



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

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REGION IV

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January 18, 2023

Via email only: president@usf.edu

Rhea F. Law, Esq.
President
University of South Florida
4202 E. Fowler Avenue
Tampa, Florida 33620

Re: Complaint # 04-22-2150

Dear Ms. Law:

This letter is to advise you of the outcome of the U.S. Department of Education, Office for Civil Rights (OCR) investigation of the complaint filed against the University of South Florida (University). The Complainant alleged that the University discriminated against him on the bases of race, color, and national origin and retaliated against him.

OCR enforces 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, which prohibit discrimination on the basis of race, color, or national origin by recipients of Federal financial assistance from the Department of Education. Title VI also prohibits retaliation. As a recipient of Federal financial assistance from the Department of Education, the University is subject to the requirements of Title VI and to OCR's jurisdiction.

OCR opened an investigation of the following issues:

- 1) Whether the University discriminated against the Complainant based on race, color, and national origin, in violation of Title VI and its implementing regulation at 34 C.F.R. § 100.3(a); and
- 2) Whether the University retaliated against the Complainant, in violation of Title VI and its implementing regulation at 34 C.F.R. § 100.7(e).

During the investigation, OCR reviewed documents from the Complainant and the University, including clinical incident reports from a clinical instructor; a complaint the Complainant filed with the University's Office of Compliance and Ethics and documents from the University's resulting investigation; and emails to and from the Complainant and University staff members.

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OCR also interviewed the Complainant and a Diversity Consultant/Title IX Investigator in the University's Office of Diversity, Equity, and Inclusion (Diversity and Inclusion Office).¹

Prior to OCR completing its investigation, the University expressed an interest in resolving the complaint pursuant to Section 302 of OCR's *Case Processing Manual*. Section 302 states that allegations under investigation may be resolved at any time when, prior to the completion of the investigation, the recipient expresses an interest in resolving the allegations and OCR determines that it is appropriate to resolve them because OCR's investigation has identified concerns that can be addressed through a resolution agreement. Following are the relevant legal standards and OCR's summary of the investigation.

Legal Standards

The regulation implementing Title VI, at 34 C.F.R. § 100.3(a), provides that no person 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 Title VI applies.² The regulation implementing Title VI at 34 C.F.R. § 100.3(b)(1)(i)-(iv) states that a recipient under any program to which Title VI applies may not, directly or through contractual or other arrangements, on the ground of race, 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 which 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/her receipt of any service, financial aid, or other benefit under the program; or 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 existence of a hostile environment that is created, encouraged, accepted, tolerated or left uncorrected by a recipient constitutes discrimination on the basis of race in violation of Title VI. A school may be found to have violated Title VI if it has failed to correct a hostile environment based on harassment of which it has actual or constructive notice. Once a recipient has notice of a hostile environment, the recipient has a legal duty to take reasonable steps to eliminate it. OCR evaluates the appropriateness of the responsive action by assessing whether it was reasonable, timely, and effective. The appropriate response to a hostile environment based on race must be tailored to redress fully the specific problems experienced as a result of the harassment.

The regulation implementing Title VI, at 34 C.F.R. § 100.7(e), 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 Title VI, or because he has made a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under Title VI and its regulations. To find that retaliation occurred, OCR must establish that an individual engaged in a protected activity, that the individual experienced an adverse action caused

¹According to the office's website, it is the Office of Diversity, Equity and Inclusion. Some documents in evidence include variations on the name of this office and in discussing those documents this letter uses the language in the documents.

² For ease of reference, OCR will use the term "race" as a shorthand reference to "race, color, or national origin."

by the recipient, and that a causal connection between the protected activity and the adverse action exists.

Findings of Fact

In 2017, the Complainant, who is XXXXX, enrolled in the University's Doctorate in Physical Therapy Program (Program). For the 2021-2022 academic year, the Program had 47 students and the Complainant was one of XXXXX students in the Program. The Program requires nearly three years of coursework and completion of three clinical internships. On XXXXX, the Complainant enrolled in his final clinical internship (Final Clinic). The Complainant has completed all Program requirements other than this Final Clinic.

The Complainant's Final Clinic was held off-site at the Lakeland Regional Health Medical Center in Lakeland, Florida (Medical Center). According to a report submitted to OCR by the University, the University's School of Physical Therapy and Rehabilitation Sciences (School) has an agreement with the Medical Center that allows students enrolled in the Program to complete their clinical internships with the Medical Center's employees and staff. The instructor for the Final Clinic (Clinical Instructor) was a registered physical therapist at the XXXXX located within the Medical Center. The Clinical Instructor was not employed by the University and, according to the University, does not have an individual employment contract or agreement with the University. The Director of Clinical Education for the University's School (Clinical Director) served as the faculty instructor for the Complainant's Final Clinic.

The Complainant stated that from the date the Final Clinic began, the Clinical Instructor was extremely critical and created an extremely stressful, uncomfortable working and learning atmosphere for him. On June 28, 2021, the Complainant reported to the Clinical Director that the Clinical Instructor had unrealistic expectations. On July 1, 2021, the Complainant emailed the Clinical Director that he had concerns about the Clinical Instructor's midterm evaluation in which the Clinical Instructor scored him below the intermediate level on three out of 18 tasks.

On July 2, 2021, while the Complainant was using a computer, the Complainant alleged that the Clinical Instructor slapped his hand away from the computer mouse with force while he was entering information and rudely yelled at him, telling him to go check on a patient. The evidence obtained shows that the Clinical Instructor does not deny there was an incident involving physical contact; documentation reflects that on one occasion she described her action as "slightly moving" the Complainant out of the way, and on another, she described it as touching his hand while it was on the mouse.³

On July 12, 2021, at 12:01 a.m., the Complainant submitted to the Clinical Director a document titled "reflection." According to the student handbook and the syllabus for the Final Clinic, students submitted reflection papers as a part of the course requirements. In this document, the Complainant said that working with the Clinical Instructor had put him in a state of high stress and her actions made him tense and uncomfortable throughout the time that he was working with her. In addition to mentioning the physical contact regarding the computer, the Complainant's

³ The Complainant reported the hand slapping incident to the local police department. Police interviewed the Clinical Instructor and prepared a police report; no charges were filed. The Clinical Instructor's statements were captured in that police report, as well as in an interview summary created by the retired EO investigator referenced below.

document gave examples such as the Clinical Instructor getting impatient when he tried to think before answering her questions and becoming agitated when he did not immediately do what she asked him to do.

In an email sent to the Complainant at 8:34 p.m. on July 12, 2021, among other things, the Clinical Director encouraged the Complainant to reflect on why the Clinical Instructor was getting frustrated. Her email also said the Complainant should stay focused for “the second half of this experience.” At 9:21 p.m. on July 12, 2021, the Clinical Instructor filed three critical incident reports about the Complainant’s performance. One report criticized the Complainant’s communications; among the listed concerns about communications was an observation that the Complainant displayed nervous behaviors including shaking, breathing heavily, and freezing. The second incident report criticized the Complainant’s clinical reasoning and the third criticized him in the area of professional behavior.⁴

On July 13, 2021, the Complainant sent an email to the Clinical Director again reporting that the Clinical Instructor had slapped his hand away and that she wanted immediate answers to her questions and refused to respond to his questions or responded with condescending comments. On July 16, 2021, the Complainant also emailed the Director of the School of Physical Therapy and Rehabilitation Sciences (School Director) to report the hand-slapping incident. The School Director responded that he took the Complainant’s concerns seriously and would respond to them. On July 16, 2021, a University staff member emailed the Complainant to notify him that the School Director had referred the Complainant to the Academic Performance Review Subcommittee (APRSC), which would meet on July 22, 2021.⁵ At some point, the University removed the Complainant from the Final Clinic and assigned him a grade of unsatisfactory for the course; the evidence obtained thus far does not clarify the Complainant’s status regarding the Final Clinic at the time that he received the notice about the APRSC meeting.

On July 18, 2021, the Complainant reported to a licensed psychologist (Psychologist) employed by the University that the Clinical Instructor discriminated against him. He repeated that the Clinical Instructor had slapped his hand and had asked him, “Why are you breathing heavily? Do all XXXXX breathe heavily like you?” even though she was aware that he recently had a sinus procedure done. He also alleged that the Clinical Instructor forced him to answer questions within five seconds and refused to answer his questions. The next day, the Complainant authorized the Psychologist to relay his concerns to the Vice Dean for Educational Affairs.

Also, on July 18, 2021, the Complainant filed a complaint through the University’s EthicsPoint incident management system, which is an Office of Compliance & Ethics (Compliance & Ethics) hotline that invites individuals to report misconduct, fraud, abuse, and other violations of University policies. The complaint reflected that the issue involved discrimination or harassment

⁴ Confusingly, updates were made to the critical incident reports to reflect a meeting with the Complainant that had not yet occurred. At 9:36 p.m., 9:38 p.m. and 9:39 p.m. on July 12, 2021, it appears someone updated the reports to state that on July 13, 2021, the Complainant met with the Clinical Director and the Assistant Director of the School to discuss the reports, and after the meeting he was told he should not return to the clinical site at that time and the Academic Performance Review Subcommittee would review the critical incidents.

⁵ The APRSC in the University’s School reviews each physical therapy student’s performance (academic, clinical, and professional) and makes recommendations to the Associate Dean/Director and the Vice Dean for Educational Affairs regarding physical therapy student promotion, probation, remediation, graduation, dismissal, and readmission.

and named the Clinical Instructor as a person involved in the behavior.⁶ The Complainant reported that he had experienced verbal abuse and a physical attack. The specific incidents detailed in the complaint included the hand-slapping incident by the computer as well as the comment about XXXXX and breathing.

According to the Complainant, the APRSC met on XXXXX, 2021 but did not reach a conclusion. In a XXXXX, 2021 email to the Complainant, the Vice Dean for Educational Affairs said it was his understanding that there was a need to gather more information prior to any APRSC action. The email also notified the Complainant that since his prior email referenced discriminatory treatment, he could file a complaint with the Diversity and Inclusion Office and included a link to that office's webpage.

The University's Diversity and Equal Opportunity Discrimination and Harassment Policy 0-007, last updated in November 2021 (Policy), states that students enrolled in the University may file complaints of race and national origin discrimination as well as retaliation with Compliance & Ethics. The Policy sets out a list of prohibited actions in Section IIIA; subpart 3 of that section reads: Discrimination and/or harassment by any vendor or individual external to USF against any USF employee(s), student(s) or program invitee(s) during the transaction of business with USF, during any program or activity coordinated through USF, and/or while on USF premises.

On XXXXX, 2021, the Complainant filed an Equal Opportunity (EO) complaint with Compliance & Ethics alleging discrimination on the bases of race and national origin and retaliation. The Complainant alleged that the Clinical Instructor physically attacked and verbally abused him; made a remark to him about breathing heavily and asked if all XXXXX breathe that way; allowed a physical therapy assistant to supervise him, which was not permitted; and falsely accused him of misconduct. The complaint also alleged that the Clinical Director, as well as the School Director and the Assistant Director of the School (Assistant Director), discriminated against him on the bases of race and national origin by disregarding his complaints against the Clinical Instructor. He alleged further that the School Director and Assistant Director chastised him for having had his concerns relayed to the Vice Dean for Educational Affairs.

On XXXXX, 2021, the Assistant Director notified the Complainant by email that the next APRSC meeting would take place on XXXXX, 2021. The Complainant responded that he had reached out to the Diversity and Inclusion Office.

On XXXXX, 2021, the School Director told the Complainant he would receive a failing grade for the Final Clinic. The School Director also emailed the Complainant on XXXXX, 2021, stating that although the APRSC was not scheduled to meet until XXXXX, 2021, they were trying to schedule an emergency meeting to review the final grade assignment for the Complainant in the Final Clinic and determine whether there was a path forward for the Complainant. The email also said that investigation of the Complainant's complaints against the Clinical Instructor would be independent of the academic review, the academic review would focus only on deficiencies that the Program had identified, and the APRSC would receive the Complainant's correspondence regarding his concerns and explanations for his deficiencies. The Complainant responded on XXXXX, 2021, saying he had reached out to the Diversity and Inclusion Office and requesting an

⁶ The complaint also alleged illegal action in that the Clinical Instructor allowed a physical therapy assistant to supervise the Complainant when the law required direct supervision by a licensed physical therapist.

incomplete grade pending the investigation of his complaint. In an email sent on that same date, the School Director reiterated that the APRSC review would focus only on identified deficiencies in the Complainant's performance and the investigation of his complaints about the Clinical Instructor would be independent of the academic review process. The School Director's email also said that the Complainant would receive a failing grade as assigned and a staff member was in the process of scheduling the APRSC meeting.

In XXXXX 2021, an EO investigator was assigned to investigate the complaint filed with Compliance & Ethics. On XXXXX, 2021, the Complainant met with the APRSC regarding a review of his unsatisfactory grade in the Final Clinic. On XXXXX, 2021, the APRSC upheld the Complainant's failing grade; the APRSC decision stated that the Complainant would be required to participate in remediation, which would involve participating in skills activities with faculty members to improve clinical reasoning, communication, and professional behavior skills. The Complainant appealed the decision regarding remediation twice, and the decision was upheld on XXXXX and XXXXX, 2021.

The EO investigator assigned to the Complainant's complaint retired in XXXXX, 2022. On or around XXXXX, 2022, another investigator (Investigator), who had previously served as a University Title IX investigator, was asked to complete the investigation and draft the final investigative report. On XXXXX, 2022, the University issued the Final Investigative Report regarding the Complainant's XXXXX, 2021 complaint (Report). The Report indicates that, as part of the investigation, the retired investigator interviewed the Complainant and Clinical Instructor, and the Investigator interviewed the other respondents, to wit: the Clinical Director, the School Director, and the Assistant Director. The Report also indicates that the investigators reviewed documents as part of the investigation. However, the Report does not include witness interviews of students or other individuals who might have witnessed the Clinical Instructor's interactions or evidence regarding how the Complainant's performance or treatment from the Clinical Instructor compared to that of other students. Further, although the Policy provides that it applies to discrimination and harassment by external persons during a program coordinated with the University, the Report states that the University had no jurisdiction over the Clinical Instructor or allegations made against her because she was not a University employee. Also, the Report does not directly address whether the Clinical Instructor discriminated against the Complainant. The Report found insufficient evidence regarding the University employees who were also respondents, concluding there was no evidence they took any action because of the Complainant's race. The Report also found the University respondents investigated the alleged comment about XXXXX and there was no evidence that their response was influenced by race; the Report did not assess whether their investigative actions were sufficient to assess the Complainant's allegations of discrimination against the Clinical Instructor.

The Investigator stated to OCR that he sent the Report to the Acting EO Director for review and believes that it was then forwarded to General Counsel for review before issuance. The Investigator also stated to OCR that he had never investigated a race or national origin discrimination complaint before completing the Report. Finally, the Investigator informed OCR that the Report contained statements made in error, including a statement that the Complainant was dismissed from the Program.

The Complainant filed an appeal of the University's determination, which was concluded on XXXXX, 2022. The Complainant's appeal was denied and the finding of "no cause" regarding his allegations of discrimination was upheld.

Analysis

OCR has a concern that Program administrators received constructive notice of intimidating conduct that may have created a hostile environment and did not respond in a manner designed to determine whether the Complainant was harassed based on race. The Complainant reported concerns to the Clinical Director about the Clinical Instructor, and then reported to the Clinical Director and School Director that the Clinical Instructor had slapped his hand. Evidence shows that the Clinical Director's initial response to the report of the physical incident was to tell the Complainant to reflect on why the Clinical Instructor might be frustrated and focus on completing the second half of his experience, and the Clinical Director did not modify that approach even though, less than two hours later, the Clinical Instructor submitted three critical incident reports about the Complainant.

OCR also has a concern about the adequacy of the University's investigation after receiving actual notice of alleged discrimination when the Complainant reported to Compliance & Ethics and others that the Clinical Instructor had discriminated against him based on race. Rather than investigate whether the Clinical Instructor had engaged in discriminatory actions, the University appears to have relied, erroneously, upon a lack of jurisdiction over the Clinical Instructor. Specifically, the Report – that allegedly has errors – stated that the University had no jurisdiction over the Clinical Instructor or allegations made against her because she was not a University employee, despite the fact that the University had placed the Complainant in the Final Clinic with the Clinical Instructor as part of the Program.

OCR also is concerned about the adequacy of the University's response because the University did not issue the Report until XXXXX 2022, over seven months after the Complainant filed his complaint with Compliance & Ethics; nor did the University interview students or staff at the Final Clinic who may have witnessed the Clinical Instructor's conduct toward the Complainant. Notably, the University approved the Report and upheld the finding of no discrimination on appeal despite the statement about no jurisdiction over the Clinical Instructor and the Investigator's admission to OCR of other errors.

Finally, OCR has a concern that, in the absence of an appropriate investigation about possible discrimination, the University did not consider whether the Complainant's ability to participate successfully in his third and final clinical may have been impacted by a hostile environment based on race. As the School Director specified in his emails to the Complainant on XXXXX, 2021, the APRSC review focused "only on the issues the program identified as deficiencies" in the Complainant's performance and while the APRSC reportedly received the Complainant's correspondence about his concerns regarding the Clinical Instructor, it completed its review before the University fully investigated those concerns through an independent process.

As noted above, the University expressed an interest in resolving the complaint with a resolution agreement pursuant to Section 302 of the *Case Processing Manual*. Based on the investigation to date, OCR notes concerns that warrant entering into a resolution agreement. The attached

Resolution Agreement (Agreement) will, when fully implemented, resolve the issues identified above. The Agreement requires the University to take various steps with respect to the Complainant, and it also requires the University to provide training to staff members in Compliance & Ethics and the Program. OCR will monitor the University's implementation of the Agreement until the University is in compliance with the terms of the Agreement and the statute and regulations at issue in this case.

Conclusion

This concludes OCR's investigation of the complaint. 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 a right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the University must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an 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.

If you have any questions regarding this matter, please contact Laura Mitchell at (202) 987-1885, or me, at (404) 974-9356.

Sincerely,



Wendy Gatlin
Compliance Team Leader

Enclosure