



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

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December 9, 2019

VIA ELECTRONIC MAIL ONLY @ sschwab@uthsc.edu

Steve J. Schwab, MD
Chancellor
University of Tennessee Health Science Center
62 South Dunlap
Suite 220
Memphis, TN 38163

**Re: University of Tennessee Health Science Center
OCR Complaint No. 04-16-2271**

Dear Dr. Schwab:

This letter serves to advise you of the resolution of the above-referenced complaint filed with the U.S. Department of Education (Department), Office for Civil Rights (OCR), regarding the above-referenced complaint filed by the Complainant on July 8, 2016, against the University of Tennessee Health Science Center (University). In the complaint, the Complainant alleged that the University discriminated against her on the basis of race (White) and age (then 50 years of age) and retaliated against her. Specifically, as clarified, the Complainant alleged the following:

1. From January 2016 through March 2016, a clinical instructor harassed the Complainant on the basis of her race and age by making disparaging remarks regarding her nursing abilities and erroneously stating that the Complainant was not answering questions correctly.
2. From January 2016 through March 2016, the clinical instructor unfairly graded her coursework and assessments because of her race.
3. From March 2016 through May 2016, the clinical instructor's supervisor refused to re-evaluate her rubrics, issued a write-up to her, and unfairly graded her fourth and final examinations in the Adult Health course resulting in her dismissal from the program, because of her race and in retaliation for her internal race discrimination complaint against the clinical instructor.

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OCR investigated this complaint pursuant to:

- Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d, and its implementing regulation, 34 C.F.R. Part 100. Title VI prohibits discrimination on the basis of race, color, or national origin by recipients of Federal financial assistance.
- The Age Discrimination Act of 1975 (Age Act), 42 U.S.C. §§ 6101 *et seq.*, and its implementing regulation at 34 CFR Part 110. The Age Act prohibits discrimination based on age in programs and activities receiving financial assistance from this Department.

The regulations that implement these statutes prohibit recipients of financial assistance from this Department or other persons from intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by those laws. The University is a recipient of Federal financial assistance and is a public entity. Accordingly, it is subject to the requirements of the foregoing statutes and their implementing regulations.

Based on the complaint allegations, OCR opened for investigation the following legal issues:

1. Whether the University discriminated against the Complainant on the basis of age and race when from January 2016 through March 2016, the clinical instructor of the Complainant's Adult Health class harassed the Complainant by making disparaging remarks regarding the Complainant's nursing abilities and erroneously stating that the Complainant was not answering questions correctly and when the University failed to promptly and equitably stop the harassment in noncompliance with the Title VI implementing regulation at 34 C.F.R. § 100.3 and the Age Act implementing regulation at 34 C.F.R. § 110.10 (a), (b)(1).¹
2. Whether the University discriminated against the Complainant on the basis of her race when a clinical instructor unfairly graded the Complainant's coursework and assessments for the Adult Health course, from January 2016 - March 2016, in non-compliance with the Title VI implementing regulation at 34 C.F.R. § 100.3(a) and (b)(1)(i)-(iv).
3. Whether the University discriminated against the Complainant on the basis of her race when the clinical instructor's supervisor (a) failed to re-evaluate the Complainant's rubrics in early March 2016; (b) unfairly issued the Complainant a write-up on or about March 18, 2016; and (c) unfairly graded the Complainant's coursework and assessments for the Adult Health course, which ultimately resulted in the Complainant's dismissal from the program in May 2016, in non-compliance with the Title VI implementing regulation at 34 C.F.R. § 100.3(a) and (b)(1)(i)-(iv).

¹ Before OCR began its investigation, and in accordance with the regulation implementing the Age Act, on September 6, 2016, OCR referred Allegation No. 1 to the Federal Mediation and Conciliation Service (FMCS). On November 17, 2016, FMCS notified OCR that its efforts to mediate the allegation were not successful. Therefore, OCR included Allegation No. 1 in its investigation.

4. Whether the University retaliated against the Complainant for filing an internal race discrimination complaint against the clinical instructor when the clinical instructor's supervisor (a) failed to re-evaluate the Complainant's rubrics in early March 2016; (b) unfairly issued the Complainant a write-up on or about March 18, 2016; and (c) unfairly graded the Complainant's fourth and final examinations in the Adult Health course resulting in the Complainant's dismissal from the program in May 2016 in non-compliance with the Title VI implementing regulation at 34 C.F.R. §107(e).

In its investigation, OCR interviewed the Complainant and reviewed documentation that the Complainant and the University submitted. Pursuant to OCR's Case Processing Manual (CPM) at Section 302, a complaint may be resolved when, before the conclusion of an investigation, "*the recipient expresses an interest in resolving the allegations and issues and OCR determines that it is appropriate to resolve them with an agreement during the course of an investigation.*" After submitting information in response to OCR's data request letter, the University agreed to take voluntary action necessary to resolve the allegations in the complaint. Accordingly, OCR has not issued findings concerning these issues. Set forth below is a summary of the evidence obtained thus far, prior to the signing of the resolution agreement and the terms of the resolution agreement.

Legal Standards

The Title VI implementing regulation at 34 C.F.R. § 100.3(a) provides that no person in the United States shall, on the ground of race, color or national origin be excluded from participation in, be denied the benefits of or be otherwise subjected to discrimination under any program to which the regulation applies.

The Title VI implementing regulation at 34 C.F.R. § 100.3(b)(1)(i)-(iv) further provides that recipients may not, on the basis of race, color or national origin: deny an individual any service, financial aid, or other benefit provided under the program; provide any service, financial aid, or other benefit to an individual that is different or is provided in a different manner from that provided to others under the program; subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program; and restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program.

The Title VI regulations, at 34 C.F.R. § 100.7(e), prohibit recipients from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Title VI.

Summary of Investigation

The University

With more than 3,000 students in Memphis, Knoxville, Chattanooga, and Nashville, the University offers four undergraduate and more than 30 graduate or professional degrees. The University's Memphis campus comprises six colleges, including its College of Nursing. The College of

Nursing is an autonomous unit of the University. A Dean (White, over 40 years of age) is the chief executive and final decision-maker for the College of Nursing.

Applicable University Policies/Procedures

During the 2015-2016 academic year, the University had a procedure, which was published in its Student Handbook, for students, who believed that they had been discriminated against on the basis of race or age. Pursuant to the Handbook, students were to file complaints of discrimination on a specified complaint form with the University's Office of Equity and Diversity.

The University also had a policy outlining the academic requirements for its nursing students. That policy was published in the 2015-2016 Academic Catalog and read, in pertinent part, as follows:

Students in the BSN program must attain a grade point average of 2.0 in a given term to progress to the subsequent term or to graduate. Any student who earns a grade of "WF" (withdraw failing), "D" (indicates marginal progress), "F" (failing), or "I" (incomplete) is reviewed by the appropriate committee.

Dismissal from the program may result from any of the following: BSN and MSN Student-A student earning a grade of "F" in any course; earning a grade of "D" in two or more courses, earning three "WFs" or any combination of two "WFs" and a "D."

The Complainant

On July 27, 2015 (prior to her official enrollment in the College of Nursing), the Complainant received the Student Handbook and signed an Acknowledgement Form agreeing that she had received and read it and would abide by the guidelines and policies set forth therein. Shortly thereafter, in August 2015, the Complainant, who is White, enrolled in the College of Nursing as a full-time student in the 17-month accelerated Bachelor of Science in Nursing (BSN) program.

At the conclusion of her first semester (fall 2015), the Complainant received a "D" in a Medication Safety course. At that time, the Program Director notified the Complainant that she would need to retake the course and if she received a "D" or "F" in any of her upcoming courses, the University would dismiss her from the program. Documentation before OCR indicates that the Complainant understood and agreed to proceed.

For the spring 2016 semester, the Complainant enrolled in four classes, one of which was Adult Health Nursing (NSG 416), a seven-credit hour course that included clinical and non-clinical portions. For the clinical portion of the course, the Complainant and other students worked at a local hospital under the supervision of a Clinical Instructor ("Clinical Instructor"), who is the subject of this complaint. The clinical portion of NSG 416 was "Pass/Fail" and did not factor into the numerical course grade. The Complainant and seven other students (three Black, four White) were placed in a clinical group referred to as "Group E." The Clinical Instructor graded the case plans of the 16 students in Group E and another clinical group and supervised the students as they

worked in the hospital. OCR's investigation to date does not include the race/age composition of the students in the class. The non-clinical classroom portion of NSG 416 was taught by three individuals, all of whom are African-American.

Students in NSG 416 were administered five examinations electronically. The exam software automatically scored the examinations with a pre-loaded answer key. After initial exam scoring, the software evaluated the validity of each question (*e.g.*, too hard, multiple 'right' answers, *etc.*). If a question was determined to be invalid, the software recalculated the results for all students, who took the exam.

The Clinical Instructor

Effective December 15, 2014, the University hired the Clinical Instructor to work in the BSN/MSN program. She is Black and over 40 years of age. As early as October 2015 (prior to teaching the Complainant), the Clinical Instructor began exhibiting performance problems and students complained about the bullying tactics of the Clinical Instructor, among other things. In response to these complaints and other performance issues, on November 11, 2015, the University placed the Clinical Instructor on a performance plan and directed her to reevaluate her students' clinical grades, identify a strategy for salvaging their grades, and create a plan to remediate the failing students.

Allegations - Race/Age Discrimination and Retaliation

The Complainant told OCR that from January 2016 through March 2016, the University subjected her to race and age discrimination when the Clinical Instructor made disparaging comments about her and unfairly graded her coursework and assessments. The Complainant also indicated that from March 2016 through May 2016, the University continued to discriminate against her because she is White and retaliated against her because she made an internal race discrimination complaint when it refused to re-evaluate her rubrics, issued a write-up to her, and graded her fourth and final examinations unfairly. The Complainant alleges that these discriminatory and retaliatory actions resulted in her unfair dismissal from the program. The University denies these allegations. OCR's investigation to date reveals the following chronology of events:

February 2016

In February 2016, several students filed complaints against the Clinical Instructor. The students complained about the Clinical Instructor's grading practices, her delay in issuing grades, and her treatment of the Complainant.² Students also reported that the Clinical Instructor was on the telephone excessively. OCR's investigation to date does not include information on the races and ages of the students, who filed complaints, against the Clinical Instructor.

² On the latter point, one student wrote, "*Our Instructor is very hard on [the Complainant] and has belittled her in front of us, her patient, and the nurses on the floor. This has happened on more than one occasion. I do not know how she is able to continue to come, knowing that she will be verbally abused when she gets there.*" "*I hate to single her out because it has happened to all of us at some point but she is constantly on [the Complainant] and telling her she will not be a good nurse. That is wrong.*"

Around this time period, the Complainant raised concerns about the Clinical Instructor, too. In a February 11, 2016 email, the Complainant informed the Program Director that she was concerned about the fairness of the Clinical Instructor's grading. The next day, on February 12, 2016, the Complainant sent the Program Director a lengthy email complaining that the Clinical Instructor was racially biased. In the letter, the Complainant did not mention perceived age discrimination. The Complainant asked that her complaint be kept confidential and she explained that she did not want to pursue a formal complaint.

In a responsive email dated February 12, 2016, the Program Director said that the Complainant's "*pretty serious*" allegations would need to go to the Associate Dean and she agreed to keep the Complainant's allegations confidential. She also told the Complainant that she had already asked another staff person to independently review the Complainant's work, a procedure which she indicated that she employed as a matter of course when a student was "*struggling or on the fence.*" The Program Director also referred the Complainant to the Office of Equity & Diversity.

In a February 16, 2016 email, the Complainant reported additional concerns to the Program Director. She wrote that the Clinical Instructor "*for a reason unknown to [her]*" had been "*gunning*" for her since the class began and that her weekly clinical paperwork since week two had been graded unfairly by the Clinical Instructor. She asked the Program Director to review and reassess the students' clinical grades. A day later, the Complainant met with the Program Director, who advised her to consult with the Assistant Professor, whom the Complainant told OCR supervised the Clinical Instructor. The Program Director also notified the Complainant that the Assistant Professor would grade the Complainant's work going forward.

In late February 2016, the University notified the Complainant that failure to improve her grade could lead to failure of the clinical component of NSG 416. Around this same timeframe, after a meeting with University personnel on February 26, 2018, the Clinical Instructor agreed that she would cease providing extensive feedback on the care plans and instead note the areas where points were deducted. She also agreed to more-timely grading of the care plans.

On February 29, 2016, yet another student filed a lengthy complaint with the Program Director against the Clinical Instructor, alleging inconsistent grading of the care plans and belittling and rudeness by the Clinical Instructor. The student did not complain of discrimination.

March 2016

By March 2016, the University had commenced an investigation of the Clinical Instructor. As part of this process, the University interviewed students, who reported, among other things, that the Clinical Instructor spent too much time "*grilling*" them on medications, was intimidating and sometimes elusive, and graded inconsistently. One hospital staff person reported that the Clinical Instructor asked the students questions, which she (a 30-year nurse) would not have been able to answer. The instructor for the non-clinical portion of NSG 416 notified the University that students, including the Complainant, had reported needing to get on medications in order to return to clinical and dreading clinical because the Clinical Instructor was mean and had told her it was the worst experience they ever had.

During this time period, the University removed the Clinical Instructor's teaching and grading responsibilities. The Complainant told OCR that in the beginning of March 2016, the University removed the Clinical Instructor from the hospital setting but she continued to grade the work of the students except for the Complainant. On March 10, 2016, the University notified the Clinical Instructor that it would not renew her appointment. A few days later, on March 14, 2016, the University placed the Clinical Instructor on administrative leave with pay through June 30, 2016.

Around March 18, 2016, the Assistant Professor issued a write up to the Complainant for (i) being 15 minutes late; (ii) having communication issues; (iii) not having her charting complete; and (iv) being unprepared. Some weeks later, by email dated March 28, 2016, the Program Director informed the Complainant that she was concerned about her grades in NSG 416 and her ability to be successful in the program. On March 29, 2016, the Complainant met with the Program Director for academic counseling. At this time, the Complainant had an average of 62 and in order to pass NSG 416, needed a score of 86 or higher on both the fourth and final exams. Given these circumstances, the Program Director counseled the Complainant to take a "WF" (Withdraw Failing) in NSG 416 and to re-take the course next year. The Program Director also informed the Complainant that if she chose to continue and failed the class, the University would dismiss her from the program, as she had already received a "D" in the Medication Safety class. Despite the Program Director's advice, the Complainant declined to withdraw from the course.

April/May 2016

In April 2016, the Complainant took the third exam, but she failed to answer 10 questions (about 20 points) because she reportedly ran out of time. In May 2016, the Complainant scored 72 on the fourth exam.

At some point, the University reviewed the NSG 416 exams, nullified some questions, and recalculated the scores. After the review, the Complainant received the following scores on the four exams in NSG 416:

- Exam 1 56
- Exam 2 76
- Exam 3 54
- Exam 4 72

On May 19, 2016, the Complainant took the 85-question final exam and received a score of 66. Scoring adjustments were also made to the final exam scores. The Complainant's final average in NSG 416 was 64.8. Consequently, the University awarded the Complainant an "F" in NSG 416,³ and on May 20, 2016, the University dismissed the Complainant from the College for failing to meet the progression standards.

On May 23, 2016, the Complainant appealed her dismissal, alleging discrimination or unfair bias. In her appeal letter, the Complainant noted that she had not filed a formal complaint of

³ The Complainant passed the clinical portion of the course.

discrimination. Nevertheless, she wrote that the Clinical Instructor's personal bias, combined with the department's refusal to correct unfairness, led to emotional distress and increased test anxiety which resulted in her inability to finish the first, third, and final exams. On May 26, 2016, the Progressions Committee recommended that the Dean uphold the Complainant's dismissal from the program.

June 2016

By letter dated June 2, 2016, the Dean notified the Complainant that she was upholding her dismissal from the College of Nursing and her grade of "F" in NSG 416. Thereafter, the Complainant filed an appeal with the Chancellor's office. Documentation reveals that the Vice Chancellor gathered information about what had occurred and ultimately declined to overturn the dismissal decision. In this regard, on June 17, 2016, the Chancellor sent a letter to the Complainant notifying her that he was affirming the decision of the Dean.

Other Students

The Complainant told OCR that seven students, all White, failed NSG 416. Documentation before OCR reveals that the University dismissed a total of nine students (eight White, one Black), including the Complainant, from the BSN program for failing to meet the progression standards.

Resolution Agreement

As indicated above, prior to the completion of OCR's investigation, the University agreed to voluntarily resolve this complaint, and OCR determined that resolution pursuant to OCR's CPM section 302 was appropriate. On November 8, 2019, OCR received the enclosed signed Agreement that, when fully implemented, will resolve the allegations in the complaint. Pursuant to the terms of the Agreement, the University will revise the Complainant's official transcript to remove the words "Academic Dismissal" and make no notation regarding academic standing and will initiate mandatory training of faculty and staff in its College of Nursing on the prohibition against discrimination, including harassment, and retaliation as detailed in Title VI and the Age Act and their implementing regulations. OCR will monitor the University's implementation of this Agreement to ensure that it is fully implemented. If the University fails to fully implement the Agreement, OCR will reopen the case and take appropriate action to ensure compliance with Title VI and the Age Act.

Conclusion

The Complainant may file a private suit in federal court whether or not OCR finds a violation. Please be advised that the University may not harass, coerce, 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. If OCR receives such a request, we will seek to protect,

to the extent provided by law, personally identifiable information that, if released, could constitute an unwarranted invasion of privacy

If you have any questions, please contact XXX, General Attorney, at XXX (404) 974-XXX or by email at XXX@ed.gov.

Sincerely,

XXX

Supervisory General Attorney

Enclosure - Agreement

cc: XXX, Esq., Associate General Counsel [w/ enclosure]