a finding of noncompliance in regards to the University's Section 504 and Title II policies and grievance procedures. The factual and legal bases for our determinations are set forth below.

Legal Standards

The Section 504 implementing regulation at 34 C.F.R. § 104.43(a) provides 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 academic, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education aid, benefits, or services. The Title II implementing regulation at 28 C.F.R. § 35.130 (a) provides that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

The Section 504 implementing regulation at 34 C.F.R. § 104.3(1)(3) defines a qualified individual with a disability with respect to postsecondary education services, as an individual with a disability who meets the academic and technical standards requisite to admission or participation in the postsecondary institution's education program or activity.

According to the Section 504 implementing regulation at 34 C.F.R. § 104.3(j)(1)-(2) and the Title II implementing regulation at 28 C.F.R. § 35.104, disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities

of such individual; a record of such an impairment; or being regarded as having such an impairment. The phrase physical or mental impairment means: (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine; or (2) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The phrase physical or mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

The phrase major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. The phrase has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. The phrase is regarded as having an impairment means the following: (1) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (3) Has none of the impairments defined above but is treated by a recipient as having such an impairment.²

In the postsecondary setting, a student is not required to provide information to a recipient concerning a disabling condition (unless the student desires assistance from the recipient), and a recipient is not required to seek out students with disabilities. Consequently, the responsibility is with the student to identify a disabling condition and to request academic adjustments in a reasonable manner, as well as, to assist in identifying appropriate and effective academic adjustments or auxiliary aids.³

Disability harassment is a form of discrimination prohibited by Section 504, Title II, 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 limit a student's participation in or receipt of benefits, services or opportunities in the recipient's program.

In determining whether a hostile environment based on disability has been created, OCR

²Under the "regarded as" prong of the disability definition, certain statutory protections apply whether or not the individual actually has the impairment, and also whether or not the impairment is perceived to be a substantial limitation on a major life activity.

³Transition of Students With Disabilities to Postsecondary Education: *A Guide for High School Educators* (March 2011); *Auxiliary Aids and Services for Postsecondary Students with Disabilities: Higher Education's Obligations Under Section 504 and Title II of the ADA* (1998).

examines all the circumstances, including: the type of harassment (e.g. whether it was verbal or physical); the frequency and severity of the conduct; the age and relationship of the parties; the setting and context in which the harassment occurred; whether other incidents have occurred; and other relevant factors.

Schools have a legal responsibility to prevent and respond to disability harassment. Once a school learns that disability harassment may have occurred, it must investigate the incident promptly and respond appropriately. The responsibility to respond to disability harassment, when it does occur, includes taking prompt and effective action to end the harassment and prevent it from recurring and, where appropriate, remedying the effects on the student who was harassed. If a school employee engages in harassment that interferes with or limits a student's ability to participate in or benefit from a school program based on disability, the school is responsible for the discriminatory conduct. The school is therefore also responsible for remedying any effects of the harassment on the victim, as well as for ending the harassment and preventing its recurrence. This is true whether or not the school has received "notice" of the harassment. A school is deemed to have notice of harassment if a responsible school employee actually knew or, in the exercise of reasonable care, should have known about the harassment. Under OCR's case processing procedures, recipients always receive actual notice of the alleged harassment and have an opportunity to take appropriate corrective action before any finding of a violation.

OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt, thorough, and effective. What constitutes a reasonable response to harassment will differ depending upon the circumstances. However, in all cases the recipient must promptly conduct an impartial inquiry designed to reliably determine what occurred. The response must be tailored to stop the harassment, eliminate the hostile environment, and remedy the effects of the harassment on the student who was harassed. The recipient must also take steps to prevent the harassment from recurring.

The Section 504 implementing regulation at 34 C.F.R. § 104.61 adopts the anti-retaliation provisions of Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d, *et seq.*, and its implementing regulation at 34 C.F.R. § 100.7(e). The Title VI anti-retaliation regulation, as incorporated by Section 504, 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 a law enforced by OCR, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under Section 504. The Title II implementing regulation at 28 C.F.R. § 35.134 similarly prohibits retaliation by public entities.

Pursuant to the Section 504 implementing regulation at 34 C.F.R. § 104.7(a) and (b), a recipient that employs 15 or more people shall designate at least one person to coordinate its efforts to comply with Section 504 and adopt grievance procedures that incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging any action prohibited by Section 504. The Title II implementing regulations at 28 C.F.R. § 35.107(a) and (b) contain similar provisions for public entities with 50 or more employees. In evaluating

whether a recipient's grievance procedures satisfy the Section 504/Title II requirements, OCR reviews all aspects of a recipient's policies and practices, including the following elements:

1. Notice to students and employees of the grievance procedures, including where complaints may be filed;
2. Application of the grievance procedures to complaints filed by students or on their behalf alleging harassment carried out by employees, other student, or third parties;
3. Provision for adequate, reliable and impartial investigation of complaints, including the opportunity for both the complainant and alleged perpetrator to present witnesses and evidence;
4. Designated and reasonably prompt time frames for the major stages of the complaint process;
5. Written notice to the complainant and alleged perpetrator of the outcome of the complaint; and
6. Assurance that the school will take steps to prevent recurrence of any disability-based harassment and remedy discriminatory effects on the complainant and others, if appropriate.

The Section 504 implementing regulation at 34 C.F.R. § 104.8(a), provides that a recipient that employs 15 or more persons shall take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees that it does not discriminate on the basis of disability in violation of Section 504. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its program or activity. The notification shall also identify the designated 504 Coordinator and their contact information. Title II has a similar notification provision. The Section 504 regulation at 34 C.F.R. § 104.8(b), provides that a notice of nondiscrimination should be included in a recipient's recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants or employees.

Background

The Complainant is a XXXXXXXX who first enrolled at the University for the Fall XXXX Semester as a pre-nursing student. She was accepted into the upper division of the School of Nursing for the Fall XXXX Semester. At the end of the Spring XXXX Semester, in May XXXX, the School of Nursing dis-enrolled the Complainant after she earned a grade of "D" in her second upper division nursing class (NURS XXXX). The Complainant is still enrolled at the University, but the last time she enrolled in any courses was during the Fall XXXX Semester, when she took an upper level course outside the nursing program. The Complainant has not applied for re-admission to the nursing program at the University.

The Complainant described her disability as "XXXXXXX" and attached an evaluation dated July 28, 2014, which provides a diagnosis of a "XXXXXXX." The Complainant alleged her "disabilities are nonetheless so profound or substantial that any trained teacher or academic

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would or should perceive her as a person of disability.” On rebuttal, the Complainant informed OCR her disability is XXXXXXXXXXXX. However, she stated she was not diagnosed with this condition until November 20, 2014, and prior to this date, no one ever “put a name to it.” She does not currently receive treatment from a medical professional for this condition.

Prior to her dis-enrollment from the School of Nursing in May XXXX, the Complainant never submitted any documentation to the University to support she had a mental or physical disability that substantially limits a major life activity. She never self-identified as an individual with a disability. She never registered with the University’s Center for Disability Services (CDS), because, according to her, she “never had an issue” nor “had people bother her about her XXXX or think it was a disability.” Moreover, the Complainant never requested academic adjustments or auxiliary aids (accommodations) from CDS or any of her nursing professors.

Perceived Disability

The Complainant contends that she has an impairment that substantially limits a major life activity. However, she acknowledged she did not notify anyone at the University that she has a disability, but she alleged her professors should have perceived her as having a disability. OCR interviewed University administrators, faculty, advisors and staff who all stated they did not view, regard or perceive the Complainant as having a disability, XXXXXXXX or other XXXXX disorder. Some described her as soft spoken, and one professor described her as having a “XXXXXX”; however, none of the interviewees thought the Complainant had a medical condition, impairment or disability related to her XXXX or XXXX.

The only explanation the Complainant provided as to why she believed faculty and staff perceived her as having a disability included, occasionally faculty members asked her to speak up when she asked a question in class, one professor suggested she visit the XXXX clinic on campus, and one professor “rolled her eyes” and gave her a “harsh look” when she asked questions.

Issue 1: Disability Harassment

Factual Findings

University’s Disability Policies and Procedures

OCR reviewed the University’s policies and procedures regarding discrimination and harassment based on disability.

Notice of Non-Discrimination

The University’s Notice of Non-Discrimination (Notice) states that “[a]ny form of discrimination or harassment related to a student’s race, color, sex, religion, national origin, age, sexual orientation, transsexualism, genetic information, military status or disability (protected status) is a violation of University policy.” The Notice designates the Human Resource Office to receive and investigate reports of harassment or discrimination; however, no title or contact information

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is provided for an individual designated to coordinate the University's efforts to comply with Section 504/Title II.

Designation of Section 504/Title II Coordinator

The University has designated two individuals to serve as its "Section 504 Compliance Officers." The 504 Compliance Officers are listed in two different places in the "Student Services" section of the University's website by name, title, office address, telephone number and email address. However, they are not listed in the University's Notice of Non-Discrimination, Anti-Harassment Policy, or Student Handbook.

Grievance Procedures

The "AUM 504 Grievance Procedure" suggests that a student first contact the person(s) considered to be the source of the problem as soon as possible after the complained of event and discuss their concerns. If the situation is not resolved, then the student should contact the Director or Associate Director of the CDS. If the student's issue is still not addressed to the student's satisfaction, the student should make an appointment with the AUM 504 Compliance Officer. The procedures state the AUM 504 Compliance Officer will inform all involved parties of his progress, findings, or resolution within 10 business days. The procedures make no reference affording each party an opportunity to present witnesses or evidence, time frames for the other major stages of the investigation, prevention of the recurrence of harassment, or remedies for individuals who have been subjected to harassment.

The University's Anti-Harassment Policy⁴ contains a section titled "Reporting and Resolution Procedures" that states students who believe they have been discriminated against on the basis of their protected class should report incidents to the Office of Human Resources. These procedures explain how the Office of Human Resources will investigate the complaint, including obtaining statements from the complainant, alleged offender and the witnesses. The procedures make no reference to affording each party an opportunity to present witnesses or evidence, time frames for major stages of the investigation, prevention of the recurrence of harassment, or remedies for individuals who have been subjected to harassment.

Alleged Harassment of Complainant and University's Response

The Complainant alleged that from the Fall XXXX Semester through the Spring XXXX Semester, some members of the nursing faculty subjected her to harassment on the basis of her disability by asking her to speak up when she asked a question in class. She further alleged, the NURS XXXX Professor sometimes gave her a "dirty look" and "rolled her eyes" when she asked a question. Also, the NURS XXXX Professor gave her a "harsh look" when she asked for study guides months prior to enrolling in her class, and another professor informed the Complainant that the NURS XXXX Professor reacted this way because she wanted students to focus on one course at a time. The Complainant further alleged she informed another professor

⁴ This policy applies to multiple bases, including sex, but does not apply to sexual violence or assault, and contains language referring readers to the separate policy to be used for reporting sexual harassment and violence.

that she was “scared” to take the NURS XXXX Professor’s class because of the harsh look she gave her, and what she had heard from other students about how the NURS XXXX Professor treated students.

The Complainant alleged the NURS XXXX Professor asked her if she ever had problems with her XXXX or XXXX, and whether she had been to the XXXX clinic on campus. She alleged she asked two other professors if they thought anything was wrong with her XXXX, and they responded she had a very soft XXXX. Also, the NURS XXXX Professor asked the Complainant if she was afraid of her because she seemed to avoid her in the hallways. A third professor asked her whether she had test anxiety. The Complainant alleged that during the Spring XXXX Semester, a classmate told her she “came off as weird.”

Reports to the University of Harassment

The Complainant did not file an internal complaint or grievance, formal or informal, alleging discrimination or harassment on the basis of disability. In addition, a series of emails dated May 9, 20XX through June 18, 20XX, documents the Complainant’s contact and communication with various University and School of Nursing administrators, faculty and staff. However, she never mentioned a disability, a request for or denial of accommodations, or discrimination or harassment on the basis of a disability or her XXXX/XXXX in any of these multiple exchanges mentioned above.

The “student grievance” the Complainant alleged she attempted to file was a grade appeal, which she did file and for which the School of Nursing provided her with due process.⁵ In support of her grade appeal, the Complainant submitted a 27-page document on June 5, 2014; a 6-page supplemental letter with attachments on June 12, 2014; and a 14-page summary of a meeting with the Interim Dean and the NURS XXXX Professor, which included a chart with three columns labeled “concern/event”, “action”, and “result/response.” The Complainant did not reference a disability or impairment, a request for or denial of accommodations, or discrimination or harassment on the basis of disability or her XXXX/XXXX in any of the aforementioned submissions to the School of Nursing.

OCR interviewed University administrators, faculty and staff, and they all stated they never personally observed the Complainant being harassed or bullied by any administrator, faculty, staff or student. In addition, none of the administrators, faculty or staff was informed by the Complainant that she had been discriminated against, harassed or bullied on the basis of a disability or her XXXX or XXXX. As stated above, according to statements they provided during interviews with OCR, none of the administrators, faculty or staff perceived or regarded the Complainant as having a disability.

⁵ On June 24, 20XX, the Grade Appeal Committee (Committee) found that after reviewing the data submitted by the parties, the Complainant did not obtain the required score to pass the course. The Associate Dean accepted the Committee’s decision; the Complainant then filed an appeal, which the Dean denied.

With regard to the alleged harassment by a student, the Complainant stated she did not report the incident where one of her classmates stated she “came off as weird” because she thought this person was her friend.

As for alleged harassment by nursing faculty and staff, the Complainant admits she did not report any of the alleged harassing acts as discrimination or harassment. During OCR interviews the nursing faculty and staff responded to the Complainant’s allegations as follows:

- The NURS XXXX Professor stated she would ask any student to speak up if she could not understand or hear them because she would not be able to answer their question otherwise. However, she did not recall a specific instance in which she asked the Complainant to speak up.
- The other NURS XXXX Professor did not recall her, or the professor who co-taught the course, asking the Complainant to speak up in class.
- The NURS XXXX Professor did not recall any issues hearing the Complainant in her classroom. There were only 20 students in the class, which was set up in a U-shape. She stated she would just lean in to hear her.
- The NURS XXXX Professor stated that due to the small class size and the way the classroom was set up, she did not have to ask any student to speak up in this environment.
- The NURS XXXX Professor stated she did ask the Complainant to speak up, but she also did the same for the other XX students in the class. She stated she has a hearing deficit in some ranges. However, she was never demeaning to the Complainant or any other student when asking them to speak up. The Complainant sat in the back of her classroom.
- The NURS XXXX Professor, who is now the XXXXX, did not deny she asked the Complainant to speak up because she does not hear well. She informs her students at the outset they will have to speak up, and she may ask them to repeat themselves. The Complainant was not the only student she asked to speak up in her class.
- The XXXX informed OCR she had students in her class who received classroom accommodations through CDS, and there are students in the School of Nursing who currently have classroom accommodations in place through CDS. CDS confirmed XX students in the School of Nursing are registered with CDS.
- The Complainant never told the NURS XXXX and NURS XXXX Professors she had difficulty speaking any louder or she was speaking as loud as possible, and she would speak up when asked to do so.
- The Complainant did not allege she complained or informed anyone that any professor who asked her to speak up was discriminating or harassing her on the basis of a perceived or actual disability.

The only incidents with a faculty or staff member that the Complainant mentioned to anyone else in the School of Nursing prior to her dis-enrollment were: (1) when she asked the NURS XXXX Professor if her XXXX sounded funny because the NURS XXXX Professor had recommended she visit the XXXX clinic on campus; (2) she told another professor three months later that the NURS XXXX Professor gave her a harsh look when she asked for study guides months before she enrolled in her class; and (3) she told the NURS XXXX Professor that she was afraid to take the NURS XXXX Professor's class due to the aforementioned harsh look and her treatment of her students.

The NURS XXXX Professor stated the Complainant came to her office door and asked her, and another professor who was in her office, "Do you think my XXXXXXXX?" The NURS XXXX Professor responded, "No. I think you have a XXXX." The other professor made a similar comment. According to the NURS XXXX Professor, the Complainant stated the NURS XXXX Professor told her she might benefit from XXXXX; then she left. The Complainant did not tell the professors she found this comment offensive or discriminatory. She did not ask that the NURS XXXX Professor be reported for offensive or discriminatory behavior, and she did not report the NURS XXXX Professor to the Dean or any administrator. The Complainant stated she asked the professors about the comment because she wanted to know "if it was accurate."

The NURS XXXX Professor informed OCR she recommended the Complainant go to the XXXX on campus because she wanted her to feel more XXXXX. She felt like the Complainant had a confidence issue. The recommendation was based on her confidence (or lack thereof), and it had nothing to do with any disability or perceived disability. She stated the Complainant appeared to lack confidence because she XXXX. The NURS XXXX Professor stated that she had this conversation with the Complainant just before she selected the Complainant as one of the students to go on the Project SERVE trip.⁶

The NURS XXXX Professor informed OCR that she usually has at least one student who requests her course materials in advance. She gives all of the students the same response, which is she will release the materials the week after completion of the course they are currently enrolled in. The Complainant alleged when she asked another professor about the NURS XXXX Professor's response to her request and that this professor told her the NURS XXXX Professor wanted students to focus on one course at a time. The Complainant did not allege that she felt harassed or discriminated against on the basis of a disability or her XXXX. The Complainant did not know of any other student who received the study guides prior to enrolling in the NURS XXXX Professor's class.

The NURS XXXXX Professor denied the Complainant's allegations. The NURS XXXX Professor informed OCR the Complainant stated she was afraid of the "course" because she had been told it was a difficult course. The Complainant never said she was afraid of the NURS XXXX Professor—only that the course's subject matter was difficult. She offered to make herself available to the Complainant to provide her with academic support when she took the

⁶ Project SERVE is a joint program between Auburn University and Auburn University Montgomery in supporting long-term care for veterans by ensuring that future nurses are prepared to care for the veterans returning home and seeking health care in non-military facilities across the country.

course. The NURS XXXX Professor had three to five scheduled meetings with the Complainant, in addition to her just stopping by the office for help with the course. The Complainant never informed her that the NURS XXXX Professor harassed her or mentioned she had a disability. Also, the Complainant stated that the only complaints she heard from other students about the NURS XXXX Professor involved the rigor of the coursework, and it was a challenging course.

University's Response to the Reports of Harassment

OCR found no corroborating evidence to support the Complainant's allegation that she reported any alleged discrimination or harassment on the basis of a disability to which the University could have responded.

Analysis and Conclusion

Disability Harassment

The evidence did not show that the Complainant complained to an administrator, faculty or staff about discriminatory treatment on the basis of her disability by faculty or students. The Complainant acknowledges that she did not report the alleged harassment by another student. With respect to alleged harassment by faculty, the evidence revealed that although the Complainant submitted to the University a large amount of documents, consisting of emails, letters, charts, summaries of meetings and other materials, nowhere in these documents did she allege discrimination, harassment, bullying, denial of an accommodation, or retaliation on the basis of her disability, XXXXX. Further, nothing in any of the aforementioned documentation indicates or even suggests that the Complainant filed a complaint or grievance, formal or informal, alleging discrimination or harassment on the basis of disability or retaliation. There is no corroborating evidence that any University official, administrator, faculty or staff thought the Complainant was being discriminated against, harassed or bullied on the basis of a disability or her XXXXX. In fact, all of them informed OCR that they did not know the Complainant had a disability, nor did they perceive her as having one.

Further, as is discussed more fully below, the evidence does not establish that there were disability-related harassing incidents for which the University had an obligation to provide a remedy even in the absence of actual notice.

Even if the Complainant's impairment meets the definition of a disability, the preponderance of the evidence does not establish that she was subjected to harassing conduct based on that disability. The evidence showed the Complainant never self-identified as a student with a disability, registered with CDS, or requested accommodations based on a disability from CDS or the School of Nursing. Also, she never submitted any documentation to the University to support that she had a disability prior to her dis-enrollment from the School of Nursing. All University witnesses stated that they were not aware that the Student had a disability and did not suspect that her manner of XXXXX was related to a disability. It is noted that one professor acknowledged referring the Complainant to the

XXXX⁷ and reported that the referral was made because the Complainant appeared to have confidence issues rather than because of an actual or perceived disability. Even if this professor's referral of the Complainant to the XXXXX provides a basis to infer that she regarded the Complainant as having a disability, the preponderance of the evidence does not establish that she harassed the Student because of a suspected disability.

The evidence does not corroborate that harassing comments about the Complainant's XXXXX were made by faculty members. Four professors did not recall having difficulty hearing the Complainant or asking her to speak up. The two professors who stated that they did ask her to speak up or repeat herself told OCR that the request was made to the Complainant and to other students because the professors had hearing deficits; there is no evidence that these requests were made in an insulting or demeaning manner. Moreover, there is no evidence that the referral to the XXXXX was made in an insulting or demeaning manner.

Finally, neither the Complainant's allegation nor the evidence demonstrates a connection between any disability – actual or perceived – and the Complainant's discussion with the NURS XXXX Professor about the upcoming course. Similarly there is no allegation or evidence of a connection between a disability and the Complainant's report that she was afraid to take the NURS XXXXX Professor's class.

Based on the above, OCR has determined that there is insufficient evidence to support that the Complainant was subjected to harassment by faculty on the basis of disability and there is no evidence that the University was on notice of possible peer harassment of the Student on the basis of disability.

CONCLUSION

Based on the preponderance of the evidence, OCR concludes the evidence is insufficient to establish that the University had notice regarding any alleged harassment or discrimination on the basis of disability, regarding the Complainant. Nor does the preponderance of the evidence establish that there were disability-related harassing incidents for which the University had responsibility and an obligation to address. However, the University is in noncompliance with respect to its notice of nondiscrimination, 504 grievance procedures and anti-harassment policy and procedures.

Whether the University's Notice of Nondiscrimination Complies with the Section 504 and Title II Regulations

Based on a preponderance of the evidence, OCR finds that the University is in noncompliance with Section 504 and Title II with respect to its Notice of Nondiscrimination (Notice). The University's Notice includes several bases of nondiscrimination, including disability. OCR recognizes the variations among the regulations governing notice requirements and understands that recipients may wish to use one statement to comply with all requirements of the various regulations. OCR encourages one combined nondiscrimination notice, which should contain two basic elements: (1) a statement of nondiscrimination that specifies the basis for nondiscrimination; and (2) identification by name or title, address, and telephone number of the

⁷ According to the University's website, the XXXXX provides diagnostic and therapeutic services to individuals who have "XXXXXX problems."

employee or employees responsible for coordinating the compliance efforts. The regulations do not require that a recipient identify the pertinent regulations by name. The University's Notice does not identify the name or title, address, and telephone number of the employee or employees responsible for coordinating its compliance efforts.

Whether the University Has Designated A Section 504/Title II Coordinator

The University has designated two individuals to serve as 504 Compliance Officers. These individuals are listed by name, title and contact information in two places under the Student Services section of the University's website. The University also designated the Human Resources Office to investigate complaints of discrimination or harassment on the basis of disability and other bases. However, the 504 Compliance Officers are not identified in the Notice of Nondiscrimination, Anti-Harassment Policy or Student Handbook. Thus, the University is not fully in compliance with the applicable regulation.

Whether the University's Harassment and Grievance Procedures Comply with Section 504 Legal Standards

While the University has a Section 504 grievance procedure, it does not incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging discrimination, including harassment, on the basis of disability. Moreover, the University's Anti-Harassment Policy and Procedures, which apply to multiple potential bases of harassment, including sex, make no reference to affording each party an opportunity to present witnesses or evidence, time frames for major stages of the investigation, prevention of the recurrence of harassment, or remedies for individuals who have been subjected to harassment. Additionally, the procedures state that the alleged victims of harassment should first confront their harasser before reporting the alleged harassment through the grievance procedures. While this "suggestion" may be appropriate in some circumstances, the procedures should be amended to make sure that the victim is aware that confronting the harasser is not required. Thus, the University is not fully in compliance with the applicable regulations.

Issue 2: Retaliation

To establish whether retaliation has occurred, OCR uses a five-step analysis which examines: (1) whether the Complainant engaged in a protected activity; (2) whether the recipient was aware of the protected activity; (3) whether the recipient took adverse action against the Complainant subsequent to or contemporaneous with participation in a protected activity; (4) whether there is a causal connection between the adverse action and the protected activity; and (5) whether the recipient can show legitimate, non-retaliatory reasons for its actions that are not a pretext for discrimination.

Factual Findings and Analysis

The Complainant alleged that the University retaliated against her "for complaining against the discrimination/hostile environment" in the School of Nursing when: a) On June 12, 20XX, a female security guard blatantly disregarded her privacy and privilege to be engaged in a

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conversation without disruption and followed her and her mother around the campus; and (b) the Complainant's grades were withheld until May 8, XXXX, which was after final grades were posted, the grades were not representative of all her tests and quizzes, and the Instructor would not show her the math used to achieve her grade.

Protected Activity and Knowledge of Protected Activity

An individual has engaged in a protected activity, and thus is protected from retaliation if: 1) the individual has opposed any act or policy that is unlawful under one of the laws that OCR enforces; or 2) the individual has made a complaint, testified, assisted, or participated in any manner in an investigation, or proceeding or hearing conducted under the laws that OCR enforces.

As set forth in the previous sections, the evidence showed that the Complainant did not, formally or informally, report to any University administrator, faculty or staff member she was being subjected to discrimination and/or harassment on the basis of her disability, despite multiple opportunities to do so during her four years in the nursing program or while she was appealing her grade after her dis-enrollment. OCR could not find any evidence to corroborate the Complainant's contention that she complained about alleged discrimination and harassment based on her actual or perceived disability. In addition, OCR could not find any evidence that University administrators, faculty and staff had knowledge of any alleged protected activity. Accordingly, OCR has determined that the evidence is insufficient to support a conclusion that the Complainant engaged in a protected activity or that the University had knowledge of any protected activity. Based on the foregoing, OCR determines that there is insufficient evidence to support findings that the University retaliated against the Student in noncompliance with Section 504 and Title II with respect to this allegation.

Proposed Resolution

To remedy these noncompliance issues, the University has agreed to implement the provisions of the attached Resolution Agreement (Agreement) which, when fully implemented will resolve the compliance concerns. OCR will monitor the implementation of the agreement until the University is in compliance with the statute(s) and regulations at issue in this case.

Pursuant to OCR procedures, the University has been reminded that no public entity may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the laws OCR enforces, or because one has made a complaint, or participated in any manner in connection with a complaint.

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 that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

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.

This concludes OCR's consideration of this complaint, which we are closing effective the date of this letter. If you have any questions regarding this letter, please contact XXXXXXXX, Compliance Team Leader, at XXXXXXXXXXXX.

Sincerely,

XXXXXXXXXXXXXXXXXXXX
Acting Regional Director

Enclosure