



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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SAN FRANCISCO, CA 94105

REGION IX  
CALIFORNIA

December 21, 2012

Edna V. Baehre Kolovani, Ph.D.  
Napa Valley College  
2277 Napa-Vallejo Highway  
Napa, California 94558

(In reply, please refer to case no. 09-12-2048.)

Dear President Kolovani:

The U.S. Department of Education, Office for Civil Rights (OCR) has completed its investigation of the above-referenced complaint against Napa Valley College. OCR investigated whether the College discriminated against XXXXX XXXXXXXXXXXXXXX (complainant) based on age and national origin. The issues OCR investigated were whether:

1. the instructor (Instructor One) of the medical-surgical clinical portion of the complainant's fall 2011 Nursing in XXXXXX XXXXXXXXXXXXXXX course (Course) treated the complainant differently from other students on the basis of age and national origin by assigning him a failing grade;
2. Instructor One created a hostile environment for the complainant based on national origin;
3. the College failed to respond adequately to the complainant's internal complaints alleging national origin discrimination; and
4. the instructor of the pediatric clinical portion of the Course retaliated against the complainant for complaining of national origin discrimination.

OCR investigated this case under the authority of Title VI. Title VI prohibits discrimination on the bases of race, color, or national origin in programs and activities operated by recipients of Federal financial assistance. The College receives funds from the Department and is subject to Title VI and the regulation.

OCR gathered evidence through interviews with the complainant, several of the complainant's classmates and College faculty and administrators. We also reviewed documents and records submitted by the complainant and the College. Based on the evidence, OCR determined that the College is not in compliance with Title VI with respect to the allegations related to hostile environment and failure to respond. OCR concluded that there was insufficient evidence of a violation with respect to the

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allegations related to different treatment and retaliation. The applicable legal standards, the facts OCR gathered and the reasons for our determination are summarized below.

*Allegation One: Different Treatment.*

Under the Title VI regulations at 34 C.F.R. §100.3(a) and (b), and the AgeDA regulation at 34 C.F.R. §110.10(a), (b), and (c), a college may not treat individuals differently on the basis of race, color, or national origin (Title VI) or age (the Age DA) with regard to any aspect of services, benefits, or opportunities it provides. The regulations state that a college may not, directly or through contractual or other arrangements, on the basis of race, color or national origin (Title VI) or age (the AgeDA), provide an individual any service, financial aid or other benefit that is different, or is provided in a different manner, from that provided to others; treat an individual differently in determining whether he or she satisfies any admission, enrollment, eligibility or other requirement which must be met to receive any service, financial aid, or other benefit; or deny an individual an opportunity to participate, or afford an opportunity to participate which is different from that afforded others.

To determine whether a student has been discriminated against on the basis of national origin or age, OCR looks at whether there is evidence that the student was treated differently than students of other national origins or ages under similar circumstances, and whether the treatment has resulted the denial or limitation of services, benefits, or opportunities. If there is such evidence, OCR examines whether the college provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination. For OCR to find a violation, the preponderance of the evidence must establish that the college's actions were based on the student's national origin and/or age. Linguistic characteristics are a component of national origin.

- At the time of the events giving rise to this complaint, the complainant was enrolled in the clinical portion (Clinical) of the Course. The complainant was seeking an Associated Degree in Nursing (ADN). Prior to the Course, the Student had a 3.48 GPA, based on completion of nine courses in the ADN program. The complainant was the only one of 14 students in his clinical group<sup>1</sup> who failed the Course.
- The complainant was born in XXXXXXXXXXXX, and Russian is his native language. As described by witnesses, he spoke English with a strong accent. Several other students in the Clinical spoke English as a second language to Spanish.
- The complainant was XX years old at the time of the Clinical. Ages of the other students in his group ranged from 25 to 51; three were over age 40.

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<sup>1</sup> This refers to students enrolled in the Student's medical-surgical component, who had rotations at the Hospital and Instructor One as their instructor.

- The Clinical included six days of participation in each of a medical-surgical and pediatric clinical at a local hospital (Hospital). The medical-surgical portion was led by Instructor One, and the pediatric portion was led by Instructor Two.
- According to the Course handbook, to pass the course students must satisfactorily complete written assignments and receive satisfactory evaluations from nurses in the clinical rotations.
- Instructor One made moderately critical comments on the complainant's first written assignment. The complainant said that Instructor One subsequently told him that she could not allow him to proceed to the next semester because of his "poor written English." Instructor One denied making this statement, and there were no other witnesses.
- Related to this assignment, Instructor One emailed the complainant, in part, "[Y]ou need to work on your language communication skills....I hope you were able to make an appointment with [the Writing Skills Lab] ...You can [also] utilize spelling/grammar check." OCR's review of the assignment showed that it did not contain spelling errors or significant grammatical errors, and was easily understood. The complainant resubmitted the assignment and Instructor One graded it and his subsequent assignments as "satisfactory."
- The complainant also alleged that Instructor One told him that it was difficult for students his age to graduate. Instructor One denied making this comment and there were no other witnesses to this alleged conversation.
- Nurses at the Hospital submit written evaluations (Evaluation Forms) of Clinical students. Additionally, clinical instructors observe students during rotations. Based on the Evaluation Forms and their own observations, the instructors provide each student both a formative (mid-point) and a summative (final) evaluation. Students are expected to remediate skill deficiencies noted during the mid-point evaluation in the Nursing Skills Lab.
- On the complainant's first two Evaluation Forms, he was rated excellent in all six categories. His third and fourth evaluations indicated that he "needed improvement" in four areas and was "satisfactory" in two. His final evaluation indicated that he needed improvement in all six categories. The other students in the complainant's group were more consistently rated "satisfactory" and "excellent" throughout their rotations.
- In October 2011 the complainant went to the Nursing Skills Lab to remediate certain skills. The Nursing Skills Lab Instructor wrote that, based on her observations, the complainant's skills were not at the proficiency level expected of a student at his level in the program.

- On his formative evaluation, the complainant was rated “needs improvement” in 16 of 63 categories. This was similar to the other students in his clinical group, all of who were also rated as needing improvement in a range of nine to 19 categories. However, the complainant was the only one rated unsatisfactory on his summative evaluation.
- The complainant failed the Course. Instructor One told OCR that this was based on her professional judgment that he had not mastered the skills necessary to perform safely as a nurse without supervision.
- The complainant alleged that he was disadvantaged because Instructor One did not show him his Evaluation Forms, and because she provided his formative evaluation very late in the Clinical. The evidence showed that several of the complainant’s peers also were not shown their forms and received late evaluations.

The complainant alleged that he was treated differently from other students in his clinical group in three respects: he was not provided with the Evaluation Forms, he did not receive his summative evaluation in a timely manner, and he failed the Course. Other students also were not given their Evaluation Forms and did not receive their summative evaluations in a timely manner; accordingly, OCR concluded that the complainant was not treated differently with respect to these actions.

However, the complainant was treated adversely compared to his peers in that he failed the Course. The complainant alleged that this was based on his age and his national origin. Although the complainant was the eldest student in his clinical group, there were other students of similar ages who passed the course. Further, the sole evidence of age discrimination was the alleged statement of Instructor One regarding the difficulty of succeeding at the complainant’s age. However, Instructor One denied making the statement and there were no witnesses to the conversation to corroborate either version. This evidence was insufficient for OCR to conclude that Instructor One failed the complainant because of his age.

With respect to whether Instructor One’s decision to fail the complainant was based on national origin, the complainant was reportedly the only student who spoke with a heavy accent, and the only student from XXXXXXXXXXXXX, and the complainant and some of his classmates perceived that he was failed because of these characteristics. Instructor One’s seemingly unjustified criticisms of the complainant’s written English skills provide some evidence of a causal connection between the complainant’s status as a non-native English speaker and his failing grade. Assuming that these facts are sufficient to raise a preliminary inference of discrimination, the College proffered a legitimate nondiscriminatory reason for the complainant’s failure. Specifically, the College asserted that the complainant did not demonstrate the skills necessary to pass the Course, and provided evidence in the form of the Evaluation Forms submitted by the nurses with whom the complainant worked and the written statement of the Nursing Skills Lab instructor to support the proffered reason. In order to conclude that the complainant’s failing grade in this case was based on his national origin rather than his

performance, OCR would be required to substitute its judgment about nursing safety and clinical competency for that of the Hospital's nurses and the College's nursing faculty; under the circumstances of this case, this is an action that OCR cannot take. Accordingly, OCR cannot conclude by a preponderance of the evidence that the complainant was treated differently based on his national origin with respect to his failure of the Course.

*Allegation Two: Hostile Environment.*

The regulations implementing Title VI, at 34 C.F.R. §100.3(a) and (b), prohibit discrimination based on race, color or national origin by recipients of Federal financial assistance. Colleges are responsible under Title VI and the regulation for providing students with a nondiscriminatory educational environment. Harassment of a student based on race, color or national origin can result in the denial or limitation of the student's ability to participate in or receive education benefits, services, or opportunities. Colleges provide program benefits, services, and opportunities to students through the responsibilities given to employees. If an employee who is acting, or reasonably appears to be acting, in the context of carrying out these responsibilities engages in harassment on the basis of race, color or national origin that is sufficiently serious to deny or limit a student's ability to participate in or benefit from the program, the college is responsible for the discriminatory conduct whether or not it has notice. In determining whether a hostile environment based on race, color or national origin has been created, OCR evaluates whether or not the conduct was sufficiently serious to deny or limit the student's ability to participate in or benefit from the college's program. OCR examines all the circumstances, including: the type of harassment (e.g., whether it was verbal or physical); the frequency and severity of the conduct; the age, race and relationship of the parties; the setting and context in which the harassment occurred; whether other incidents have occurred at the college; and other relevant factors. Linguistic characteristics are a component of national origin and harassment of a student based on accent falls under Title VI.

- The complainant told OCR that Instructor One spoke to him in a threatening way during the Clinical, and often implied that his performance was inadequate without providing any specific criticism. Instructor One denied the complainant's characterization of her conduct toward him.
- Several students interviewed by OCR described their experience in the Clinical as stressful, due to what they perceived as unreasonable expectations and intimidating behavior by Instructor One. None of these students described difficulty related to their own national origins or language skills.
- One student (Student One) told OCR that because of the complainant's accent, Instructor One repeatedly told him in a harsh manner that she could not understand what he was saying, and that, in response, other students would sometimes interpret the complainant's statements for Instructor One. She said that she thought that

Instructor One was trying to embarrass the complainant rather than legitimately trying to clarify his statements. Student One said that she perceived that Instructor One did not like the complainant, and was harder on him than on other students. Another student (Student Two) similarly stated that Instructor One sometimes made mocking facial expressions when the complainant spoke to suggest that she could not understand him, frequently asked him to repeat himself and spoke condescendingly to him in a way that she did not to other students. Student Two recalled Instructor One telling the class that if they did not have “clear English” that they would not pass the class. Another student (Student Three) told OCR that other students told him that Instructor One had said that the complainant could not pass if he could not speak English; he did not hear the statement firsthand.

- Students One, Two and Three stated that the complainant had a heavy accent, but that they could understand him. Instructor One told OCR that she did not have difficulty understanding the complainant due to his accent yet she also stated that she could not recall whether she had made the comments recounted by Students One, Two and Three.
- The complainant told OCR that throughout the medical-surgical clinical, Instructor One’s behavior toward him caused him to feel intimidated and stressed to the point that he developed insomnia and health problems.

According to the complainant and other witnesses, Instructor One singled the complainant out for disparagement in front of his classmates because of the accent with which he spoke English. As described by witnesses, Instructor One did not make this request in a respectful manner, or with the legitimate intention of clarifying the complainant’s statements; rather, she spoke in a harsh tone, made facial expressions that communicated her displeasure, and told the complainant repeatedly that she could not understand him. This type of behavior is demeaning and, because it was witnessed by the complainant’s peers, also humiliating. Witnesses also described other behavior of Instructor One that communicated to them that she did not like the complainant. Instructor One told OCR that she did not have difficulty understanding the complainant’s speech, further suggesting that her conduct was motivated by animus related to his accent rather than a legitimate desire for clarification. This evidence was sufficient for OCR to conclude, based on a preponderance of the evidence that the alleged harassing conduct did occur. Further, the conduct was sufficiently serious to create a hostile environment for the complainant based on national origin.

*Allegation Three: Failure to Respond.*

Under Title VI and the regulations, once a college is on notice of possible discrimination against a student on the basis of race, color or national origin, it is responsible for determining what occurred and responding appropriately. OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt, thorough, and effective. What constitutes a reasonable response to such discrimination will differ

depending upon the circumstances. However, in all cases the college must promptly conduct an impartial inquiry designed to reliably determine what occurred. If discrimination is found to have occurred, the college's response must be tailored to stop such discrimination, and remedy its effects on the victim. The college must also take steps to prevent the discrimination from recurring.

- The complainant sent an email to Instructor One on September XX, 2011 reading, "I feel targeted and threatened as a non-native English speaker hearing that my written English may not let me to proceed in the IV semester." The complainant copied Instructor Two and the Associate Dean of the ADN. For various reasons, none of the recipients of the email responded.
- On October XX, 2011, the complainant sent an email to the Dean of the Health Occupations, in which the ADN program resides, expressing that Instructor One had targeted him because he was not a native English speaker. The Dean responded that she would inform with the Associate Dean.
- The Associate Dean later called the complainant. Based on this call, she understood the complainant to be satisfied with arrangements Instructor One had made for him to have an extra clinical rotation, and took no further action<sup>2</sup>.
- Student Three gave a note to the Associate Dean dated November X, 2011, indicating that he thought Instructor One had treated the complainant unfairly and that he had heard from other students that Instructor One had made comments to the complainant about his English. Student Two told OCR that, after the semester ended, he also told the Associate Dean about the problems he perceived the complainant had with Instructor One related to his language skills. The Associate Dean did not take any specific action in response to these communications.
- On November XX, 2011, the complainant emailed the Associate Dean, stating that he was discriminated against in the Course and requesting reinstatement in the ADN Program. The Associate Dean responded the next day, suggesting that they meet. Instead, the complainant filed an OCR complaint.
- The College has Administrative Regulations that sets forth the procedure for Handling Complaints of Unlawful Discrimination. College representatives did not inform the complainant of the procedure or how to file a complaint.

The complainant's September, October and November email communications, as well as the communications from his classmates, were sufficient to put the College on notice of possible discrimination based on national origin. Despite this notice, the College did not conduct any inquiry to ascertain whether discriminatory conduct was occurring. As a result, it had no basis to understand whether additional steps were necessary to

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<sup>2</sup> The complainant was not able to complete this rotation due to illness.

ensure that the complainant was able to participate in the ADN program in a nondiscriminatory environment. A reasonable inquiry by the College into the complainant's concerns would have revealed, as OCR's investigation did, the harassing conduct of Instructor One. The College could have then taken steps to stop the behavior and correct the hostile environment that it created. It also did not inform the complainant of the process for filing a complaint under its procedure for resolving discrimination complaints. The College's actions did not constitute an appropriate response under Title VI.

*Allegation Four: Retaliation.*

The Title VI regulations, at 34 C.F.R. §100.7(e), prohibit colleges from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Title VI. 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 college, under circumstances that suggest a connection between the protected activity and the adverse action. If a preliminary connection is found, OCR asks whether the college can provide a nondiscriminatory 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.

- The complainant started the pediatric clinical with Instructor Two in October 2011. As described by the complainant, Instructor Two was overly critical, hostile and condescending toward him.
- In email correspondence reviewed by OCR, and in interviews, other students in the Clinical indicated that Instructor Two was hard on students generally, and that many students felt intimidated by her. Additionally, documentation provided by the complainant, including some correspondence from other students to College administrators, showed that other students felt that Instructor Two created a hostile environment for students in the ADN program.

The complainant's emails alleging discrimination based on his status as a non-native English speaker constitute protected activity under Title VI. Accordingly, the College was prohibited from retaliating against him for these communications. As described by the complainant, Instructor Two treated him with hostility in the pediatric clinical. The conduct alleged by the complainant, if true, could reasonably deter the complainant or other individuals from engaging in future protected activity; as such it constitutes adverse action. However, the evidence indicates that Instructor Two treated many students similarly to how she allegedly treated the complainant, regardless of whether they had engaged in protected activity and there was no evidence to distinguish Instructor Two's treatment of the complainant from her treatment of other students. This evidence is insufficient to establish a causal connection between Instructor Two's alleged conduct toward the complainant and his protected activity. Accordingly, OCR



cannot conclude by a preponderance of the evidence that the College retaliated against the complainant.

The College and OCR reached an agreement that, when fully implemented, will resolve the compliance issues identified by OCR. OCR will monitor implementation of the agreement. This concludes the investigation portion of this complaint and the complainant is being notified concurrently.

This letter is a resolution letter issued by OCR to address an individual OCR case. Resolution letters contain fact-specific investigative findings and dispositions of individual cases. Resolution letters are not formal statements of OCR policy and they 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.

Thank you for your cooperation in resolving this case. If you have any questions regarding this letter, please contact Suzanne Taylor, Attorney, at (415) 486-5561 or Danette Ng, Investigator, at (415) 486-5539.

Sincerely,

/s/

David Rolandelli  
Team Leader

Enclosure

cc: XXXXXXXX XXXXXXX, Esq.