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NAME OF SIGNER: STEFAN ROSENZWEIG
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Mr. Jerry Lee
President
National University
11255 N. Torrey Pines Road
LaJolla, California 92037-1011

(In reply, please refer to Docket Number 09-99-2014.)

Dear President Lee:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its resolution of the complaint referenced above. The complainant alleged that the student agreement used by National University (University) for its Master of Arts in Counseling Psychology (MAC) program on its face discriminates against students with disabilities and that the University discriminated against her on the basis of a psychiatric disability by dismissing her from its MAC program without affording her due process and by applying inappropriate standards. OCR is now closing this case based upon a written commitment by the University to implement a voluntary resolution plan (VRP).

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation. Section 504 prohibits discrimination on the basis of disability in programs and activities operated by recipients of Federal financial assistance. The University receives Department funds and is subject to Section 504 and the regulation. Though OCR also enforces Title II of the ADA, OCR did not apply it in this matter because the University is a private entity under the ADA and therefore not subject to Title II (the University is subject to Title III of the ADA which is enforced by the United States Department of Justice).

OCR initiated its resolution process by interviewing the complainant and reviewing documentary evidence and statements submitted by the complainant and the University. Under OCR resolution procedures, OCR may close a case at any time during the course of an investigation if the recipient commits in writing to take actions which OCR has determined will resolve the complaint allegations under applicable legal standards. On February 2, 2000, the University, without admitting that it violated any laws enforced by OCR, submitted a signed VRP that OCR concluded will satisfactorily resolve the complaint allegations (see enclosed VRP).

Under the terms of the VRP, the University agreed to readmit the complainant upon receiving certain assurances from her doctor, if she wishes to re-enroll. It also agreed, with technical assistance from OCR, to modify its policies, procedures and student agreements regarding its requirements for students to remain in the University's academic program so as to ensure that they do not discriminate against persons with disabilities. Because this matter was resolved by the terms of the VRP, it was not necessary for OCR to complete its investigation or make findings regarding the legality of the University's student agreement or the University's dismissal of the complainant. However, as technical assistance, OCR will discuss the allegations in the complaint and legal standards that should be applied under such circumstances. OCR hopes this discussion will provide guidance to the University regarding modifications which may be needed in its current policies, procedures and student agreements.

The complaint raises several factual questions about the complainant's performance or conduct at the University's administrative offices and during two practicums. The complainant and the University assert very different versions of what occurred. Since this matter was resolved before OCR obtained a full explanation of what occurred, and a determination of the facts was not necessary for resolution, OCR did not reach any conclusions about the actual nature of the complainant's performance or conduct.

BACKGROUND

According to the complainant, she has a diagnosis of depression. In 1996, she was accepted into and enrolled in the University's MAC program. The MAC degree requires that a student satisfactorily complete 80 quarter units of coursework and 20 hours of psychotherapy, and obtain a total of 250 hours of counseling experience at a designated practicum site while enrolled in an associated practicum course. The complainant completed her academic coursework by December 1997, earning an "A" or "A-" in each of ten classes in which she matriculated. She was approved to commence her practicum and began it at an approved site at the end of January 1998.

She experienced problems at the practicum site, and her practicum supervisor terminated his supervision of her. However, the complainant received a positive written evaluation of her performance from her practicum supervisor, and the University permitted her to continue in the practicum at another designated site where she remained until June 1998.

The University contends that on June 3, 1998, the complainant arrived at the University and demanded to speak to certain individuals regarding an objection she had related to not having received a gold tassel to wear during upcoming graduation ceremonies in which she reasonably expected to participate. According to the University, she was "rude, abusive and threatening", engaged in "unprofessional

conduct” and “evidenced strange physical movements, including jerky and strange speech.” Because of this incident, the University states that it developed a concern regarding the complainant’s conduct and the safety of its employees and decided to inquire with her practicum supervisors regarding whether she was able to safely continue in her practicum. Based on these inquiries, it learned more information about the complainant, which lead to her dismissal from the University’s MAC program.

On June 19, 1998, only a few weeks before the complainant’s anticipated graduation, the complainant’s faculty advisor¹ wrote a letter to the complainant stating that she could no longer continue in the practicum because of threatening behavior to the advising staff at National University, her previous agency supervisor, her faculty advisor, students in her practicum class, and her current supervisor. The letter also said that, as of June 18, the complainant’s current practicum site supervisor was ending the complainant’s relationship with her clinic and the complainant’s participation in her practicum course would be graded unsatisfactory. The letter stated that “the reasons for termination are based upon your psychological problems that make you unsuitable for further training and participation in the Master of Arts in Counseling Psychology program.” The letter cited in support paragraph 7 of the University’s student agreement, which all students prior to enrollment in the program are required to sign. Paragraph 7 states:

I understand that National University may suspend or terminate my participation in the [MAC] program, after affording me due process in accordance with the procedures published in the National University catalog, if National University determines that: ... (iv) I suffer from emotional, psychological or personal problems which pose an appreciable risk that I may do harm to myself or to others; (v) I have suffered in the past from such emotional, psychological or personal problems and stand a substantial likelihood of suffering a recurrence of such problems; and (vi) I suffer from emotional, psychological or personal problems which otherwise render me unsuitable for further training and participation in the program, even though my performance in those courses that are graded on academic work alone has been adequate.

The letter noted that when the complainant was first interviewed for the program, she informed the University that she had been diagnosed with a psychiatric disorder (the complainant disputes that particular diagnosis), but that she was in therapy and functioning well. The letter stated that the University, together with the complainant’s supervisor, agreed to end the complainant’s practicum “immediately for the protection

¹ The complainant’s faculty advisor has a doctoral degree in psychology and is the Chair of the University’s School of Education and Human Service’s Department of Psychology.

of [the complainant's] clients and the agency."²

The complainant denies that the facts alleged by the University are true. She contends that her first practicum supervisor retaliated against her for complaining about his inappropriate conduct, that her second practicum supervisor misinterpreted certain things that she did, and that she did not engage in inappropriate conduct at the University's administrative offices. On July 6, 1998, an attorney representing the complainant wrote to the University explaining that the complainant believed her conduct had been misinterpreted and requested an "opportunity to clarify, explain, and reassure the administration at National University that she in fact has not engaged in behavior that warrants suspension of her participation in the program." She requested due process procedural protections outlined in the University's catalogue including adequate notice and opportunity to be heard before she would be suspended.

The University catalog states:

"[a]ny form of academic dishonesty or inappropriate conduct by students or applicants may require the University to impose such penalties as deemed appropriate, ranging from warning to dismissal. Any such disciplinary action will be taken following the procedures of due process. Due process mandates that students be informed in writing of the nature of the charges against them, that they be given a fair opportunity to refute the charges, and that there be provisions for appeal of a decision."

The catalog goes on to describe in greater detail the University's grievance procedures including procedures for notice, hearing and appeal.

On July 31, 1998, the complainant's attorney wrote to the University canceling a meeting scheduled for August 7, 1998 to discuss the complainant's appeal because she was no longer representing the complainant. She advised the University that the complainant wished to proceed with her appeal and would be retaining other counsel. On September 15, 1998, the University's counsel responded in writing to the complainant asking that she have her representative contact his office or that she please contact his office to arrange a telephone conference.

On October 13, 1998, a second attorney representing the complainant wrote to the University's counsel. She alleged that the University had discriminated against the

² The letter proposed a remedial plan which called for participation by the complainant in psychotherapy and monitoring by the University for a year, and, after the year, reconsideration (in consultation with the complainant's therapist) of whether the complainant could be reinstated in the MAC program.

complainant on the basis of disability and denied the complainant of due process. She also alleges that the University's student agreement discriminated on the basis of disability. The complainant's attorney requested that the complainant be afforded due process and that the student agreement be revised in accordance with applicable laws which prohibit discrimination based on disability. The complainant's attorney also requested that the University immediately reinstate the complainant to the MAC program and place her on authorized leave status pending completion of due process procedures.

On October 22, 1998, the University agreed in writing to provide the complainant with due process and to notify her of the initial charges. The University also agreed, without conceding fault, to reinstate the complainant and place her on authorized leave. However, the University did not respond to the complainant's complaint regarding the University's student agreement. On December 18, 1998, the complainant's attorney wrote to the University's counsel stating that she had not yet received anything from the University and repeating her request that the University inform the complainant of the charges against her.

The complainant initially filed this complaint with OCR on October 27, 1998, alleging only that the University's student agreement on its face discriminated against students with disabilities. On January 19, 1999, after the complainant had not heard anything from the University since October 22, 1998, the complainant's attorney submitted a second letter to OCR amending the original complaint. The complainant contends that she did not engage in any kind of inappropriate or threatening behavior and that if given the opportunity could explain any misunderstanding the school might have. She alleges that the University discriminated against her when it dismissed her from the MAC program without providing her with adequate notice, a hearing, and an opportunity to appeal as called for in the University's catalog and by applying an unlawful standard in the dismissal process.

The University asserts that it did not deny the complainant due process as it was always prepared to provide her with a hearing and it rescinded its termination of the complainant. The University also asserted that its student agreement complied with Section 504 and its disqualification of the complainant was lawful under applicable legal standards. The University did not dispute the fact that the complainant was a person with a disability under Section 504.

On February 2, 2000, the University signed a VRP that resolves the allegations in the complaint. Because the allegations are resolved by the VRP, it was not necessary for OCR to complete its investigation, determine whether the University's student agreement on its face violated Section 504, reconcile disputed facts related to the complainant's alleged conduct, or decide whether the University's actions against the complainant failed to comply with legal standards. However, by the terms of its VRP,

the University must modify its policies, procedures and student agreements to ensure that they do not discriminate against persons with disabilities. Therefore, OCR is providing the following legal analysis of the issues raised by the complaint as technical assistance to the University.

LEGAL ANALYSIS

OCR would like to emphasize at the outset of this analysis that it supports colleges in adopting and enforcing high standards and expectations for all students including students with disabilities. In the disciplinary context, OCR generally requires only that students with disabilities be treated in a manner that is comparable to how similarly situated students without disabilities are treated. An important exception, however, arises when a college proposes to take action against a student with a disability, not because the student has actually failed to achieve or abide by academic or technical standards of the college, but because, as a result of a disability, the college believes either that further participation by the student in a program or activity operated by the college poses a risk to health and safety, or, that the student will not be able in the future to meet academic or technical standards of the college. In such a situation, due process will require a college to adhere to more rigorous procedures to ensure that students with disabilities are not subject to adverse action on the basis of unfounded fear, prejudice or stereotypes.

Correspondence in this case refers to three possible reasons for the University's dismissal of the complainant. First, the University alleged that the complainant engaged in conduct which led to the termination of her participation in the practicum. Second, the University alleged that, as a result of psychological problems, the complainant could not safely participate in the University's MAC program. Third, and finally, the University alleged that the complainant, as a result of psychological problems, was "unsuitable" for further participation in its MAC program. Depending on the reason for the University's action against the complainant, different procedures would have been required. As technical assistance, OCR will discuss the procedures and standards which are required in each of these three situations. Before discussing these procedures, however, OCR will address issues raised when a policy, such as that embodied in the University's student agreement, singles out for different treatment students with disabilities.

This analysis will therefore discuss four legal issues under Section 504:

1. May post-secondary educational institutions (colleges) impose special requirements upon persons with disabilities?
2. What due process must be provided before a college suspends or dismisses a student with a disability for failing to achieve or abide by academic or technical

standards of the college?

3. What procedures are required before a college suspends or dismisses a student because it believes that, as a result of a disability, the student's participation in a program or activity operated by the college poses a risk to the health or safety of the student or others?
4. What procedures are required before a college suspends or dismisses a student because it believes that, as a result of a disability, the student is not able to meet academic or technical standards of the college?

This analysis is based upon OCR's interpretation of the regulation implementing Section 504 which is found at 34 C.F.R. Part 104. Under 34 C.F.R. §104.4(a) and (b)(1)(ii), no qualified disabled person shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance. An individual with a disability is any person who has a physical or mental impairment which substantially limits one or more major life activities. (34 C.F.R. §104.3(j)(1)) A "qualified" individual with respect to post-secondary education is a disabled person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity. (34 C.F.R. §104.3(k)(3))

Under 34 C.F.R. §104.44(a), a post-secondary educational institution which receives federal financial assistance must make academic adjustments or modifications (reasonable accommodations) to its academic requirements which are necessary to ensure that such requirements do not discriminate or have the effect of discriminating on the basis of disability against a qualified student. Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such a student or to any directly related licensing requirement will not be regarded as discriminatory. The Section 504 regulation does not require a college to provide accommodations that would fundamentally alter the nature of the school's program such as lower its academic standards.

A. SPECIAL REQUIREMENTS FOR STUDENTS WITH DISABILITIES ARE PRESUMPTIVELY DISCRIMINATORY

Until this year, students who wished to enroll in the University's MAC program were required to sign the University's student agreement which in effect stated that they may be suspended or terminated if they have or have had "emotional, psychological or personal problems"³ ("psychiatric disabilities") which pose an "appreciable risk" that the student will do harm to him or herself or others, or, which otherwise render the student "unsuitable" for further training or participation in the program. While the statement may reflect a concern regarding the ability of at least some students with psychiatric disabilities to safely participate in or meet the requirements of the MAC program, it also brings into effect stereotypes about students with psychiatric disabilities. It is the influence of such stereotypes that Section 504 was enacted to eliminate from decisions affecting the participation of students in programs funded by the federal government.

Under Section 504, policies that single out persons with disabilities for different standards are presumptively discriminatory. Schools cannot establish criteria that exclude or otherwise limit the participation of students because of their disabilities without justification. This, of course, does not mean that colleges may not set high standards. On the contrary, colleges are encouraged to establish and publish high standards, including high standards related to conduct and safety, for all students, including students with disabilities. However, because the law strongly favors decisions about student participation that are based on determinations of individual merit rather than generalized notions about persons based upon their membership in a protected class, any policy or practice which distinguishes a person solely based upon the person's status as a disabled person will always be subject to very careful scrutiny.

B. DUE PROCESS REQUIRED BEFORE A COLLEGE SUSPENDS OR DISMISSES A STUDENT WITH A DISABILITY FOR FAILING TO ACHIEVE OR ABIDE BY ACADEMIC OR TECHNICAL STANDARDS

A critical issue raised by the complaint regards whether the complainant was afforded due process. To the extent that the University dismissed the complainant because it believed that she had failed to achieve or abide by its academic or technical standards, it was required to afford her due process.

³ Because this case was resolved, it was not necessary to determine how the University defined the term "personal problems" and whether its meaning was distinct from "emotional" or "psychological" problems. OCR's concern here regards the use of terms which connote mental health, psychological, or psychiatric disorders or disabilities and uses in this letter the term "psychiatric disabilities" to encompass these concepts. OCR does not comment regarding the use of the term "personal problem" to the extent that it means something different than a "psychiatric disability".

A student with a disability is qualified to remain in a college program so long as the student meets the academic and technical requirements of the program. 34 C.F.R. § 104.3(k)(3). Subsumed within these requirements are the college's code of conduct, standards related to relevant licensing requirements, and expectations pertaining to safety. Section 504 generally permits a college to suspend or dismiss a student with a disability, if, after affording the student any due reasonable accommodations, the student fails to meet academic or technical standards of the school, so long as the student with a disability is treated in a manner that is equal to how a similarly situated student without a disability is treated. Such treatment would entail the application of standards and procedural safeguards, such as notice, opportunity for hearing and appeal that are comparable to those applied to students without disabilities. If a college, generally, considers mitigating circumstances when deciding whether to suspend or dismiss students without disabilities, it must consider similar factors for students with disabilities including whether the student, if provided reasonable accommodations, could, in the future, meet school standards.

It is important also to note that Section 504 does not prevent a college from taking steps that are necessary to ensure safety, including, in certain circumstances, the immediate suspension of a student with a disability. However, in all situations, it is expected that, at a minimum, that a student with a disability will be afforded due process that is fully comparable to that provided to students without disabilities prior to any final disciplinary action. Of course, a college will also make available to a student with a disability prompt and equitable grievance procedures if the student believes that he or she has been discriminated on the basis of disability in the disciplinary or dismissal process.

C. PROCEDURES REQUIRED BEFORE A COLLEGE SUSPENDS OR DISMISSES A STUDENT BECAUSE, AS A RESULT OF A DISABILITY, THE STUDENT'S PARTICIPATION POSES A RISK TO HEALTH OR SAFETY

When a college proposes to dismiss a student because of a concern that, as a result of the student's disability, the student *might* engage in conduct which poses a risk to health or safety, special standards apply that are designed to balance legitimate concerns for safety with the goal of protecting disabled students from unfounded fears and prejudice. Under a United States Supreme Court decision interpreting Section 504, *School Board of Nassau County v. Arline*, 480 U.S. 273, 107 S.Ct. 1123 (1987), a college may dismiss a student from a college program when, as a result of a disability, the student's participation in the program poses a risk to health or safety only if that risk constitutes a "direct threat". A "direct threat" is a significant risk of causing substantial harm to the health or safety of the student or others that cannot be eliminated or reduced to an acceptable level through the provision of reasonable accommodations. A significant risk constitutes a high probability of substantial harm

and not just a slightly increased, speculative or remote risk. An “appreciable risk” is less than a “significant risk” and is therefore not sufficient to constitute a direct threat.

A college’s determination that a student poses a direct threat must be based upon an individualized assessment of the student’s present ability to safely participate in the academic program in which the student is enrolled. This assessment must be based upon objective evidence and reasonable judgements relying on current medical knowledge. In making such a determination, a college must identify the specific behavior that would pose a direct threat and determine the nature, duration and severity of the risk, the probability that the potential injury will actually occur, and whether reasonable modifications of policies, practices or procedures would sufficiently mitigate the risk. The more speculative and remote the risk, the greater is the opportunity for discrimination, and, consequently, the greater is the need for a careful consideration of evidence and a higher level of justification. This level of protection may not be present in existing disciplinary procedures. Colleges may have to establish new procedures or modify existing ones to ensure that appropriate considerations are taken into account.

D. PROCEDURES REQUIRED BEFORE A COLLEGE SUSPENDS OR DISMISSES A STUDENT BECAUSE, AS A RESULT OF A DISABILITY, THE STUDENT IS NOT ABLE TO MEET ACADEMIC OR TECHNICAL STANDARDS

In most cases, OCR expects that a college will not take action against a student unless the student actually has failed to achieve or abide by the college’s academic or technical standards. However, in certain situations, a college might learn of information about a student which leads the college to take action against the student, not because the student has failed to do so, but because the college believes that the student will not be able to meet such standards in the future.

When a college considers taking action against a student because it anticipates that, as a result of the student’s disability, the student will not be able to achieve or abide by academic or technical standards, including any standards related to student performance in a clinical program or to licensing requirements, it must be careful to ensure that any action ultimately taken will be based upon legitimate considerations rather than stereotypes or prejudice based on the student’s disability. In considering such action, a college cannot rely simply upon a vague standard such as “suitability”. Such a standard fails to warn students about program expectations or guide school officials who must decide whether students can, with or without reasonable accommodations, meet program requirements.

Academic and technical standards, including those related to interpersonal or technical skills required in a clinical setting, if used to determine that, as a result of a disability,

a student will not be able to satisfactorily participate in a program operated by a college, must be limited to those which are essential to the program of instruction or directly related licensing requirements or professional standards. (34 C.F.R. §104.44(a)) Publishing clear standards that are applicable to all students will advantage a college. Doing so gives everyone clear notice of expectations, reduces the opportunity for the introduction of bias into the decision-making process, and lessens the possibility that a standard will be challenged as an “after the fact” pretext for discrimination.

Before a college decides to suspend or dismiss a student because it believes that the student, as a result of a disability, is not able to meet academic or technical standards, the college must identify the standard that the student is not able to meet and explain why the standard is essential to the program of instruction or to a related licensing or professional requirement. It must also explain why the student’s disability will prevent the student from meeting that standard. The decision must be based upon an individualized assessment of the student’s ability, with or without reasonable accommodations, to meet this standard. It must avoid mere speculation and be based upon reliable information demonstrating that the student is not able to meet the identified standard. Any determination about the student’s ability to meet or conform to such a standard must be based on objective evidence and reasonable judgements relying on current medical knowledge.

SUMMARY

Based on the University’s commitment to implement the terms of the VRP mentioned above, OCR has concluded that the issues raised in the complaint under Section 504 have been or will be resolved. This letter concludes OCR’s investigation of this matter. OCR may provide further technical assistance if requested by the University and will work with the University in making the changes in its policies, procedures and student agreements which are called for in the VRP.

This letter is not a determination of the compliance status of the University with respect to any issues other than those explicitly addressed herein.

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

OCR thanks the University for its cooperation in reaching a voluntary resolution of this matter. Further communication with OCR related to implementation of the VRP should be directed to David Giles at (415) 556-4143.

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Sincerely,

Stefan M. Rosenzweig
Director
San Francisco Enforcement Office
Western Division

Enclosure