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OFFICE FOR CIVIL RIGHTS

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July 16, 2008

IN RESPONSE, PLEASE REFER TO: 03072121

Dr. David J. Ramsay
President
University of Maryland, Baltimore Campus
520 West Lombard Street
Baltimore, Maryland 212011

Dear Dr Ramsay:

This is to inform you that the Office for Civil Rights (OCR), U.S. Department of Education (the Department), has completed its investigation of the above referenced complaint filed on behalf of Mr. (b)(7)(C) (the Student), against the University of Maryland, Baltimore Campus (the University). The complaint alleged that the University discriminated against the Student on the bases of sex, disability, and retaliation. Specifically, the complaint alleged that:

1. in January and February 2007, the Student was sexually harassed by a female student (X) in his School of Nursing (the School) clinical group, and the professor of the clinical group failed to address these incidents when the Student reported them to her.

The complaint alleged that in retaliation for reporting incidents of sexual harassment to the clinical professor, and for threatening to report them to other University officials:

2. the clinical professor failed the Student for the February 17, 2007 clinical session;
3. the clinical professor falsely characterized the Student's behavior during and after an incident that occurred between the Student and X in the February 17, 2007 clinical session as "dangerous and threatening", and further misrepresented it as "unsafe clinical performance;" and
4. the University denied the Student due process, as outlined in the School's handbook under "Unsafe Clinical Performance," by:
 - a. not providing the Student with notice of the specific behavior resulting in the clinical professor's charge of "unsafe clinical performance;"

- b. not determining remedial strategies for addressing "unsafe clinical performance" and reinstatement; and
- c. not providing the Student the opportunity to respond to the charge of "unsafe clinical performance."

The complaint also alleged that the University discriminated against the Student on the basis of perceived disability by:

5. placing the Student on involuntary leave of absence prior to the completion of an investigation into the February 17, 2007 clinical group incident;
6. requiring the Student to participate in an independent medical examination (hereinafter, IME) as a condition of reinstatement to the School;
7. using a biased evaluator to assess the Student's ability to safely participate in the School; and
8. filing a false police report which resulted in the search of the Student's residence.

OCR is responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX) and the Department's implementing regulation, at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex by any recipient receiving Federal financial assistance from the Department. OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance from the Department. Retaliation is prohibited under Title VI of the Civil Rights Act of 1964, which is incorporated by reference in the Title IX regulation at 34 C.F.R. 106.71, and in the Section 504 regulation at 34 C.F.R. Section 104.61. The University is both a recipient of Federal financial assistance and is, therefore, subject to the requirements of Title IX and Section 504, and the ADA.

In reaching a determination in this complaint, OCR reviewed information provided by the Student, his attorney (the Complainant), and the University, and conducted interviews with the Student, University staff, and several witnesses identified by the Student. As a result of our investigation, we have determined that there is insufficient evidence of a violation of Title IX, Section 504, and the ADA with respect to allegations #2-8. However, we have identified a compliance concern with respect to allegation #1; specifically, the University's failure to complete its investigation into the Student's claims of sexual harassment. We have also identified deficiencies in the University's policies and procedures for addressing Title IX grievances. The basis for our finding is explained below.

Evidence Pertaining to Allegations #1 Through #4

Beginning in Fall 2006, the Student was enrolled in the School's clinical nursing program, a program which includes classroom instruction and instruction in a clinical (hospital) setting.

The Student asserted to OCR that during each of the first three Spring 2007 nursing clinical sessions, he verbally informed the clinical professor that X made inappropriate sexual comments to him. These included comments that referred to his breasts, sexual acts, and that questioned his gender and sexual orientation. The Student asserted that he did not welcome these comments, and that he told X that he did not want to discuss such matters and wanted to keep their relationship professional. He asserted that, on many occasions, the clinical professor told students in the clinical group that they were not to take their concerns outside of the clinical

group or to administration and that she would handle their concerns. He also asserted that the clinical professor made inappropriate sexual remarks to him. The Student acknowledged that he did not inform the clinical professor in writing (email or letter) about X's comments. In an interview with OCR, the clinical professor denied that the Student informed her of any inappropriate comments made by X, that she made inappropriate comments to the Student, or that she dissuaded students from raising their concerns with the administration.

OCR attempted to schedule interviews with all of the students in the clinical group. Only one student made herself available for an interview. This student stated that she never heard Student X make inappropriate comments toward the Student, nor did she hear the Student inform the clinical professor about X's inappropriate comments.

On February 17, 2007, the Student and X engaged in a heated verbal altercation in the nurse's lounge on the floor of the unit to which the clinical group was assigned. The clinical professor, in accordance with the School of Nursing's Unsafe Clinical Performance procedures, contacted the course coordinator on that same day to inform him about the altercation. She was unable to reach him by phone so she sent him an email with a written statement describing what had occurred. Her written statement about the incident indicates the following: X accused the Student of assaulting her; patients were pointing toward the lounge at the time of the altercation; both students would receive an unsafe clinical performance for that day for unprofessional conduct; and the clinical professor requested that both students not be allowed to return to the clinical setting. She characterized the verbal altercation between the students as behavior that was "unprofessional" and "degrading" to the nursing profession. The clinical professor also described the Student's attempts to speak with her immediately after the incident, noting that the Student came very close to her at one point, that he was asked to leave the clinical area several times, and that she had someone escort her to a stairway.

According to the School of Nursing's Unsafe Clinical Performance procedures, "*Unsafe clinical performance is defined as any behavior determined by faculty to be actually or potentially detrimental to the client or to the health care agency.*" The procedures also stipulate that the faculty instructor who dismisses a student who demonstrates unsafe clinical practice is required to: immediately notify the course coordinator and the Department chair; identify and document in writing, the student's unsafe clinical practice, advise the student regarding unsafe clinical performance and strategies for addressing the deficiencies and, if appropriate, refer the student for evaluation and assistance. Copies of the faculty instructor's documentation of the student's unsafe clinical practice and remedial action recommended will be provided to the course coordinator and the Associate Dean. The procedures also note that the Associate Dean will make the ultimate decision regarding the student's continuation in the clinical area and any conditions placed upon that continuation. Such decision will be made within seven (7) days at the time of removal from the clinical area. Students may respond to circumstances resulting in suspension or dismissal by submitting to the Associate Dean any relevant data pertaining to the incident and requesting an opportunity to be heard concerning the matter(s). The School reserves the right to readmit a student only if remedial action has been followed and documented.

Both the Student and the Complainant assert to OCR that the clinical professor's description of the incident, as described in her written statement, falsely characterizes the Student's behavior immediately after the incident as dangerous and threatening. The Student and the Complainant dispute this, and assert that the Student was simply anxious and distressed about the potential charge of assault made by X during the verbal altercation and was trying to dispute it. The Student and the Complainant believe that the clinical professor's focus on the Student's

behavior raises serious questions about his suspension from the clinical setting and the need to undergo a fitness for duty evaluation.

The clinical professor acknowledged to OCR that she did not provide either student with notice of the specific behavior resulting in the unsafe clinical performance charge, but asserted that they were aware that the matter was being sent to the attention of the course coordinator. While she recommended that neither student return to the clinical setting, she left that determination up to the course coordinator. The Student does not dispute engaging in the altercation. However, the parties dispute whether or not patients on the floor were disturbed by the altercation. School staff asserted to OCR that it was not necessary for the School to determine whether or not patients were actually disturbed. Rather, they assert that the nature of the altercation and the fact that it occurred within the clinical setting had the *potential* to disturb patients, and therefore, presented a patient safety and security concern. In addition, such an incident could compromise the University's clinical relationship with the hospital facility. Staff confirmed that X was moved to a different clinical group.

On February 19, 2007, the Student met with a School professor. The Student told her that X continuously made personal and derogatory remarks to him, which culminated in the February 17, 2007 altercation. He also told her that he believed that the clinical professor wanted to flunk him on the basis of the altercation. The Student was on his way to speak with the School's course coordinator regarding X when the course coordinator asked the Student to meet with him and an associate School professor to discuss the February 17, 2007 verbal altercation. During the meeting, the Student stated that X had subjected him to inappropriate sexual remarks during the clinical sessions. The Student also described what happened during the altercation. Summaries of the Student's conversations with these staff members were provided to other School staff members, who investigated the February 17, 2007 verbal altercation. The investigating staff members informed OCR that they incorporated the Student's claims about X and the clinical professor into their investigation of the altercation. They interviewed the clinical professor, X, and students who were witnesses to the altercation. According to the School staff members, their investigation could not find evidence to support the Student's claims about the clinical professor or X. The Student did not receive notification of the outcome of the School's investigation into his claims of sexual harassment.

The course coordinator asserted to OCR that on February 20, 2007, he had lunch with the Associate Dean for Academic Affairs (the Associate Dean) to discuss the verbal altercation and generally how to handle the matter. Later that day, he found out that the Student was emergency petitioned to University of Maryland Hospital Psychiatric Emergency Services (UMD-PES) for psychiatric evaluation (*see discussion of Allegations 5-8, below*). On Friday, February 23, 2007, the Associate Dean issued a letter to the Student stating, in pertinent part, that, "[y]our performance during your clinical practicum experience on Saturday February [17], 2007 represents unsafe behavior according to the unsafe clinical performance policy in the Undergraduate Student Handbook (pp. 22-23)." The Associate Dean also instructed the Student to direct future contacts to her only. On the same day, the Student emailed the School Chair, and copied the Associate Dean, responding to the charge of unsafe clinical performance and requesting a meeting with her to discuss the matter further. The School Chair asserted to OCR that she did not respond to that request as it was already determined that the Associate Dean would be the sole contact person. The Associate Dean asserted to OCR that once the Student was emergency petitioned to a psychiatric hospital for suicide risk, and the determination was made to require a fitness for duty evaluation, the University's focus shifted from the unsafe clinical performance to his personal safety and the safety of others.

Analysis-- Allegation #1

In determining whether the University violated Title IX by failing to address the Student's sexual harassment claims, OCR considered the following factors:

1. Was the Student subjected to unwelcome conduct of a sexual nature that was sufficiently serious to deny or limit the Student's ability to participate in or benefit from the School's program?
2. Did the School know or should have known about the harassment but failed to take prompt, effective action to stop the harassment, prevent recurrence, and/or remedy the effects of the discrimination for which it was responsible?
3. Does the School have a policy against sex discrimination and has it adopted, published, or implemented an effective grievance procedure providing for the prompt and equitable resolution of complaints of sex discrimination.

In making its determination, OCR considers the totality of the circumstances, including the context, nature, scope, frequency, and location of the alleged incidents, as well as the number, identity, and relationship of individuals involved, and the age of the alleged victim. Based upon the information obtained, there is insufficient evidence for OCR to establish that the Student was, in fact, subjected to unwelcome conduct of a sexual nature that was sufficiently serious to deny or limit the student's ability to participate in or benefit from the School's program. However, because the School was notified on February 19, 2007 of the Student's claims that X had sexually harassed (made inappropriate sexual comments) him, the University had an obligation under Title IX to conduct an investigation of the Student's claim. While the University did initiate an investigation, and determined that the Student's claim could not be supported, its investigation was limited only to interviews of students who were witnesses to the verbal altercation. The University did not interview other students in the clinical group or report its findings in writing to the Student. A preponderance of the evidence shows that the University failed to comply with the requirements of Title IX by not conducting a complete investigation of the Student's claims and by not notifying the Student of the outcome of its investigation.

As part of the investigation of this issue, OCR reviewed the University's Title IX grievance procedures and found them to be deficient in several areas, including not having designated timeframes for the major stages of the complaint process and not addressing sexual harassment by third parties. OCR's also found that the University's Non-Discrimination Statement does not meet the standards set forth by Title IX and Section 504 because it does not identify the individual(s) responsible for coordinating compliance with the regulations or the contact information for the responsible individual(s). Furthermore, some of the University's publications, like the School of Nursing Handbook, do not include the University's Non-Discrimination Statement.

The University has agreed to remedy these compliance concerns through implementation of the enclosed Commitments to Resolve. Full implementation of these commitments will fully resolve the compliance concerns identified by OCR in this complaint. As is our usual practice, OCR will monitor the University's implementation of the commitments.

Analysis -- Allegations #2 Through #4

In order to establish a *prima facie* case of retaliation, OCR must determine that: 1) an individual engaged in a protected activity; 2) the recipient had notice of the individual's protected activity; 3) the recipient took an adverse action contemporaneous with or subsequent to the protected activity; and 4) there was an inference of a causal connection between the protected activity and

the adverse action. If these elements are found to have occurred, OCR then considers whether the reason asserted by the recipient for its adverse action is a pretext for discrimination. While it would be necessary to address all the elements in order to find a violation, it is not necessary to address all of these elements in order to find insufficient evidence of a violation, where the evidence otherwise demonstrates that retaliation can not be established.

With respect to allegations #2 and #3, OCR's investigation confirmed that the clinical professor provided the written statement regarding the altercation to the course coordinator on February 17, 2007. As noted in our analysis of allegation #1, OCR did not find any evidence to support the Student's alleged reporting of the sexual harassment to the clinical professor before February 17, 2007. Therefore, we cannot establish that the Student engaged in a protected activity *prior* to the alleged adverse action. Since an essential element of a case of retaliation has not been established, OCR cannot find that the University retaliated against the Student as asserted in allegations #2 and #3. Therefore, OCR is closing these allegations effective the date of this letter.

Because the Student's assertion of a complaint of sexual harassment on February 19, 2008, which is a protected activity, occurred during the timeframe in which the University was investigating the clinical professor's charge that the Student engaged in unsafe clinical performance, and that the University was aware of his assertion, the Complainant has established that the Student engaged in a protected activity with respect to allegations #4a-c. To determine if the actions alleged as retaliatory are adverse, OCR considers whether the alleged adverse actions significantly disadvantaged the Student, causes lasting and tangible harm or had a deterrent effect to further protected activity. Merely unpleasant or transient incidents are not considered adverse.

With respect to allegation #4. a., the School of Nursing's Unsafe Clinical Performance procedures do not require that students receive notice of the *specific behavior* resulting in the clinical professor's charge of unsafe clinical performance. Rather, the faculty instructor must document in writing the student's unsafe clinical practice, advise the student regarding unsafe clinical performance and strategies for addressing the deficiencies and, if appropriate, refer the student for evaluation and assistance. Copies of the faculty instructor's documentation of the student's unsafe clinical practice and remedial action recommended are to be provided to the course coordinator and the Associate Dean. We also note that School of Nursing's Unsafe Clinical Performance procedures do not indicate a specific timeframe for when the faculty instructor must advise a student regarding unsafe clinical performance. In this case, the clinical professor assigned both students a clinical failure for the incident and informed the course coordinator by providing a written statement. She *requested* that neither student be allowed back to the clinical setting, but left it up to the course coordinator to make the final decision regarding her request. The course coordinator initiated an investigation into the verbal altercation, and met with the Student to discuss the matter. The Associate Dean informed the Student by letter dated February 23, 2007 that he had engaged in unsafe clinical performance.

Based on this evidence, OCR finds that the University did not retaliate against the Student by denying him due process under the Unsafe Clinical Performance procedures because the procedures do not require notice of the specific behavior, and he was, in fact, advised of his unsafe clinical performance (by the Associate Dean). Accordingly, OCR finds that there is insufficient evidence to establish that the Student suffered the adverse action alleged in allegation #4a, and OCR is closing this allegation effective the date of this letter.

With respect to allegation #4b, the Complainant has established a *prima facie* case of retaliation. The Student asserted a complaint of sexual harassment on February 19, 2008,

which is a protected activity, and the University was aware of his assertion. The University failed to determine remedial strategies to address the Student's unsafe clinical performance and reinstatement, which could be considered an adverse action. The adverse action followed the protected activity within a period of time and under circumstances from which retaliatory motivation could be inferred.

Once a *prima facie* case of retaliation has been established, the burden shifts to the recipient who must articulate a legitimate, nondiscriminatory reason for its action. The evidence is then analyzed to determine whether the recipient's proffered reason is a pretext for retaliation.

The University explained that it did not determine remedial strategies to address the Student's unsafe clinical performance and reinstatement because, as the University was in the process of taking those steps, the Student was emergency petitioned to UMD-PES. The University asserts that once the Student was hospitalized, its focus shifted from the Student's unsafe clinical performance to ensuring the safety of the Student and their patients and that the Student was fit for his duty as a nursing student. OCR finds that this justification is legitimate, non-discriminatory, and is not a pretext for retaliation. The evidence does not support a conclusion that the University retaliated against the Student with respect to allegation #4b, and we are closing this allegation effective the date of this letter.

With respect to allegation #4c, the Student spoke with three School staff members on February 19, 2007 about the February 17, 2007 verbal altercation, and provided additional information in his February 23, 2007 email to the School's Chair, which was copied to the Associate Dean. While the School did not specifically respond to his February 23, 2007 request to meet, the Student did have several opportunities to provide the School with information concerning the February 17, 2007 verbal altercation. He was also informed that he should direct future contact to the Associate Dean. There is no evidence to suggest that the Student was denied an opportunity to respond to the charge of unsafe clinical performance, and therefore, he was not denied due process with respect to this requirement of the policy. Accordingly, OCR finds that there is insufficient evidence to establish that the Student suffered the adverse action alleged in allegation #4c, and OCR is closing this allegation effective the date of this letter.

Evidence Pertaining to Allegations #5 Through #8

The Complainant and the Student assert that the University perceived the Student as a student with a disability by: placing him on involuntary leave of absence prior to the completion of an investigation into the February 17, 2007 clinical group incident; requiring him to participate in an independent medical examination as a condition of reinstatement to the School; using a biased evaluator to assess his ability to safely participate in the School; and filing a false police report in April 2007 which resulted in the search of the Student's residence. In support of this assertion, they identified the following statements made by School staff as evidence that the University perceived the Student to be a student with a disability:

- A series of emails between the Dean and the Associate Dean for Admissions and Student Affairs dated September 8, 2006, which indicate that University officials considered requiring the Student to undergo a FFD evaluation at that time. The emails included comments, such as: the Student's thought process was "*irrational*"; the Student had "*warped views*"; and questions about the Student's health status. In addition, within one email, the Dean inquired, "*Are you feeling that the situation is under control? Telling people he has stage 4 leukemia and is dying sounds like a delusional system.*" In another response, the Dean stated, "*My big concern is his judgment (how will he handle a clinical situation) and his stating that he is dying.*"

- In response to a February 22, 2007 email noting that the Student would be out due on illness, the course coordinator wrote: "I will need the accommodation of knowing that he is on meds and cleared by a mental health professional before allowing him back into clinical" and "I prefer not to have a repeat of the University of Arizona incident."
- In an email dated April 19, 2007, the Associate Dean for Admissions and Student Affairs expressed concerns about Student in comparison to the perpetrator of the Virginia Tech shooting incident.
- In the August 17, 2007 letter from the Dean to the Student, in which the Dean informed the Student of the University's agreement with the FFD Evaluator's determination that he was not fit for duty, the Dean wrote: "The seriousness and breadth of your identified mental health problems and your inability to act with the integrity and professionalism required by a nurse or student nurse, leads me to conclude that you would be an unsafe student nurse or practitioner in the clinical setting and elsewhere."

However, both the Student and his attorney admit that the Student did not present himself as a student with a disability to the University. The Student also asserted that he has never considered himself to be a qualified student with a disability. During OCR's investigative interviews, School staff, including the Dean, stated that the Student did not present himself as a student with a disability at any time during his enrollment. The Associate Dean stated that the purpose of the FFD evaluation was not to determine whether the Student had mental health issues, but rather to determine whether the Student was fit for duty.

OCR interviewed the Student's friend (Student #2), and she provided the following to information:

- She carpooled with the Student during the fall 2006 and spring 2007 semesters, and had gotten to know the Student very well.
- A couple of weeks prior to the February 17, 2007 altercation, the Student informed her and another carpooler (Student #3) that X had said many inappropriate things, including racist comments about the clinical professor and vulgar comments directed to him that seemed to center on sex and his sexuality.
- On the evening of February 19, 2007, Student #3 called her and informed her that during the ride home, the Student appeared distressed and told her that he had been thinking of killing himself and that he had a plan to do so.
- The next morning (February 20, 2007), when she picked the Student up, he appeared to be extremely distraught. The Student described a plan to kill himself to her: he had rented a storage facility, he would park his van in the storage facility, close it, and lay in the back of the van with the motor running.
- Student #2 and Student #3 felt strongly that the Student was in danger and encouraged the Student to go to the Counseling Center, which he did.

On February 20, 2007, the Student went to the University's Counseling Center, accompanied by Student #2. The Student spoke with a counselor, the Counselor Director, and the Center psychiatrist. The Student asserted to OCR that:

- The Student informed these individuals that he had been experiencing depression and anxiety about the altercation and suspension from the clinical group; X had made inappropriate comments to him; and the clinical professor did not address his complaints. He also discussed some personal health matters.
- Counseling Center staff asked him whether or not he was feeling suicidal or had considered suicide. He responded that he had contemplated suicide at one point earlier in his life, when his health was poor, but insisted that he was not feeling suicidal at that time.

- The questions posed by Counseling Center staff were intentionally designed to reach a conclusion that he was contemplating suicide, and that staff misinterpreted his responses.
- The Counseling Center psychiatrist planned to allow him to go to home with 24 hours of observation by his partner, instead of being sent to a psychiatric hospital for evaluation, but then, changed his mind, saying that he had no choice but to recommend that the Student be admitted for evaluation.

OCR interviewed the Counseling Center counselor, Director, and psychiatrist. These University staff members asserted the following in interview with OCR:

- The Student was anxious and depressed about the altercation and the possibility of being removed from the School.
- The Student stated that he had been dealing with many health issues, including cancer and a recent stroke, and was worried about the possibility of having his other testicle removed.
- The Student stated that he was contemplating suicide and described a plan for doing so. He also stated that he shared parts of his plan previously with Student #2 and his partner.
- The Director of the Counseling Center spoke via telephone with the Student's partner, who confirmed that the Student told him the night before that he had a suicide plan and noted that he had not seen the Student in such a state before.
- The Student expressed concern over the possibility of being admitted for evaluation. The psychiatrist considered allowing the Student to be observed for 24 hours at home and return for therapy sessions as a viable alternative to admitting the Student, but at no time, did he commit to that approach or present it as his final determination. The psychiatrist consulted with the Director and the counselor, who informed him that they were very concerned about the Student and that the psychiatrist's schedule would not allow him to provide therapy sessions to the Student that week, and therefore, releasing the Student was not a viable plan. The psychiatrist then returned to the Student and informed him that he would be emergency petitioned to UMD-PES for psychiatric evaluation.

OCR also interviewed the Student's partner, who asserted that while the Student was worried about school, neither the Student nor Student #2 made any mention of suicide. He does not recall who called him from the Counseling Center, nor what was discussed, but noted that the Student might have contacted him by phone, possibly when he was at UMD-PES, stating why he was there.

Student #2 told OCR that, during the session with the Counseling Center counselor, the Student reiterated his concerns, noting that he was contemplating suicide and that he had a plan for doing so, and describing portions of the plan. However, when he met with the psychiatrist, he discussed suicide and the plan as something he had at one time, but was not currently, thinking about.

After meeting with Counseling Center staff, the Student was emergency petitioned to University of Maryland Medical Center's Psychiatric Emergency Services for psychiatric evaluation. He was later transferred to another facility, and subsequently released on February 22, 2007. On Friday, February 23, 2007, the Associate Dean issued a letter to the Student stating that, "*Your performance during your clinical practicum experience on Saturday February [17], 2007 represents unsafe behavior according to the unsafe clinical performance policy in the Undergraduate Student Handbook (pp. 22-23). Your hospitalization on Tuesday February 20, 2007 for a mental health issue also gives me great concern for your own safety and the safety of others, especially the patients in our clinical settings.*" The letter instructed the Student not to attend classes or clinical unless permission was granted from Dean's office. The letter also recommended actions the Student must take before continuing in School: 1) complete an

"independent" fitness for duty (FFD) evaluation; and 2) if treatment were required, the cost would be borne by the Student. In addition, the letter stated that the Student needed to be reevaluated upon completion of treatment to determine readiness to return to class. The Associate Dean also included a release for the Student's medical records.

We note that the University has fitness for duty policies that pertain to employees, but does not have specific policies or procedures pertaining to students or nursing students. One of the University's policy statements contains a disclaimer which notes that the University reserves the right to ask a student to withdraw at any time when it is considered to be in the best interest of the University.

The University identified an evaluator (the Evaluator) to conduct the Student's FFD evaluation. The Evaluator told OCR that the University contacted her, asking her to conduct an FFD evaluation and that the University did not request that she evaluate him to determine if he had a disability. She conducted her evaluation of the Student by reviewing medical, academic, and counseling center records, and by meeting with the Student on four separate occasions between March and June 2007. She asserted that she did not speak to other people about the Student because she wanted the evaluation to be free from bias.

Upon completion of the FFD evaluation in June 2007, the Evaluator issued a report dated July 18, 2007, in which she gave the following opinion:

"To a reasonable degree of medical certainty [the Student] is not psychiatrically fit to be enrolled in nursing school at this point in time. Until [the Student] is able to obtain a more solidified sense of self, decrease his perfectionist tendencies, decrease his emotional over reactivity, decrease his high level of anxiety, and stop all lying and exaggerating facts, it is recommended that [the Student] be placed on a two-year medical leave of absence. Being a nurse requires the highest degree of integrity and professional behavior, which are critical toward ensuring patient safety. At this point in time, these characteristics have not been demonstrated by [the Student]. Furthermore, [the Student] has never had any formal intensive psychodynamic psychotherapy to address the above issues. The necessary changes require a high degree of motivation. Time will tell if [the Student] possesses the ego strength to effect these changes. It is strongly recommended that [the Student] be treated by an experienced psychiatrist who practices in a psychodynamic psychotherapeutic manner."

The Evaluator diagnosed the Student with the following (in accordance with DSM-IV-TR, the Diagnostic and Statistical Manual of Mental Disorders):

- Axis I – Dysthymic Disorder-300.4; Generalized Anxiety Disorder-300.2
- Axis II – Personality Disorder – Not Otherwise Specified with features of Obsessive Compulsive, Narcissistic, and Borderline personality disorders
- Axis III – History of testicular cancer; possible history of acute myelogenous leukemia (no medical records to support diagnosis except by [the Student's] report
- Axis IV – (Psychosocial and Environmental problems): Educational problems
- Axis V – 58 (Global Assessment of Functioning score)

By letter dated August 10, 2007, the Student's attorney responded to the Evaluator's July 18, 2007 report. He asserted that the report did not address the Student's ability to interact safely with others, did not apply any discernable standard of fitness, relied on innuendo, not facts, and unfairly impugned the Student's veracity.

Analysis– Allegations #5 Through #8

In determining whether the evidence establishes that the University discriminated against the Student on the basis of a perceived disability, OCR must first determine whether the University perceived the Student as a student with a disability at the time of the alleged discriminatory acts (which occurred between February and April 2007).

34 C.F.R. Section 104.3 of the regulation implementing Section 504 prohibits discrimination against students who are regarded as having a physical or mental impairment. This section further defines such students as: having a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; having a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or having none of the impairments defined by the regulation, but is treated by a recipient as having such an impairment. The Student and the Complainant deny that the Student had an actual physical or mental impairment during the time period relevant to this complaint. Instead, they asserted that the University perceived the Student as a student with a disability. The statements identified by the Student and the Complainant as evidence that the University perceived the Student as a student with a disability only indicate that the University considered whether the Student was unfit to perform the duties of a nurse. In order to establish disability discrimination, OCR must find evidence that demonstrates that the University regarded him as unable to perform a substantial class of jobs.¹ The evidence presented in this case does not meet the threshold requirement for a disability discrimination claim.

It is also important to note that the University's statements were made in the context of the Student engaging in behaviors that prompted concern among University staff for the safety of the Student, other students, and patients. Requiring the Student to undergo the fitness for duty exam does not prove that the University perceived the Student as disabled. The University had a right to use reasonable means to ascertain the cause of the Student's troubling behavior.² Furthermore, the purpose of the fitness for duty evaluation was not to determine if the Student was a student with a disability. Instead, the evaluation was conducted to determine the Student's fitness for performing nursing duties. Given the nature of the Student's position as a clinical nursing student, we find it reasonable, in light of the Student's presented suicidal thoughts and planning, to ensure that the Student was fit for duty. Because the evidence does not support a conclusion that the University perceived the Student as a student with a disability, there is insufficient evidence to support allegations of disability discrimination (Allegations #5-8). Accordingly, we are closing these allegations effective the date of this letter.

We are concluding our investigation of this complaint. This letter is not intended, nor should be construed, to cover any other issues regarding the University's compliance with Title IX or

¹ See *Shibley v. City of University City*, 195 F.3d 1020, 1023 (8th Cir. 1999) (explaining that "[i]t is not enough for a plaintiff to demonstrate that he is regarded as unable to perform a particular job or type of job. To be regarded as substantially limited in the major life activity of working, one must be regarded as precluded from a substantial class of jobs."); *Dupre v. Charter Behavioral Health Systems of Lafayette Inc.*, 242 F.3d 610, 616 (5th Cir. 2001) (concluding that "an employer does not necessarily regard an employee as having a substantially limiting impairment simply because it believes the employee is incapable of performing a particular job.")

² See *Cody v. Cigna Healthcare*, 139 F.3d 595, 599 (8th Cir. 1998) (explaining that, "a request for an evaluation is not equivalent to treatment of the employee as though he were substantially impaired. Employers need to be able to use reasonable means to ascertain the cause of troubling behavior without exposing themselves to ADA claims.")

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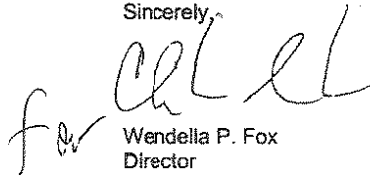
Section 504 that may exist and are not discussed herein. The Complainant may file a private suit pursuant to section 203 of the Americans with Disabilities Act, whether or not OCR finds a violation of Title II. As is our usual practice, we will monitor the University's implementation of the enclosed commitments.

Please be aware that Federal regulations prohibit the harassment or intimidation of individuals who file complaints with OCR and those who cooperate with our investigations. If any such actions occur, such individuals can file a complaint with OCR.

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, personal information that, if released, could constitute an unwarranted invasion of privacy.

Thank you for your cooperation in this matter. If you have any questions, please contact Mr. Michael Wesley, the Equal Opportunity Specialist assigned to this complaint at (215) 656-6908, or by email at: Michael.Wesley@ed.gov.

Sincerely,

The image shows a handwritten signature in black ink. The signature is written in a cursive style and appears to read "Wendella P. Fox". To the left of the main signature, there is a smaller, less distinct handwritten mark that looks like "for".

Wendella P. Fox
Director

Enclosure

cc: Meryl L.K. Eddy, Esquire

Commitments to Resolve

In order to resolve complaint #03072121, the University of Maryland, Baltimore (the University) submits the following Commitments to the U.S. Department of Education (the Department), Office for Civil Rights (OCR).

Commitments:

Title IX Grievance Procedures and Notice of Nondiscrimination and Compliance Coordinators

By September 1, 2008, the University will draft and submit to OCR:

1. Grievance procedures in accordance with the requirements of Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulation, at 34 C.F.R. § 106.8, which incorporate appropriate due process procedures and provide for the prompt and equitable resolution of complaints alleging any action prohibited by Title IX and its implementing regulations. The University's grievance procedures will include, but not be limited to, the following components:
 - a. Notice of the grievance procedures and instructions regarding how and where to file a complaint, including a provision for an alternate official to accept complaints where the complaint is against the person who normally receives them;
 - b. Designated and reasonably prompt timeframes for filing a complaint and for conducting an investigation;
 - c. Manner in which an investigation will be conducted, and how a decision will be made;
 - d. Assurance that the investigation will be conducted in an impartial manner, including an impartial decision-maker;
 - e. The right of the parties to present witnesses and other evidence relevant to the complaint;
 - f. The time within which the parties shall expect a response regarding the disposition of the investigation;
 - g. Notice (either written or oral) to the parties of the outcome of the complaint and the basis for the decision;
 - h. An opportunity for the parties to appeal the findings;
 - i. Assurance that the appeal will be conducted in an impartial manner by an impartial decision-maker;
 - j. Designated and reasonably prompt timeframes for the appeal;
 - k. Prohibition against retaliation;

- i. The opportunity for both students and employees to utilize procedures that meet these standards;
- m. A provision that provides for confidentiality to the extent possible with regard to complaint filing, investigation, and disposition; and
- n. To the extent that the procedures include informal mediation, mediation may be recommended, but is not required for complaints to be fully processed.

Title IX does not require a separate sexual harassment complaint procedure. The University assures OCR that if it chooses to maintain a separate sexual harassment complaint procedure, it will comply with the requirements outlined above.


2. A notice of nondiscrimination, to the extent required by the regulations implementing Title IX of the Education Amendments of 1972, 20 United States Code (U.S.C.) § 1681 (Title IX), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504), Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 (Title II), the Age Discrimination Act of 1975, 42 U.S.C. § 6101 (Age Act), and Title VI, setting forth the University's obligations to comply with those laws. The notice will state that the University does not discriminate on the basis of race, color, national origin, sex, disability or age in its programs and activities. *The revised notice of nondiscrimination must add the name or title, address, and telephone number of the District employee(s) designated to coordinate efforts to comply with and carry out responsibilities under Title IX, Section 504, Title II, and the Age Act. If more than one person is designated to coordinate compliance under these laws, the District shall specify which coordinator is responsible for each law. The University may refer to OCR's policy guidance entitled "Notice of Nondiscrimination" (January 1999), including the sample combined notice of nondiscrimination, which may be accessed at <http://www.ed.gov/about/offices/list/ocr/docs/nondisc.html>.*
3. Within 14 days of OCR's approval of revised grievance procedures and notice of nondiscrimination, the University will implement the procedures and will provide all students and employees with written notice regarding the availability of its grievance procedures for resolving Title IX complaints (and, if applicable, the University's sexual harassment policies), together with information on the manner in which they may obtain a copy of the policies and grievance procedures. The University will review and, as necessary, update its student handbook and online webpage to ensure that these sources of student information clearly state the University's policies and procedures with regard to its sexual discrimination grievance procedures. The University will also ensure that its electronic and printed publications of general distribution that provide general information to employees and students about University services and policies contain the revised notice of nondiscrimination. Inserts may be used pending the reprint of the University's student handbook.
4. Within 21 days of the execution of these Commitments, the University's School of Nursing (SON) shall distribute a memorandum to all employees stating that it prohibits and will not tolerate discrimination and harassment on the basis of sex against or promulgated by SON students. The memorandum will advise employees of the procedures for reporting such incidents.

Investigation of Claims of Sexual Harassment by the Student

5. By September 1, 2008, the University's SON shall complete its investigation of the Student's claims that he was sexually harassed by another student in his nursing clinical group during January and February 2007. During its investigation, the University will make all reasonable efforts to interview the remaining students in the clinical group, and any other relevant witnesses.
6. By September 15, 2008, in accordance with the revised policies and procedures required by Commitment #1, the SON will provide the Student with notice of the outcome of its investigation of his claims.

Reporting Requirements:

7. By September 1, 2008, the University will provide OCR with:
 - a. A copy of the draft Title IX grievance procedures and notice of nondiscrimination, developed pursuant to Commitments #1 and #2 above, for review and comment. The University will also provide a description of the manner in which they will be published and disseminated.
 - b. a copy of the memorandum distributed pursuant to Commitment #4, including a narrative describing the manner in which the memorandum was distributed; and
 - c. documentation of the University's efforts to interview all relevant witnesses, pursuant to Commitment #5.
8. By September 21, 2008, the University will provide OCR with a copy of the written notice provided to the Student, pursuant to Commitment #6.
9. By January 1, 2009, the University will provide OCR with documentation showing implementation of Commitment #3, including: a copy of the notice provided to students and employees; a written narrative regarding the manner in which the notice was disseminated; a copy of the final grievance procedures and notice of nondiscrimination; and copies of the relevant sections of the student handbook, bulletins, applications, forms and materials of general distribution, including a link to the appropriate section of the University's webpage(s).



President or Designee
University of Maryland, Baltimore

7-10-08
Date

