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OFFICE FOR CIVIL RIGHTS

WENDELLA P. FOX
DIRECTOR
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February 13, 2009

In response, please refer to: 03082127

Dr. David J. Ramsay
President
University of Maryland, Baltimore
520 West Lombard Street
Baltimore, MD 21201

Dear Dr. Ramsay:

This letter is to notify you of the determination by the U.S. Department of Education (the Department), Office for Civil Rights (OCR), regarding the above-referenced complaint against the University of Maryland, Baltimore (the University). The Complainant, ^{(b)(7)(C)} alleges that the University discriminated against her on the bases of race (African-American) and sex by failing to address her complaints of different treatment, retaliation and racial and sexual harassment by various University staff including a clinical instructor in Nursing 511 Psychiatric/Mental Health Nursing (allegation #1).

The Complainant also alleges the University retaliated against her because she filed complaints of different treatment, retaliation and racial and sexual harassment with the University through its grievance procedure and because she suggested to University staff that her aforementioned complaints warrant an investigation by OCR. Specifically, the Complainant alleges that the University retaliated against her by: denying her the opportunity to register for course Nursing 508 Community Health Nursing (allegation #2); requiring her to register for course Nursing 514 Adult Health Nursing (allegation #3); subjecting her to inappropriate requirements for an Independent Study course (allegation #4); and, dismissing her from Nursing 511 Psychiatric/Mental Health Nursing (which resulted in her dismissal from the University) (allegation #5).

OCR is responsible for enforcing Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d et seq. (Title VI), and its implementing regulation at 34 C.F.R. Part 100 which prohibit discrimination on the basis of race, color or national origin in any program or activity receiving Federal financial assistance from the Department and Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulation, 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex by recipients of Federal financial assistance from the Department. The regulation implementing Title VI of the Civil Rights Act of 1964 (Title VI), at 34 C.F.R. § 100.7(e), prohibits retaliation against an individual who exercises his or her rights under Title VI by filing a complaint or for participating in an investigation or proceeding thereunder. That prohibition is incorporated by reference into the Title IX regulation at 34 C.F.R. § 106.71. Because the

University receives Federal financial assistance from the Department, it is subject to the provisions of Title VI, Title IX, and their implementing regulations.

Regarding allegation #1, the Complainant alleged the University discriminated against her on the bases of race and sex by failing to appropriately address her complaints of different treatment, retaliation and racial and sexual harassment by various University staff including a clinical instructor in Nursing 511 Psychiatric/Mental Health Nursing. However, OCR found that the Complainant filed a grievance with the University that contained the same allegations on the bases of race, sex and retaliation as those filed with OCR. The University conducted an investigation of the Complainant's allegations, which included a review of student records, documentation provided by the Complainant to support her allegations and interviews of the Complainant, students and faculty. The University issued a letter of findings on July 2, 2008, that found no evidence of discrimination, retaliation or a violation of University regulation, policy or procedure. As such, OCR determined that its review of these issues would initially focus on the internal investigation conducted under the University's grievance process. After reviewing the University's investigative file, OCR has determined that, with regard to the allegation of different treatment, retaliation and racial and sexual harassment by faculty, the Complainant was provided a comparable process under comparable legal standards under the University's internal grievance process to that which she would have received by OCR. Accordingly, this allegation is being closed administratively because the allegation has been resolved.

The Complainant's University Grievance¹

By letter dated September 17, 2008, OCR informed the Complainant that because she filed her allegation with the University and the University completed an investigation, OCR's action would be limited to a review of the University's investigative process. We have completed our review and have determined that the University adequately and fully addressed all matters encompassed in her first OCR allegation. That is, the University addressed the Complainant's April 2008 complaints to the Lecturer about the Clinical Instructor's behavior, and adequately handled the Complainant's formal May 2008 complaints alleging the same behavior by the Clinical Instructor as well as the Lecturer's earlier mishandling of her complaint and subsequent retaliation. Accordingly, the first OCR allegation is being closed administratively because the allegation has been resolved.

OCR learned that the Complainant alleged that the University subjected her to racial and sexual harassment in an April 15, 2008 letter to the Dean, followed by a May 28, 2008 addendum letter. Generally, the first letter asserts that the Complainant became uncomfortable with the Clinical Instructor's comments, she complained to the Lecturer about this, and the Lecturer ignored the effect that the comments had on the Complainant and did not give the Complainant

¹ On April 15, 2008, the Complainant filed a complaint under the University's grievance procedures that the University discriminated against her on the bases of race (African-American) and sex by failing to address her complaints of different treatment, retaliation and racial and sexual harassment by various University staff including a clinical instructor in Nursing 511 Psychiatric/Mental Health Nursing. On or about June 20, 2008, the University provided the outcome of its investigation of the Complainant's complaint to her. The University found no evidence of discrimination, retaliation or a violation of University regulations, policy or procedure and afforded the Complainant the opportunity to appeal its findings. On June 25, 2008, the Complainant informed the University that she disagreed with the University's determination but did not provide additional information to the University to support her disagreement/appeal. On July 2, 2008, the University upheld its finding and provided the outcome of its investigation to the Complainant.

an opportunity to cease interacting with the Clinical Instructor. The letter identifies several comments made by the Clinical Instructor. The letter states that the Complainant was burdened by being given an alternative site for some of her work, and that the arrangement "could" provide the Clinical Instructor the opportunity to subject her to further harassment and "possible retaliation." The addendum letter asserts that meetings the Complainant had with the Lecturer on April 4 and 11 were themselves "discriminatory and retaliatory." It states that the Lecturer told the Complainant, "If you said [the Clinical Instructor] touched you, you know I wouldn't believe you" at the first meeting, and mentions that the April 11 meeting was when the Complainant was given an alternative assignment but was still required to attend the Clinical Instructor's morning session. The addendum identifies the following additional acts of retaliation: the Lecturer denied the Complainant an opportunity to view an exam and related materials; required the Complainant to attend face-to-face meetings; and, scheduled and then rescinded an "offer" that her exam and clinical be on the same day. It also states that after the first letter of complaint was filed, the Complainant was subjected to different treatment in grading her for the Nursing 511 course.

Pursuant to the Title VI and Title IX implementing regulations, once notified of racial and sexual harassment, a recipient must adequately respond and, depending on the facts, take interim measures pending the outcome of the investigation. OCR reviewed the University's investigatory record to determine whether all of the allegations were investigated and whether appropriate legal standards were applied. We considered whether an adequate, reliable, and impartial investigation of the complaint was done, and whether the Complainant was provided the opportunity to present witnesses and other evidence. OCR also considered whether the University's investigation fully and appropriately addressed the legal issues raised in the complaint, including her concerns that she was initially denied the opportunity to cease interacting with the alleged harasser and her concern that when alternative arrangements were made, these burdened her. Finally, OCR considered whether there was evidence gathered during the investigation to support the conclusions reached by the University.

The record of the investigation indicates that on May 19, 2008, and at several points thereafter, the Complainant was given the opportunity to provide witnesses and other evidence. The University reports that she did not provide any evidence beyond what was in her complaint letter and addendum letter, except for an intake form and a document written by the University concerning clinical expectations. Therefore, OCR determined that the Complainant was afforded the opportunity to present witnesses and provided evidence in support of her complaint.

OCR found that two attorneys served in the capacity of investigators. Regarding the alleged discriminatory conduct, they interviewed the Complainant, the persons named in her complaint and five student witnesses. The investigating attorneys were not named parties or otherwise implicated in the complaint allegations that were being investigated. In addition to requesting documentation from the Complainant, the attorneys collected and reviewed documentation from the University personnel, including e-mails, letters and other course-related materials relevant to the Complainant's allegations. Throughout the investigation, they developed and maintained a record of their investigation. Thereafter, they compiled their findings and conclusions in a written report, which was supported by the record that was created, and submitted it for review. The University then presented this report to the Complainant.

OCR finds that the University's investigation was sufficiently thorough and a legal standard very similar to that which OCR would have used was applied by the University. In making a determination as to whether racial or sexual harassment occurred, and if so, whether it was sufficient to create a hostile environment, OCR would, depending on the facts, evaluate several

factors. Such factors include the context, nature, scope, frequency, duration and location of the alleged discriminatory comments, acts or incidents, as well as the ages, number, and relationships of the persons involved. Similarly, OCR notes that the University first sought to determine whether the alleged conduct occurred, and if it did, whether it was based on race or sex and whether it was sufficient to create a hostile environment based on race or sex. We have determined that in investigating the Complainant's complaint, the University collected the accounts of five other students as well as the Complainant and two instructors, weighed all of this evidence, and considered whether prohibited harassment occurred. Based on all of the interviews conducted, the University determined that many of the situations the Complainant described occurred, but that her characterization of the Clinical Instructor's actions as racially or sexually discriminatory was not credible. With regard to the Clinical Instructor's actions, the University found some to be, at most, imprudent, but concluded the conduct did not meet the definition of harassment. This is the kind of legal analysis that OCR conducts in its investigations.

In making a determination as to whether the University responded adequately to the Complainant's complaints to the Lecturer while the clinical was still under way, the investigating attorneys determined that she did not allege during the April 4 and 11 meetings that she had been racially or sexually harassed. Nonetheless, the investigation established that the Lecturer responded to her concerns promptly, sometimes answering multiple e-mails in a single day and on weekends, gave her an additional opportunity to provide as much information as she chose, discussed with her alternative clinical sites, and offered her a means for the grading of her work to be reviewed by someone other than the Clinical Instructor. As interim measures pending the outcome of the University's investigation, these actions were sufficient. OCR also found that the University addressed her complaint that an extra burden had been placed on her in these matters, and her allegation that her grading was different from other students.

Accordingly, OCR has determined that the University responded appropriately to the Complainant's allegations of sex and race discrimination and retaliation with a prompt and thorough investigation and we consider the University's resolution of these allegations as having met OCR standards. Overall, OCR's review determined that the University's complaint investigation process as applied to the Complainant was, adequate, reliable and impartial. In our review of the detailed and thorough investigative report, OCR further determined that the University's processes, both in terms of the investigation conducted and the legal reasoning used, were comparable to OCR's standards and legal analysis. Therefore, OCR considers the Complainant's first allegation to have been resolved by this investigation and we are closing this allegation administratively, in accordance with our complaint resolution procedures.

Retaliation

The Complainant's retaliation allegations were not addressed as part of the internal grievance; therefore, OCR conducted an investigation of these allegations. OCR has determined that, with regard to the Complainant's retaliation allegations, there is insufficient evidence to support a finding of noncompliance. The reasons for OCR's decision are explained below.

The Complainant alleges that the University retaliated against her because she filed her complaints of different treatment, retaliation and racial and sexual harassment with the University through its grievance procedure and because she suggested to University staff that her aforementioned complaints warrant an investigation by OCR. In order to establish a prima facie case of retaliation, OCR must review the evidence to establish the following elements of a retaliation claim: 1) an individual engaged in an activity protected by the regulations and laws enforced by OCR; 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 a causal connection between the protected activity and the adverse action. If any one of these elements cannot be established, OCR will not find a retaliation violation. However, if all of these elements establish a prima facie case, OCR next considers whether the recipient has identified a legitimate, non-discriminatory reason that is not pretextual for taking the adverse action or whether the recipient's stated reason is a pretext for retaliation. A showing of pretext is sufficient to support a finding that the complainant was subjected to retaliation.

Regarding allegation #2, the Complainant alleges that the University's denial of her opportunity to register for course Nursing 508 Community Health Nursing (Nursing 508) was retaliation. OCR finds the Complainant established a *prima facie* case of retaliation under this allegation. However, the University offered a legitimate non-discriminatory reason for not permitting the Complainant to register for Nursing 508. Specifically, the University asserts that the Complainant failed to take and pass a mandatory prerequisite for the course (Nursing 514 Adult Health Nursing).

The University's School of Nursing (SoN) MS Clinical Nurse Leader (CNL) Plan of Study states that Nursing 514 is a prerequisite for enrollment in Nursing 508. The course syllabus for spring 2008 semester Nursing 514 states, "Prior to the start of the clinical experience[,] the student must pass a medication calculation examination. Passing score is 100%. The student will be given a total of three (3) attempts to pass the exam." While the Complainant enrolled in Nursing 514 during spring 2008 semester, she failed a mandatory medication calculation exam and withdrew from Nursing 514. Therefore, the Complainant did not meet the requirements for passing Nursing 514 and was not permitted to enroll in Nursing 508 because she had not completed the prerequisite. Although the University acknowledges that another CNL student enrolled in Nursing 508 without the proper prerequisites in spring 2008 semester, the evidence indicates that once the University discovered the error, it withdrew the other CNL student from Nursing 508 and that student did not receive credit or a refund for the course. On December 4, 2008, OCR e-mailed the Complainant and requested that she provide further information to support allegation #2. The Complainant was unable to provide evidence that the University's proffered legitimate non-discriminatory rationale is pretext for retaliation. As such, there is insufficient evidence to find that the University's denial of the Complainant's opportunity to register for Nursing 508 was unlawful retaliation.

Regarding allegation #3, the Complainant alleges that the University required her to register for course Nursing 514. However, the University offered a legitimate non-discriminatory reason for requiring the Complainant to register for Nursing 514 before taking other courses. Specifically, Nursing 514 is a prerequisite for other CNL clinical classes, such as, Nursing 508, Nursing 523 Clinical Nurse Leader Practicum (Nursing 523) and Nursing 525 Clinical Nurse Leader (Nursing 525). According to the University, it advised the Complainant to take and pass Nursing 514 during fall 2008 semester so that she would be able to complete other clinical classes, (i.e., Nursing 523, Nursing 525) and thus complete the CNL program without delay. Furthermore, CNL students are required to satisfactorily complete Nursing 514 in order to earn a CNL degree. The Complainant has provided no information to support her claim that the University requirement that she register for Nursing 514 was adverse since it was needed to satisfy the University's requirements for earning a CNL degree. Furthermore, there is insufficient evidence to find that the University's legitimate non-discriminatory reason for having the Complainant take Nursing 514 was pretext. As such, there is insufficient evidence to find that the University's requirement that the Complainant register for Nursing 508 before taking other classes was unlawful retaliation.

Regarding allegation #4, the Complainant alleges that the University subjected her to inappropriate requirements for an Independent Study (IS) course during fall 2008 semester. The requirements for an IS outlined in the University's MS Handbook state, "The student and faculty member who will guide the independent study establish mutually agreed upon objectives and evaluation criteria, from which the specific requirements of the project follow..." An 'Independent Study Agreement' form is signed by both the student and faculty member. The University informed OCR that the Complainant registered and took a two credit hour IS Nursing 628 course in fall 2008.

During a September 8, 2008 telephone conversation with OCR investigator Beth Cavallucci, the Complainant stated that the University subjected her to inappropriate requirements for IS Nursing 628 but failed to provide specific information regarding her allegation. In a December 4, 2008, e-mail to the Complainant, OCR requested that she provide specific information regarding her allegation, but to date, the Complainant has not provided any information to support her allegation. During a January 22, 2009, telephone conversation with Ms. Cavallucci, the Complainant stated the University assigned her a grade of "F" for IS Nursing 628 because she failed to submit 'appropriate' paperwork, and that the University required her to get approval from a faculty member in order to enroll in that course. However, the Complainant failed to clarify what paperwork to which she referred and if the required faculty approval for IS Nursing 628 differed from the requirements for IS course approval outlined in the MS Handbook. Nonetheless, the evidence indicates the Complainant was actually enrolled in IS Nursing 628 in fall 2008 after she filed her OCR complaint. Based on this, it remains unclear to OCR what the Complainant meant by "inappropriate requirements." In order to establish the adverse action element of a *prima facie* case of retaliation, OCR must find that an individual suffered a lasting and tangible harm as a result of the recipient's actions. In the present case, because the Complainant has not articulated exactly what she meant when she alleged the University subjected her to inappropriate requirements for an IS course during fall 2008 semester, OCR can neither discern nor assess whether the action she alleges is adverse. As such, there is insufficient evidence to find that the University engaged in unlawful retaliation regarding this allegation.

Regarding allegation #5, the Complainant alleges that the University dismissed her from Nursing 511 Psychiatric/Mental Health Nursing (Nursing 511), which resulted in her dismissal from the University in fall 2008. The Complainant informed OCR that she attempted to enroll in Nursing 511, a clinical course, during fall 2008 semester and provided the necessary immunization requirement for a tuberculosis test (PPD), which is a University requirement for enrollment in clinical courses, but the University would not permit her to enroll in Nursing 511. The University refuted the Complainant's account, asserting that she did not provide proof of the required PPD immunization despite its repeated requests. According to University documentation issued prior to fall 2008 semester, the compliance deadline for the PPD immunization for fall 2008 semester was August 1, 2008, and a CNL student's immunization must have been valid through November 2008. Each semester, the University provides clinical information sessions for CNL students in order to provide students with necessary dates and the process for clinical registration. The University also posts the same information on its website. The University requires that each student must submit the results of the PPD screening performed within 12 months of the date of the student's enrollment in the clinical course to University Student Health.

Between April and September 2008, the University informed the Complainant at least seven times via e-mail that it did not have her required PPD immunization and that proof of the PPD immunization was required in order for her to enroll in Nursing 511. However, despite the University not receiving confirmation of the Complainant's PPD immunization by August 1,

2008, it allowed her to enroll in Nursing 511 and extended its deadline until September 10, 2008, for her to provide proof of her updated PPD immunization. According to the information provided to all University CNL students, attendance for all classes, clinicals and orientation sessions for Nursing 511 is mandatory.

In an August 20, 2008, e-mail, the University informed the Complainant that her TB (PPD) skin test expired on August 15, 2008, and updated documentation from her regarding the immunization was necessary. The Complainant continued to inform the University that she in fact provided the required information to Student Health. The University continued to inform her that it had not received the required information. While the Complainant provided OCR with evidence that on September 4, 2008, she sent information regarding a PPD immunization from March 2008 to the University, she did not provide OCR with evidence that she had provided the University an updated PPD immunization, (one that was valid through November 2008). In a September 9, 2008, e-mail, the University informed the Complainant that it had not received proof of her updated immunization, and the University needed to provide health clearances to the clinical site by September 10, 2008. According to the University, as of September 10, 2008, the Complainant still had not provided the required PPD immunization, so it withdrew her from Nursing 511. While the University received proof of the Complainant's PPD updated immunization on September 11, 2008, the University withdrew her from Nursing 511 because she had not provided the required updated PPD immunization and had missed the orientation and make up orientation sessions. The Complainant acknowledged to OCR that her absences from those sessions were unexcused.

OCR finds that the University has provided a legitimate non-discriminatory reason for its actions that is not pretextual. Although the Complainant maintains she provided the information about her PPD, she was aware that the University did not believe they had her PPD. The importance of the test was also known to the Complainant. OCR also found that the University extended the deadline for the Complainant to submit her PPD, which does not suggest a motive to retaliate. The University withdrew the Complainant from Nursing 511 in fall 2008 because she did not submit the required PPD immunization prior the extended September 10, 2008 deadline. As such, the University articulated a legitimate non-discriminatory reason for withdrawing the Complainant from Nursing 511 in fall 2008, and there is insufficient evidence that the University's reason is pretext for unlawful retaliation. Therefore, there is insufficient evidence to find that the Complainant's dismissal from Nursing 511 in the Fall 2008 semester was unlawful retaliation.

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, OCR will seek to protect, to the extent provided by law, personal information that, if released, could constitute an unwarranted invasion of privacy.

Federal regulations prohibit recipients of Federal financial assistance from taking actions which intimidate, threaten, coerce or discriminate against individuals who exercise their statutory rights, or because they filed a complaint or are taking part in the complaint resolution process.

Page 8 – Dr. David J. Ramsay

If you have any questions or concerns regarding OCR's case determination, please contact Team Attorney Randle Haley at (215) 656-8532.

Sincerely,

A handwritten signature in black ink, appearing to read "LouAnn Pearthree". The signature is written in a cursive style with some loops and flourishes. Below the signature, the word "for" is written in a smaller, simpler font.

LouAnn Pearthree
Acting Chief Attorney
Philadelphia Office