



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGION IX
CALIFORNIA

50 UNITED NATIONS PLAZA
MAIL BOX 1200, ROOM 1545
SAN FRANCISCO, CA 94102

August 8, 2023

Newman Hoffman
newman.hoffman@touro.edu
Interim Chief Executive Officer and Vice President
Touro University
1310 Club Drive
Mare Island
Vallejo, CA 94592

By email only to: newman.hoffman@touro.edu

Re: Touro University
OCR Case No. 09-22-2081

Dear Interim CEO and Vice President Hoffman:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), completed its investigation of the above-referenced complaint against the University. The Complainant alleged the University discriminated against him on the basis of disability.¹ Specifically, OCR investigated whether the University subjected the Complainant to different treatment on the basis of disability and retaliation when he was dismissed from the [redacted content] Program in [redacted content] of 2021, and the University failed to respond adequately to his discrimination complaint.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104 which prohibits discrimination on the basis of disability under any program or activity receiving Federal financial assistance. The University receives funds from the Department and is therefore subject to Section 504 and its implementing regulation.

To investigate this complaint, OCR conducted interviews and reviewed information provided by the Complainant and the University. Specifically, OCR interviewed and reviewed documents provided by the Complainant, interviewed the University Associate Dean of Academic Affairs and the University factfinder (Factfinder) for the Complainant's discrimination complaint and reviewed the University's April 5, April 7, April 12, April 29, 2022, January 20, 2023, and March 16, 2023, data responses. After

¹ OCR previously provided the Recipient with the identity of the Complainant. We are withholding their name from this letter to protect their privacy.

careful review of the information gathered in the investigation, OCR concluded the University violated Section 504 and its implementing regulation with regard to the issue OCR investigated. The legal standards, facts gathered, and the reasons for OCR's determinations are summarized below.

Legal Standards:

Under the Section 504 regulations, at 34 C.F.R. § 104.4(a) and (b), 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 program or activity which receives Federal financial assistance. To determine whether an individual has been discriminated against on the basis of disability under Section 504, OCR assesses whether there is evidence that the individual was treated differently than individuals without disabilities under similar circumstances, and whether the treatment has resulted in the denial or limitation of services, benefits, or opportunities. If there is such evidence, OCR examines whether the University provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination. For OCR to find a violation, the preponderance of the evidence must establish that the University's actions were based on the individual's disability.

OCR evaluates the appropriateness of a University's response to notice of disability discrimination by examining reasonableness, timeliness, and effectiveness. What constitutes a reasonable response will differ depending upon the circumstances. However, in all cases the University must conduct an impartial inquiry designed to reliably determine what occurred. The response must be tailored to stop the discrimination, remedy the effects of the discrimination, and take steps to prevent the discrimination from recurring.

The regulation implementing Section 504, at 34 C.F.R. § 104.61, incorporates by reference 34 C.F.R. § 100.7(e) of the regulation implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., which 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 regulations enforced by OCR or because one has made a complaint, testified, assisted or participated in any manner in an investigation, proceeding, or hearing held in connection with a complaint. The Title II regulations, at 28 C.F.R. § 35.134, similarly prohibit intimidation, coercion, or retaliation against individuals engaging in activities protected by Title II. The following three elements must be satisfied to establish a prima facie case of retaliation: (1) an individual engaged in a protected activity; (2) an individual experienced an adverse action caused by the recipient; and (3) there is some evidence of a causal connection between the adverse action and the protected activity. When a prima facie case of retaliation has been established, OCR then determines whether there is a facially legitimate, non-retaliatory reason for the adverse action; and if so, whether the facially legitimate, non-retaliatory reason is a pretext for retaliation.

Factual Findings:

Background:

The Complainant attended the University's Doctor of [redacted content] Program ([redacted content] Program) from [redacted content] 2015 until [redacted content] 2021. In [redacted content] 2021, the University dismissed the Complainant from the [redacted content] Program for exceeding the six-year time limit for completion of the [redacted content] Program and earning a failing grade in a repeated clinical clerkship.

The Complainant's Enrollment in the [redacted content] Program:

The Complainant enrolled in the [redacted content] Program in [redacted content] 2015. In [redacted content] 2018, the Complainant requested and received disability accommodations through the University for a diagnosis of [redacted content]. According to his accommodation plan, the Complainant received time and a half for exams in a room without distractions. After signing this initial accommodation plan, the Complainant did not request additional accommodations for the remainder of his enrollment in the [redacted content] Program with respect to his academic courses.

On [redacted content], 2020, the Complainant notified the University that he had severe health issues, and on or about [redacted content], 2020, the Complainant requested a medical leave of absence. The Complainant reported to OCR that he requested this leave on the basis that he was experiencing [redacted content]. The University granted the Complainant's medical leave for five clinical rotations in [redacted content] 2020 and [redacted content] 2021. After approximately four months, the Complainant returned early on [redacted content], 2021, to complete remediation for his [redacted content] rotation and the Complainant received a passing grade.

On [redacted content], 2021, the Complainant began the [redacted content] rotation, his final requirement for the [redacted content] Program. On [redacted content], 2021, the Complainant received a "no pass" on his final [redacted content] evaluation and thereby failed the rotation. When this occurred, the University offered the Complainant an opportunity to complete a resolution plan whereby the Complainant worked one-on-one with a professor to review [redacted content] rotation material. The Complainant passed this resolution plan and the University enrolled the Student in a second [redacted content] rotation.

On [redacted content], 2021, the Complainant began his second [redacted content] rotation at a new rotation hospital (Rotation Hospital). According to the University, the Rotation Hospital contacted the University within the first two weeks to express concern about the Complainant's performance and on [redacted content], 2021, the Complainant received a "no pass" on his midpoint evaluation. This midpoint evaluation ranked the Complainant's performance as "performs minimally" or "unacceptable" in all areas except for his attendance and professional appearance. The midpoint evaluation further stated, amongst other things, that the Complainant struggled to complete tasks, demonstrate clinical knowledge and understanding, and recall information.

The Complainant's Report of Discrimination and the University's Response:

On [redacted content], 2021, the Complainant sent an e-mail to the Assistant Dean, stating that preceptors at the Rotation Hospital created a hostile environment for him. For example, he stated that when he disagreed with their assessment, they would “get agitated and start insulting me.” The Complainant also alleged that Rotation Hospital preceptors told him that he “might have a mental problem” because he demonstrated difficulty remembering information. The Complainant told OCR that he felt the preceptors treated him negatively based on his disability and that was the basis of his complaint. The University notified the Complainant that it would conduct an investigation into whether the Rotation Hospital subjected the Complainant to a hostile work environment. This notification did not specify whether it would consider the Complainant's e-mail as a complaint of discrimination on the basis of disability.

The University's Policies and Procedures for complaints of disability discrimination state that when the University receives a report of discrimination, the University Compliance Officer (Compliance Officer) or designee meets with the complainant to review the investigation procedure and timeframe. The University then conducts a thorough and impartial investigation including document review and interviews of witnesses with relevant knowledge. When a complaint concerns University faculty or other employees, an impartial factfinder, rather than the University investigator makes the final compliance determination and issues a written decision. This written decision includes the outcome of the investigation, the reasons for the compliance decision, and any corrective actions.

With respect to the Complainant's report of disability discrimination, the Compliance Officer conducted an investigation that included interviews with the Rotation Hospital Director of [redacted content], Clinical Coordinator, and [redacted content] Manager, all of whom worked for the Rotation Hospital. The Compliance Officer requested to interview the Complainant, however, the Complainant did not respond. Therefore, the University closed the investigation after notifying the Complainant that it would complete the investigation if it did not receive a response. According to documentation of the investigation interviews, the Compliance Officer's questioning focused solely on the Complainant's performance and did not address whether the Rotation Hospital preceptors made comments to the Complainant about whether his performance was related to a disability ([redacted content]), or if the preceptors were aware of his disability and the accommodations he received at the University. During these interviews, the [redacted content] Director, Clinical Coordinator, and [redacted content] Manager each told the Compliance Officer they had concerns about the Complainant's performance during the rotation.

Also according to the University's investigation, the Complainant's [redacted content] Rotation concluded after a conversation between the Complainant and the [redacted content] Director regarding the Complainant's report of discrimination. The [redacted content] Director reported that he met with the Complainant on [redacted content], 2021, to discuss the Complainant's discrimination complaint. During this conversation, the

Complainant stated he had been accused by Rotation Hospital preceptors of being forgetful; the [redacted content] Director asked whether there were Rotation Hospital preceptors with whom he would feel comfortable working and the Complainant responded affirmatively. At the close of the conversation, the [redacted content] Director told the Complainant that his placement at the Rotation Hospital “was not working out,” “he should go home for the day,” and the University would “be reaching out to him.” According to the [redacted content] Director, the Complainant then turned in his Rotation Hospital badge “voluntarily.”²

The [redacted content] Director’s report that the Complainant turned in his badge voluntarily is at odds with the Complainant’s statement to OCR that he involuntarily turned in his badge after meeting with the [redacted content] Director. The Complainant told OCR that he turned in his badge because the [redacted content] Director directly informed him that his rotation had ended and he would not be returning to the Rotation Hospital. The Complainant further stated that he turned in his badge even though he wanted to continue his rotation because he felt he had no choice but to follow the directions of the [redacted content] Director when he told him the rotation was over. On his way home from the Rotation Hospital, the Complainant spoke with the University Associate Dean of Clinical and Professional Affairs. In an internal University email sent that day, the Associate Dean of Clinical and Professional Affairs documented that the Complainant had spoken with the [redacted content] Director about his discrimination complaint and at the close of the conversation, the [redacted content] Director asked the Student to leave because there were no preceptors aside from those accused of discrimination to supervise the Complainant. The Complainant agreed to leave, stated that he would not return, and turned in his badge.

On [redacted content], 2021, the University issued a letter of findings signed by the case factfinder (Factfinder) stating the facts of the investigation did not conclusively demonstrate a violation of University policies with regards to the Complainant’s allegation of a hostile work environment. The Factfinder told OCR that he did not understand the complaint to concern disability discrimination and he did not make a determination regarding whether Rotation Hospital preceptors had told the Complainant that he had a mental problem or whether this constituted a hostile environment on the basis of disability. The letter of findings did not document the reasons for the Factfinder’s determination that there was insufficient evidence of a violation of University policies or the facts relied upon. When asked by OCR to explain the reasoning for his determination, the Factfinder stated that he could not recall it. The Factfinder further told OCR that disability discrimination complaints were investigated according to a general grievance policy and when asked to describe this policy, the Factfinder responded that he did not know if he was the right person to ask about disability discrimination.

² OCR requested to interview the [redacted content] Director to learn more about this conversation, however, the [redacted content] Director was not available for an interview. OCR also requested to interview the University Experiential Director to learn about the process for dismissing a student from a clinical rotation and the University Experiential Director also was not available for an interview.

After OCR's interview with the Factfinder, the University sent an email to OCR stating that the Complainant's allegation that he had been told he might have a mental problem was not related to the Complainant's disability or perceived disability. The University stated that this allegation instead referred to the Complainant's "preceptors taking issue with his cognitive ability and recall, telegraphing to him that he might not be able to meet the academic rigors of the program." The University subsequently told OCR that it believed the Complainant used the discrimination complaint "as a sword" and that when the [redacted content] rotation did not go his way, the Complainant asserted that the issues were not based on his academic insufficiency, but the result of discrimination.

Dismissal from Final Rotation and the University:

On [redacted content], 2021, the University sent the Complainant an email stating that the University removed the Complainant from the [redacted content] rotation because the investigation into his discrimination complaint found there was no violation of University policies and this resulted in the Complainant's failure of the rotation. The Rotation Hospital issued an [redacted content] final evaluation for [redacted content], 2021, to [redacted content], 2021, with ratings and comments identical to the Complainant's midpoint evaluation, including a statement that the Complainant "is failing at the midpoint evaluation. [The Rotation Hospital] would like to see much more effort, willingness, and good work from [the Complainant] in the next three weeks in order to pass the rotation." The University Experiential Rotation Manual states that scores from a midpoint evaluation will not contribute to a final score for a rotation. The University further told OCR that if a student fails the midpoint evaluation, even if they have previously failed the rotation, their failing midpoint evaluation does not result in a failure of the rotation. Instead, the University works with the student to create a success plan to support their ability to pass the rotation and if their performance improves, a student is able to pass the rotation. The University told OCR that there had been a conversation about how to support the Complainant in his [redacted content] rotation, however, it was not implemented because the University learned the Complainant had already turned in his badge.

On [redacted content], 2021, the University dismissed the Complainant from the [redacted content] Program. The University told OCR that the Complainant was dismissed due to academic and professionalism failures for exceeding the six-year time limit for completion of the [redacted content] Program and earning a failing grade in a repeated clinical clerkship. The Associate Dean of Academic Affairs, who made the final determination regarding the Complainant's dismissal, told OCR that the University dismissed the Complainant because he failed his second [redacted content] rotation when he turned in his badge to the Rotation Hospital. The University Compliance Officer further told OCR that the Complainant turning in his badge was considered a resignation and automatic failure of the [redacted content] rotation. According to the Compliance Officer, a dismissal decision is made collaboratively between the Rotation Hospital and the University and communicated to a student in writing. Therefore, the [redacted content] Director's unilateral statement that the Complainant should leave was not a dismissal from the [redacted content] Rotation and would not have required the Complainant to turn in his badge.

The Associate Dean of Academic Affairs told OCR that she did not consider the Complainant's medical leave of absence or his disability as part of the dismissal decision even though the University Handbook states the six-year rule excludes approved leaves of absence for medical or personal reasons. Without excluding his medical leave in [redacted content] 2020 and [redacted content] 2021, the Complainant would have reached the six-year mark in [redacted content] of 2021.

Similarly Situated Students:

During the 2020-2021 and 2021-2022 school years, in addition to dismissing the Complainant, a student with a disability, the University College of [redacted content] dismissed two students without disabilities. One student was dismissed for violating the academic integrity policy and the second for twice failing an academic course.

Analysis:

Different Treatment

To determine whether a University engaged in different treatment on the basis of disability, OCR considers both direct and circumstantial evidence of discriminatory intent. Direct evidence includes remarks, statements, testimony, or other admissions that reflect discriminatory motives by University officials. Circumstantial evidence is evidence that creates an inference of discriminatory intent from the facts of the investigation as a whole or from the totality of the circumstances. Circumstantial evidence may include, but is not limited to, different treatment of similarly situated students and departures from normal procedures, practices, or substantive conclusions.

The evidence regarding the Complainant's dismissal does not indicate the University treated similarly situated students differently because during the relevant school years, the University also dismissed two students without disabilities, one of whom was dismissed on a comparable basis, for twice failing an academic course. Therefore, OCR found that the University did not treat the Complainant differently on the basis of his disability.

Retaliation

OCR found that the University retaliated against the Complainant when he was dismissed from the [redacted content] Program and from the [redacted content] rotation.

Protected Activity, Causal Connection, and Adverse Actions

OCR determined the Complainant's complaint of discrimination, that was submitted on [redacted content], 2021, on the basis of disability, was a protected activity, and due to the proximity in time, that there was some evidence of a causal connection between this complaint and the adverse actions of dismissing the Complainant from his [redacted content] rotation on [redacted content], 2021, and the [redacted content] Program on [redacted content], 2021. OCR therefore analyzed the non-discriminatory reason for the adverse action offered by the University.

The University's Non-Discriminatory Reason

The University told OCR that its nondiscriminatory reason for dismissing the Complainant from the [redacted content] Program was the Complainant's academic and professionalism failures. Specifically, the Complainant failed a repeated clinical clerkship and exceeded the six-year limit for completion of the [redacted content] Program. The University further stated that it dismissed the Complainant from his second [redacted content] rotation because he voluntarily turned in his badge, which constituted a resignation and automatic failure of the rotation. The University stated that the Complainant used the discrimination complaint "as a sword," and when things did not go his way, he asserted that it was not on the basis of his academic insufficiency, but the result of discrimination. The University further stated that there had been a conversation about how to support the Complainant in his [redacted content] rotation, however, it was not implemented because the University learned the Complainant had already turned in his badge.

As described below, the University's stated nondiscriminatory reasons for dismissing the Complainant from the [redacted content] Program indicate pretext for discrimination because the aforementioned dismissal bases deviate from the University's established policies and procedures. The University's stated reason for the Complainant's failure of his second [redacted content] rotation also indicates pretext for discrimination because it contradicts the University's previous statements.

The University's reasons for dismissing the Complainant deviate from University policies and procedures in two ways. First, the University deviated from its policy of excluding medical leaves of absence from the six-year time frame for completing the [redacted content] Program when it dismissed the Complainant for exceeding the time limit without taking into consideration his disability-related medical leave of absence. The Complainant enrolled in the [redacted content] Program in [redacted content] 2015, took a leave of absence for approximately four months during the 2020-2021 school year, and was dismissed from the University in [redacted content] 2021. Therefore, taking the Complainant's medical leave of absence into consideration, the Complainant had not exceeded the six-year time limit for the [redacted content] Program at the time of his dismissal. Yet the Associate Dean of Academic Affairs told OCR that she dismissed the Complainant and did not consider the Complainant's medical leave of absence.

Second, the University deviated from its policy of not failing a student based upon their midpoint evaluation when it dismissed the Complainant for failing a repeated clinical clerkship based upon a final evaluation with ratings identical to his midpoint evaluation. The University Experiential Rotation Manual states that scores from a midpoint evaluation will not contribute to a final score for a rotation. The University further told OCR that if a student fails their midpoint evaluation, even if they have previously failed the rotation, it does not result in failure of the rotation; the University will work with the student to create a success plan. However, the documentation provided does not indicate the University implemented a success plan to address the Complainant's areas of need or provide academic support to pass the rotation. While the University stated that it had a conversation about supporting the Complainant, it told OCR that did not

provide this support on the basis that the Complainant had turned in his badge. Instead, the University issued a final evaluation with ratings and comments identical to the Complainant's midpoint evaluation. This indicates the Complainant's midpoint evaluation scores not only contributed to but constituted his final evaluation.

The University's stated nondiscriminatory reason for dismissing the Complainant from the [redacted content] rotation further indicates pretext for discrimination because the University's statements to OCR contradict the University's previously documented reasons for the dismissal. The University told OCR that the Complainant voluntarily turned in his badge, which constituted a resignation and automatic failure of the rotation. Previous University documents, however, do not include any mention of the Complainant's turning in his badge as the reason for his failure. The Complainant's final evaluation for the [redacted content] rotation bases his failure on scores from his midpoint evaluation and does not state that the Complainant failed the rotation because he voluntarily turned in his badge. Moreover, the University sent an email to the Complainant on [redacted content], 2021, stating that he failed the [redacted content] rotation because his report of discrimination was not substantiated, and the University sent an internal email on [redacted content], 2021, stating the Complainant was asked to leave the [redacted content] rotation during a conversation about his discrimination complaint. As none of these University documents state the University failed the Complainant because he turned in his badge; rather these documents state the Complainant failed the rotation because his discrimination report was not substantiated and the [redacted content] rotation asked him to leave during a conversation about his discrimination complaint, OCR determined that a preponderance of evidence supported the conclusion that the University's stated nondiscriminatory reason was not the actual basis for the dismissal from the [redacted content] Program. Instead, the Complainant was dismissed because he filed a discrimination complaint and was not allowed to finish his rotation as a result.

Failure to Respond

OCR evaluates the appropriateness of a University's response to notice of disability discrimination by examining reasonableness, timeliness, and effectiveness. With respect to this allegation, OCR found the University's response to the Complainant's disability discrimination complaint was inadequate under the requirements of Section 504. First, given that the Complainant received approved accommodations from the University related to [redacted content] disorder, and he alleged that the Rotation Hospital preceptors had made comments about a "mental problem," the University should have been on notice that the Complainant was asserting possible discrimination on the basis of disability, even though the e-mail did not explicitly say so. Second, the University only investigated whether the Complainant was subjected to a hostile environment generally and did not gather information regarding the Complainant's allegation of disability discrimination. The University's interviews with the Rotation Hospital [redacted content] Director, Clinical Coordinator, and [redacted content] Manager gathered information solely about the Complainant's performance during the rotation and did not inquire whether the Complainant had been treated negatively based on disability. While it is true that the Complainant was not cooperative during the investigation and did not provide additional information, the University's investigation

was not designed to reliably determine what occurred. Third, the University Factfinder who determined there was no violation of University policies failed to consider whether the e-mail alleged disability discrimination and stated that he did not make a determination regarding it. Finally, the letter of findings did not document the reasons for the Factfinder's determination that there was insufficient evidence of a violation of University policies as is required by University policy.

In addition to OCR's finding that the University's response to the Complainant's report of discrimination did not meet Section 504 requirements, OCR identified an additional concern that the University Factfinder was not aware of the University's disability discrimination policy and told OCR that he did not believe he was the right person to speak to about disability discrimination.

Overall Conclusion:

This concludes OCR's investigation of this complaint.

To address the complaint allegations and OCR's concerns identified in the investigation, the University, without admitting to any violation of law, entered into the enclosed resolution agreement (RA). Pursuant to the RA, the University agreed to issue a guidance memorandum and provide training to University employees on the policies and procedures for complaints of disability discrimination, rescind and remove the Complainant's dismissal letter from his academic file, waive the Complainant's [redacted content] requirement, and bestow upon the Complainant the Doctor of [redacted content] degree.

Based on the commitments made in the enclosed RA, OCR is closing the investigation of this complaint as of the date of this letter, and notifying the Complainant concurrently. When fully implemented, the RA is intended to address the evidence obtained and all of the allegations investigated. OCR will monitor the implementation of the RA until the University is in compliance with the terms of the RA and the statutes and regulations at issue in the case.

OCR's determination in this matter 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. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

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.

Please be advised that the University must not harass, coerce, intimidate, discriminate, or otherwise retaliate against any individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a separate retaliation complaint with OCR.

Under the Freedom of Information Act (FOIA), it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, OCR will seek to protect, to the extent provided by law, personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released.

Your cooperation is appreciated. If you have any questions, please contact our office at Anne.Busacca-Ryan2@ed.gov.

Sincerely,

/s/

Ava DeAlmeida Law
Team Leader

Enclosures