



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

April 12, 2023

SENT VIA ELECTRONIC MAIL

Ms. Simonida Cvejic
Institute Director/Chief Executive Officer
Bay Area Medical Academy
simonida@bamasf.com

(In reply, please refer to # 09-22-2233.)

Dear Ms. Cvejic:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed the investigation of the above-referenced complaint against the Bay Area Medical Academy (BAMA). The Complainant¹ alleged that the BAMA discriminated against her on the basis of disability and retaliation. Specifically, OCR investigated whether the BAMA:

1. Failed to provide the Complainant with the academic adjustments necessary to ensure that she could participate in the education program in a nondiscriminatory manner; and
2. Retaliated against the Complainant, after she informed the BAMA that she had filed an OCR complaint, when she was accused of cheating on the final exam; made to retake the final exam; not informed of the grade that she received on the repeated final exam; and issued a grade of only 25% for professionalism.

OCR investigated the complaint under 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. This law and regulation prohibit discrimination on the basis of disability under any program or activity receiving Federal financial assistance. The BAMA receives funds from the Department and is therefore subject to Section 504.

¹OCR identified the Complainant to the BAMA previously. We are withholding her name from this letter to protect her privacy.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

To investigate this complaint, OCR conducted interviews and reviewed documents and other information provided by the Complainant and the BAMA. Based on the evidence, OCR found insufficient evidence to show that the BAMA discriminated against the Complainant on the basis of disability or unlawfully retaliated against her. The reasons for the determination are discussed below. However, during the investigation, OCR identified a compliance concern regarding the BAMA's policy and procedure for students to formally request and receive disability accommodations. Prior to OCR completing its investigation, the BAMA agreed to voluntarily resolve the concerns through the enclosed Resolution Agreement pursuant to Section 302 of OCR's Case Processing Manual (CPM). The legal standards, facts gathered, and the reasons for OCR's determination are summarized below.

Allegation #1: Whether the BAMA failed to provide the Complainant with the needed academic adjustments and auxiliary aids necessary to ensure that she could participate in the education program in a nondiscriminatory manner.

Legal Standards

The Section 504 regulations, at 34 C.F.R. § 104.4(a) and (b), state 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 program or activity which receives Federal financial assistance. Under 34 C.F.R. § 104.4(b)(1)(iii), a recipient may not, on the basis of disability, provide a qualified disabled individual with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others.

Factual findings

The BAMA was established in 2004 and offers programs for students wanting to train to become a phlebotomist, medical assistant, or pharmacy technician. The BAMA's Certified Phlebotomy Technician Program (Program) is a two-week (60-hour) course that is offered 24 times per year or twice per month at the BAMA campuses located in San Francisco and San Jose. The Complainant was enrolled in the BAMA's Program at the San Francisco campus during a two-week session that began on XXXXX XX, 2022 and ended on XXXXX XX, 2022.

At the conclusion of the Program's two-week classroom and lab segments, students are given a final exam consisting of 100 multiple choice questions and must also demonstrate their ability to successfully perform venipunctures. Upon successful completion of the Program's two-week classroom and lab segments; receiving a passing score on the National Certification Phlebotomy Technician (NCPT) exam; and completing a clinical externship, students receive a certificate of completion.

OCR learned that typically prospective students interested in enrolling in one of the programs may contact a BAMA admissions advisor who will provide information such as the admission requirements and the cost of the programs. Upon completion of the

enrollment process and when funding is secured, the BAMA admissions advisor emails a welcome packet to each registered student. The welcome packet includes the School Catalog (Catalog), which contains a written procedure detailing how to request disability accommodations. The 2022 Catalog mentions how to request accommodations in two places. First, it has a section called “Students with Disabilities” that informs students to seek accommodations by informing their academic advisor prior to the pre-enrollment process. Second, accommodations are also mentioned in the statement of non-discrimination, which states that students seeking accommodations for their disability must submit paperwork to the Director two weeks prior to enrollment. OCR learned that although Students are provided the welcome packet with information about how to request accommodations upon enrollment, after they have officially enrolled. The Admissions Office is not in charge of helping potential students that may need accommodations. That task is handled by a different BAMA department.

The Catalog is available on the BAMA website; however, during interviews, OCR learned that it is not directly provided to students until after the enrollment process is completed. The admissions advisor indicated it is not common for them to receive disability-related accommodation requests directly from incoming students. The Compliance Manager said that if a student informs the admissions advisor that they are disabled and need accommodations, the request is referred to the Phlebotomy Program Manager (Program Manager), who then makes the final decision as to whether or not to provide the requested services to the student. However, the Program Manager told OCR that the Compliance Manager approves the requested accommodations.

In the Complainant’s case, the Compliance Manager stated that she was not aware of the Complainant having a disability or of her need for accommodations until after the Complainant had taken the Program’s final exam. Additionally, the Complainant’s admissions advisor informed OCR that between XXXXXX XX, 2022 and XXXXXX X, 2022, she and the Complainant exchanged multiple messages regarding the Program, almost daily, and the Complainant did not identify herself as having a disability and needing disability-related accommodations in any of those communications.

According to the Complainant’s Instructor, the first time that the Complainant asked for accommodations was the day before the final exam, when the Complainant informed her that she had already submitted paperwork to the office, which had been approved. The Complainant informed the Instructor that she would need to take the exam in a dark private space. The Instructor then texted the Program Manager who immediately approved the requested accommodations via text. The Program Manager informed the Instructor that the Complainant could take the final exam alone in a private classroom, which she did on XXXXXX XX, 2022. After the exam, the Instructor contacted the Program Manager because the Complainant had finished the exam in unprecedented time. Subsequently, the Program Manager contacted the Complainant to let her know that they needed more information about the Complainant’s accommodation paperwork since the office did not have a record of the Complainant providing any medical documentation supporting her need for accommodations and that she would need to retake the exam. The Complainant then provided a note from a doctor indicating that she needed a private

room in which to take the final exam. She took the exam again, along with a proctor, and was provided the same accommodations the second time.

According to the Complainant, once she enrolled in the BAMA, she visited the office and explained that she required accommodations. The Complainant told OCR that she also spoke to the admissions advisor regarding her need for accommodations prior to signing a contract with the BAMA. According to the Complainant, the admissions advisor told her to speak to her Instructor for the course regarding her need for accommodations. The Complainant said that when she went to the Instructor, the Instructor told her it would be no problem and that she could receive extra time on tests and work as needed and advised her to speak to the office manager. The Complainant informed OCR that no one pointed her to the written procedures and she was unaware of how else to request an accommodation. She stated that she felt she was given the runaround and no one knew the process. She assumed based on what she had been told that getting her accommodations would not be an issue. Neither the office manager nor the Instructor affirmed to OCR that they had discussed accommodations with the Complainant prior to the final exam.

Analysis

Based on OCR's review of the evidence, OCR found that the BAMA's policy and procedure for providing disability accommodations is included in their student catalog, a copy of which is included in the welcome packet sent to all incoming students. Students are required to affirm in writing that they have received a copy of the student catalog. Additionally, information on the BAMA's website states that applicants with disabilities who may need accommodations in any class must provide documentation at least two weeks prior to enrollment.

In order for postsecondary students to receive accommodations for their disabilities, they must identify themselves and notify the educational institution of the accommodations they need. As long as reasonable notice of these procedures is provided, postsecondary students are responsible for knowing and following these procedures. In this case, it is not clear that the Complainant had provided any documentation regarding her request for accommodations prior to beginning the Program or prior to the day of the exam. It is also unclear whether she informed anyone at the BAMA of her needs prior to the final exam; and if she did, whether she was provided correct information about the process of requesting accommodations.

In this case, the BAMA staff interviewed stated that they had not been informed of the Complainant's need for an accommodation prior to the day before the final exam, but the Complainant stated that she had informed someone in the office who had directed her to inform her Instructor. Though the timing of when the BAMA was informed about the Complainant's accommodation request is in dispute and the process used to approve the Complainant's accommodation did not follow the BAMA's stated procedures, ultimately the BAMA did provide the Complainant with the requested accommodation of a dark private exam room for both times that she took the exam.

Therefore, OCR finds insufficient evidence that the BAMA failed to provide the Complainant with the necessary academic adjustments needed to ensure that she could participate in the education program in a nondiscriminatory manner.

However, during several of the interviews with BAMA staff, OCR learned that the BAMA staff have differing understandings of the process for students to request accommodations. The BAMA staff interviewed provided inconsistent descriptions of the process and who holds the responsibility to approve the accommodations. For example, the Program Manager stated it was the Compliance Manager's duty to review and approve and vice versa. Also, the admissions advisor stated that students should be sent to the instructor, and that the instructor would decide whether to provide the requested accommodations. When interviewed, the instructor did not know the process for how students request accommodations nor how instructors are made aware of a student having any need for accommodation. Additionally, the welcome packet provided to students informs students to submit supporting medical documentation and make a formal request for accommodations at least two weeks prior to the pre-enrollment process, which would be before they receive the welcome packet with the instructions.

As such, OCR had concerns regarding the BAMA's process for students to request accommodations. As noted above, however, the BAMA voluntarily agreed to enter into the enclosed Resolution Agreement regarding the concerns that OCR found during its investigation regarding their process for students requesting accommodations.

Allegation #2: Whether the BAMA retaliated against the Complainant, after she informed the BAMA that she had filed an OCR complaint when she was:

- *accused of cheating on the final exam;*
- *made to retake the final exam;*
- *not informed of the grade that she received on the repeated final exam; and*
- *issued a grade of only 25% for professionalism.*

Legal Standard

The Section 504 regulations, at 34 C.F.R. §104.61, incorporate 34 C.F.R. §100.7(e) of the regulations implementing Title VI and prohibit recipients from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Section 504. When OCR investigates an allegation of retaliation, it examines whether an individual experienced an adverse action caused by the recipient, and the recipient knew that the individual engaged in a protected activity or believed the individual might engage in a protected activity in the future, and there is some evidence of a causal connection between the adverse action and the protected activity so that OCR is able to conclude an inference of unlawful retaliation is raised. OCR will then determine if a recipient has identified a facially legitimate, non-retaliatory reason for the adverse action. If a recipient identifies a facially legitimate, non-retaliatory reason for the adverse action, OCR next conducts a pretext inquiry to determine whether this reason is genuine or is a cover for retaliation. OCR examines all available evidence to determine whether the recipient's

proffered reasons are credible and whether the preponderance of the evidence establishes that the adverse action was in fact retaliation.

Factual Findings

The BAMA has repeatedly used the same course materials and final exam, consisting of 100 multiple choice questions, for all the phlebotomy sessions at both their San Francisco and San Jose campuses for many years. During an interview with OCR, the Instructor stated that while she was teaching during the first day of the course, the Complainant commented that a relative had taken the course before and that is not how the class was run when her relative took the course. The Instructor also stated that other students told her that they did not feel safe having the Complainant draw their blood because she had been on her phone during class, so they felt that she was not paying attention adequately to be familiar with how to draw blood. With respect to the professionalism grade, several witnesses including the Instructor explained that the basis for that grade included these reasons stated above, among several others, and that the Complainant had been asked several times not to speak on her phone during class. The Complainant's grade for professionalism had been determined prior to the day of the final exam.

On the day of the final exam, XXXXX XX, 2022, the Complainant completed the exam in nine minutes and with a perfect score of 100% which witnesses felt was not consistent with the Complainant's academic performance in the classroom portion of the Program. Moreover, the Instructor informed OCR that on the day of the exam, another student informed the Instructor that the Complainant had offered to share test answers that she had gotten from her relative. The Instructor also told OCR that most students finish the exam in somewhere between 45 minutes and an hour and some take as long as 90 minutes.

According to the Instructor, scoring 100% on the final exam is very rare, but has occurred once or twice in the past, just not in under ten minutes. OCR learned from the Instructor that another student in the Complainant's Program received 100% on the final exam, but unlike the Complainant, this student had put in additional time and did well on the homework and quizzes throughout the program, so the BAMA staff did not question this student's integrity when she scored 100% on the final exam.

After the Complainant completed the exam in under ten minutes the first time, the Complainant left campus. She received a phone call to return to campus the same day to retake the exam and provide additional information about her need for accommodations. She returned that day to retake the exam and scored 99% with a proctor present. The Complainant also provided some medical documentation regarding her need for the requested accommodation. The second final exam given to the Complainant had the same questions as the first final exam that the Complainant had completed in nine minutes and with a perfect score. However, the questions on the exam were in a different order. When the Complainant was provided with the exam the second time, it was proctored by the BAMA Community Academic Manager. The Community Academic Manager heard the Complainant say something about the questions being

shuffled or not in the same order. The Complainant took slightly longer to complete the final exam the second time and missed one question, resulting in a score of 99%.

OCR learned that once the grades have been finalized, the grades are forwarded to the registrar. In turn, the registrar must confirm the attendance records of all of the students in order to meet the state's guidelines. The Instructor informed OCR that typically grades are posted five to seven business days after the last day of the Program. Over the weekend, several of the students in the Complainant's program returned so that they could see their grades on the final exam. The Complainant's grade was not posted at that time. The evidence shows she informed BAMA she would be filing a discrimination complaint on XXXXX XX, 2022. She then filed this complaint with OCR on XXXXX XX, 2022. The Complainant stated that when she informed the BAMA that she would be filing an OCR complaint, they requested being able to contact OCR, to which she responded that she wanted her grade posted. She stated that is when she was told her grade for professionalism was only 25%. The BAMA informed the Complainant that her grade would be finalized and released by Thursday, XXXXX XX, 2022. Her grade was posted on XXXXX XX, 2022.

Analysis

As stated above, when OCR investigates an allegation of retaliation, it examines whether the alleged victim engaged in a protected activity and was subsequently subjected to adverse action by the school, under circumstances that suggest a connection between the protected activity and the adverse action. If a preliminary connection is found, OCR asks whether the school can provide a nondiscriminatory and nonretaliatory reason for the adverse action. OCR then determines whether the reason provided is merely a pretext and whether the preponderance of the evidence establishes that the adverse action was in fact retaliation.

In this case, the Complainant engaged in a protected activity when she filed a complaint with OCR. She informed the BAMA on XXXXX XX that she would be filing an OCR complaint, establishing a causal connection between her filing a complaint and several of the adverse actions listed above. However, the BAMA's decision to require the Complainant to retake the exam occurred prior to the Complainant having engaged in a protected activity. Additionally, OCR determined that the grade the Complainant received for professionalism had been determined and set prior to her informing the BAMA that she would be pursuing a discrimination complaint. As such, OCR found that requiring the Complainant to retake the exam and giving her a 25% grade for professionalism were not retaliation for having filed or having communicated the intent to file a discrimination complaint.

The BAMA informed OCR that its non-discriminatory reason for suspecting the Complainant of cheating was that witnesses reported comments made by the Complainant that she had the answers for the final exam and had offered to share them with other students, and that the Complainant had completed the exam with a perfect score which was very unusual. Additionally, the Instructor stated that the Complainant's academic ability in the classroom portion of the Program was not consistent with the

perfect score that the Complainant received on the final exam. The BAMA also informed OCR that the delay in posting the grade was related to their suspicion that she had cheated on the exam. While the BAMA did not make a definitive determination as to whether the Complainant had cheated on the final exam, the evidence gathered does not suggest that the BAMA's actions were pretext for discrimination. Rather, the BAMA had multiple reasons, including the Complainant telling several people that she had answers to the exam, to suspect that the results of the exam were not an accurate reflection of her knowledge of the course. As such, OCR finds insufficient evidence to suggest that the Complainant was subjected to retaliation when the BAMA suspected her of cheating and her grades took several days to post. Additionally, regarding the grade posting, because the grade was ultimately posted only several days after the exam, which is not atypical for grade posting at the institution, OCR did not find that the Complainant suffered a tangible harm that would amount to an adverse action with respect to the timing of the grade posting.

Overall Conclusion

Based on documentation provided by BAMA, the Complainant, and interviews conducted by OCR, OCR found that BAMA did not violate Section 504 by failing to provide the Complainant with the academic adjustments needed to ensure that she could participate in the education program in a nondiscriminatory manner or by retaliating against the Student when she was accused of cheating on the final exam; made to retake the final exam; not informed of the grade that she received on the repeated final exam; and issued a grade of only 25% for professionalism.

To address the procedural concerns identified during the investigation, the BAMA, without admitting to any violation of law, entered into the enclosed resolution agreement. The resolution agreement commits the BAMA to the following actions: provide training to all staff regarding the process that students must follow in order to request and receive accommodations, provide students with written notice that students must acknowledge that they have read the BAMA catalog and understood its contents; and ensure that students are aware of the process to request disability-related accommodations prior to enrolling in the Program.

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

OCR's determination in this matter should not be interpreted to address the BAMA'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 BAMA may not harass, coerce, intimidate, discriminate, or otherwise retaliate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the individual subjected to such retaliatory treatment may file another complaint alleging retaliation.

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 about this letter, please contact our office at OCR.SanFrancisco@ed.gov.

Sincerely,

/s/

Sara Berman
Team Leader

Enclosure