

**U.S. DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
NEW YORK OFFICE
32 OLD SLIP, 26TH FLOOR
NEW YORK, NY 10005-2500**

ADMINISTRATIVE COMPLAINT

COMPLAINANT

Tsholofelo Stephanie Stewart
[REDACTED]

Stephanie Stewart is currently a student at the Borough of Manhattan Community College (“BMCC”), one of the twenty-three colleges within The City University of New York (“CUNY”). She has been enrolled since August 2011, and is about to start her fourth and final semester toward her Associates Degree, with a major in Liberal Arts. During the Spring semester of 2012, Stephanie experienced pregnancy discrimination when BMCC refused to excuse absences related to her pregnancy and retaliation when she complained.

COMPLAINANT’S COUNSEL

National Women’s Law Center
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The National Women’s Law Center (“NWLC”) is a non-profit organization that has been working since 1972 to expand the possibilities for women and girls at work, in school, and in their communities. The NWLC has a particular focus on the promotion of equal educational opportunities through its work to ensure compliance with Title IX, including the law’s prohibition of discrimination based on pregnancy.

RECIPIENT

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RECIPIENT’S COUNSEL

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PRELIMINARY STATEMENT

1. This Complaint is filed by Stephanie Stewart pursuant to Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (“Title IX”), and the regulations and policies promulgated thereunder. *See* 34 C.F.R. § 106 *et seq.* Title IX prohibits discrimination on the basis of sex, including pregnancy discrimination, in federally funded education programs and activities.
2. As detailed in the Factual and Legal Allegations below, Stephanie has been subjected to pregnancy discrimination and retaliation by a BMCC professor and by BMCC administrators. Further, BMCC has an ongoing policy that allows for pregnancy discrimination.
3. In order to address these failures, Stephanie requests that the New York Office for Civil Rights (“OCR”) investigate BMCC to determine whether it is meeting its obligations under Title IX and take all necessary steps to remedy any unlawful conduct.

JURISDICTION

4. OCR is responsible for ensuring compliance with Title IX and receiving information about, investigating, and remedying violations of Title IX and its implementing regulations and guidelines in the region. 34 C.F.R. §§ 106.71, 100.7.
5. The complaint is timely. Stephanie withdrew from the course in question on March 21, 2012. On September 5, 2012, Stephanie filed a complaint of pregnancy discrimination and retaliation with the New York State Division of Human Rights (“Division”) under Article 15 of the Executive Law of the State of New York. This complaint is attached as Exhibit A.
6. On November 21, 2012, the Division issued a determination and order of dismissal for lack of jurisdiction. The dismissal order stated that the New York Court of Appeals’ decision in *North Syracuse Central School District v. N.Y. State Division of Human Rights*, 19 N.Y.3d 481 (2012), “requires the dismissal of all cases alleging discrimination in the provision of educational services by public educational institutions.” A copy of this dismissal order is attached as Exhibit B.
7. Stephanie files this complaint on January 17, 2013, less than 60 days from the Division’s dismissal of her complaint. Pursuant to Section 107 of OCR’s Case Processing Manual, the agency “may grant a waiver of the 180-day filing requirement for good cause shown,” such as if “[t]he complainant filed a complaint alleging the same discriminatory conduct within the 180-day period with another federal, state, or local civil rights enforcement agency . . . and filed a complaint with OCR within 60 days after the other agency . . . notified the complainant that it would take no further action.” Case Processing Manual, Section 107(c), available at <http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.html>. OCR should grant a waiver in this case.

8. In any case, since BMCC continues to maintain a policy that enables discrimination, this complaint is timely. BMCC's policy of allowing classroom instructors to determine whether to excuse absences and allow for make-up work on a case-by-case basis violates the Title IX regulations, which provide that "[i]n the case of a recipient which does not maintain a leave policy for its students . . . a recipient shall treat pregnancy . . . and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began." 34 C.F.R. § 106.40(b)(5).

FACTUAL ALLEGATIONS

9. BMCC receives federal financial assistance and is therefore prohibited from discriminating on the basis of sex by Title IX.¹
10. Upon information and belief, neither BMCC nor CUNY maintains a formal leave policy for its students who are pregnant or who have temporary disabilities. Rather, each instructor is allowed to determine his or her own policy for absences and make-up work for pregnancy and related medical conditions.
11. Stephanie has been enrolled full-time at BMCC since August 2011, and on January 28, 2013 she will begin her fourth and final semester in her Associates degree program. A model student, Stephanie received an "Out-In-Two" academic scholarship, which made her eligible for a \$1,600 grant for her second, third, and fourth semesters.² Stephanie was one of eight students chosen for the 2012 BMCC Out-In-Two scholarship program based on her first semester grades. A copy of Stephanie's Fall 2011 grades is attached as Exhibit C.³
12. At the start of the Spring 2012 semester, Stephanie informed all her professors about her pregnancy, and requested that she not be penalized and be allowed to make up the work should she be admitted to the hospital and miss class on a day a test or quiz is given. She offered to provide a doctor's note to prove the reason for her absence. Four of her five professors had no problem with this proposal, and allowed her to make up her work. Examples of email correspondence verifying these arrangements are attached as Exhibit D to this complaint.

¹ See, e.g., <http://www.bmcc.cuny.edu/finaid/page.jsp?pid=1032&n=Loans>.

² See <http://www.bmcc.cuny.edu/advisement/page.jsp?pid=1004&n=Out%20in%20Two%20Program>.

³ Stephanie had earned three A's, and two A-'s. She received a GPA of 3.88 and made the Dean's List.

BMCC's Discriminatory Leave and Make-up Work Policy and Refusal to Address and Correct Discrimination

13. Professor [REDACTED] who taught Anthropology 210, entitled Roles of Women,⁴ did not accede to Stephanie's request. On January 30, 2012 during the first class meeting, Professor [REDACTED] gave students an introduction to the course, and discussed the syllabus and class policies. A copy of the Anthropology 210 syllabus is attached as Exhibit E to this complaint. Professor [REDACTED] explained that she does not allow makeup tests or assignments. Stephanie inquired whether this policy covered absences supported by medical documentation, such as in the case of hospitalization, and Professor [REDACTED] said that it did. Stephanie then asked if the policy applied to unforeseen emergencies, and Professor [REDACTED] stated that it did.⁵
14. Stephanie sent Professor [REDACTED] a formal notification of her pregnancy by email on February 16: "I would like to inform you that I am currently pregnant and am in my third trimester, but as you may know labor is unpredictable. However I am asking that if it just so happens that I am admitted to the hospital on a day that you give a test can I still be granted the chance to write the test." Stephanie offered to provide her medical records to justify her absence. Because she did not receive a reply, on February 20 Stephanie forwarded the message to Professor [REDACTED] again, asking for a reply. Copies of these emails can be found in Exhibit F at page 4.
15. On February 21, Professor [REDACTED] replied that she does not give opportunities to make up missed work, and would not reconsider this policy in Stephanie's case. She explained as follows:

If you miss one test, this is not replaceable with another test [I don't give make ups, as it shows on the course syllabus]. However, you will still have a chance to receive full credit for your test grades since **I will drop ONE test grade.** This means, you need to try to take the test without thinking you may have an emergency. But if you have one, it will **NOT** hurt your test grade at all. What you must try is NOT to have TWO emergencies. Is this clearer now?

This email is contained in Exhibit F, at p. 3.

16. The same day, February 21, Professor [REDACTED] refused to grade homework that Stephanie turned in via email after she missed class due to a doctor's appointment. (The class normally met on Mondays, but was rescheduled for Tuesday, February 21 due to the

⁴ According to the BMCC website, "this course analyzes the status and roles of women in cross-cultural perspective. Particular emphasis is given to the socio-cultural forces underlying the women's rights movements in the 19th century and the present resurgence of feminism." See [http://faculty.bmcc.cuny.edu/\[REDACTED\]](http://faculty.bmcc.cuny.edu/[REDACTED])

⁵ Curiously, the class syllabus included a statement on academic adjustments for students with disabilities: "Students with disabilities who require reasonable accommodations or academic adjustments for this course must contact the Office of Services for Students with Disabilities. BMCC is committed to providing equal access to all programs and curricula to all students." Exhibit E, at 3.

President's Day holiday; the rescheduled class conflicted with Stephanie's doctor's appointment.) A copy of the email exchange between Stephanie and Professor [REDACTED] is attached as Exhibit G.

17. On March 19, Stephanie emailed [REDACTED], a Student Persistence and Retention Outreach Specialist;⁶ [REDACTED], a Student Advisor⁷ and the advisor for the Out-In-Two scholarship program; and Dean [REDACTED].⁹ She cc'd Professor [REDACTED]. In her email, Stephanie asked the administration to intervene on her behalf with Professor [REDACTED]. After explaining the situation, Stephanie noted that "[a]s Prof. [REDACTED] mentioned [i]n her email, I should not try to have more than one emergency, yet emergencies in their nature are unpredictable, unplanned and unpreventable." This email is contained in Exhibit F, at p. 2-3.
18. Professor [REDACTED] replied to all, explaining that she would not change her course policy for Stephanie. She said she found it "disconcerting" that "she could not accept any of my policies" and "have told her that . . . I will not change my course policy just because she finds it inconvenient." This email is contained in Exhibit F, at p. 1.
19. That same day, on March 19, Stephanie met with [REDACTED]. She explained Professor [REDACTED]'s response to her request, and asked for the BMCC administration to intervene on her behalf. Ms. [REDACTED] told Stephanie that each professor was allowed to set their own policies regarding make-up work, and that she needed to follow Professor [REDACTED]'s rules. Ms. [REDACTED] informed Stephanie that not only was Professor [REDACTED] the course instructor, she is tenured and the Director of the [REDACTED] Department, and that if Stephanie found the policy inconvenient she should drop the course. Stephanie asked to see the Dean.
20. The same day, on March 19, Stephanie met with Dean [REDACTED], and reiterated her desire to be allowed to make up any tests she might miss during her labor and recovery. He told her that the professor's rules are her rules and there was not anything he could do. He told Stephanie that if she did not like the policy, she would need to drop the course.
21. On March 21, in the face of Professor [REDACTED]'s refusal to provide time off for any medical absences related to her pregnancy; BMCC's policy of allowing professors to set their own make-up policies; its refusal to intervene on her behalf; and the repeated suggestion from the professor and members of the administration that she should drop the course, Stephanie withdrew from the course. A copy of the withdrawal form is attached Exhibit H to this complaint. This withdrawal was well in advance of the April 19 deadline to withdraw with a grade of "W," which does not affect a student's GPA. After that deadline, no withdrawals are allowed, and any withdrawals are designated as "WU," an unofficial withdrawal, which is calculated as an "F" in the student's GPA. The BMCC academic calendar confirming the April 19 date is attached as Exhibit I. BMCC

⁶ See <http://www.bmcc.cuny.edu/directory/departments.jsp?id=1177>.

⁷ See *id.*

⁸ See <http://www.bmcc.cuny.edu/advisement/page.jsp?pid=1004&n=Out%20in%20Two%20Program>.

⁹ See http://www.bmcc.cuny.edu/about_bmcc/page.jsp?pid=1040&n=Dean%20Erwin%20J.%20Wong.

webpages explaining the school's grading system and the "WU" grading option are attached as Exhibit J.

22. The Contract Agreement that Stephanie signed for her Out-In-Two merit scholarship provided that "I will not change or withdraw from any courses or register without the approval of the Coordinator—any unauthorized changes will automatically withdraw me from the scholarship program." A copy of this agreement is attached as Exhibit K.
23. As a result of withdrawing from Anthropology 210, Stephanie was concerned that she would be kicked out of the Out-In-Two program, so she resigned from the scholarship program before that could happen. In an email dated April 30 Stephanie explained to Ms. [REDACTED], Ms. [REDACTED], and Dean [REDACTED] by email that she was disappointed that the BMCC administration and scholarship coordinator (Ms. [REDACTED]) did not come to her aid with Professor [REDACTED] "even though the scholarship's main prerogative is to make sure that a recipient[']s academic progress is not affected nor delayed." Stephanie also cc'd Senior Vice President [REDACTED], who supervises the Out-In-Two Scholarship Program. A copy of this email is attached to this complaint as Exhibit L. The scholarship would have provided Stephanie with \$1,600 per semester for the last three semesters of her tenure at BMCC.¹⁰
24. On May 23, Stephanie wrote a letter to Ms. [REDACTED] explaining that she "had followed the chain of command to solve the problem through my scholarship coordinator [REDACTED] and Dean [REDACTED], but unfortunately to no avail." She included attachments of the relevant documents for Ms. [REDACTED] "to review in order for you to understand my problem and where my decision[s to drop the course and withdraw from the scholarship program] stem[] from." Stephanie hand delivered this latter to Ms. [REDACTED]'s assistant. A copy of this letter is attached to this complaint as Exhibit M.
25. BMCC never intervened on Stephanie's behalf regarding Professor [REDACTED]'s refusal to excuse any pregnancy-related absences. Nor did it modify its professor-driven absence policy.

Retaliation

26. After the email exchange of February 21, detailed above in Paragraph 15, Professor [REDACTED] began singling Stephanie out for discipline and unfair treatment. This punitive treatment began February 21, the very same day on which the emails detailed above were sent. For instance, as detailed above in Paragraph 16, on February 21 Professor [REDACTED] refused to grade homework that Stephanie turned in via email after she missed class due to a doctor's appointment. In addition, on or about March 5, Professor [REDACTED] reprimanded Stephanie in front of the entire class—telling her to be quiet and pay attention—when Stephanie replied to a question from the student sitting next to her. Professor [REDACTED] did not publicly scold any other students in a similar manner. Other unfair reprimands occurred on February 27 and March 12.

¹⁰ See <http://www.bmcc.cuny.edu/advisement/page.jsp?pid=1004&n=Out%20in%20Two%20Program>.

27. During class on March 12, Professor [REDACTED] checked each student's homework. Stephanie had completed two of the three assignments, but showed the professor that she had not completed the third assignment only because the document Stephanie had downloaded from the electronic "blackboard" site was missing the assignment. Professor [REDACTED] refused to give Stephanie credit for the assignment, told Stephanie they were having a communication problem, and asked to speak to her after class.
28. After class, Professor [REDACTED] accused Stephanie of being rude in class and challenging her authority. Stephanie maintained she was not rude, and that she only asked about the absence policy one time. She offered to provide classmates as witnesses. Professor [REDACTED] then suggested their failure to communicate might be a "cultural issue" (Stephanie is from South Africa), reiterated that she would not change her policy, and said that if Stephanie did not like the policy she should drop the course.
29. On March 19, the same day of Stephanie's email complaint and meetings with Ms. [REDACTED] and Dean [REDACTED] described in Paragraphs 19 and 20, Professor [REDACTED] filed an academic warning against Stephanie, based on Stephanie's alleged failure to turn in her homework and her "attitude towards instructor." Professor [REDACTED] recommended that Stephanie address her "respect for faculty" and "understanding and acceptance of course policy." The academic warning form claimed that "another form was sent earlier, but lost."
30. On March 27, as required, Stephanie met with Professor [REDACTED], a counselor, to discuss the academic warning.¹¹ She brought in documentation that she had turned her assignments in on time, and Professor [REDACTED] agreed, noting "all assignments completed" on the academic warning form. Stephanie offered to provide members of her class as witnesses who could attest to her attitude in class. Ultimately, Professor [REDACTED] determined that Stephanie had not done anything wrong. He remarked that he "wasn't sure why [she] was here" and noted that it was "ironic" that the complaint came from her women's studies professor. The academic warning, including Professor [REDACTED]'s note regarding Stephanie's completed assignments, is attached as Exhibit N to this complaint.
31. Professor [REDACTED] continued to retaliate against Stephanie. Over the summer, Stephanie checked her grades online and realized that her grade for Anthropology 210 was listed as a "WU," which was calculated into her GPA as an "F," causing her GPA for the semester to be a 2.53, and bringing her cumulative GPA down to a 3.27. These grades are included in Exhibit C. As discussed above at Paragraph 21, Stephanie had in fact withdrawn well in advance of the deadline, and should have received a "W," which would not have affected her GPA.
32. On the first day of the Fall semester, August 28, Stephanie inquired about the error on her transcript with [REDACTED], the Assistant Registrar. Mr. [REDACTED] told Stephanie that because she withdrew before the deadline, her grade would automatically be a "W," and the only way it would show up as a "WU" was if Professor [REDACTED] had

¹¹ See <http://www.bmcc.cuny.edu/counseling/counselors.jsp>.

manually changed her grade. Mr. [REDACTED] corrected Stephanie's grade, so that it accurately reflected her withdrawal before the relevant deadline. Mr. [REDACTED]'s signature and verification of her grade of "W" on August 28 is on the withdrawal form, attached as Exhibit H.

33. Once the registrar corrected Stephanie's grade following Professor [REDACTED]'s retaliation, Stephanie had a cumulative GPA of 3.56. A copy of Stephanie's corrected transcript is attached as Exhibit O.
34. Stephanie informed the administration about Professor [REDACTED]'s retaliation against her. In her April 30 email to Ms. [REDACTED], Ms. [REDACTED], and Dean [REDACTED], referenced in Paragraph 17 above and attached as Exhibit L, Stephanie clearly stated that Professor [REDACTED]'s "unwillingness to accommodate" Stephanie's pregnancy—and her "immediate[] retaliat[ion]" after Stephanie complained—violated Title IX, and raised concerns about BMCC's decision to "condone and accept this type of illegal activity."
35. BMCC never investigated Stephanie's allegations that Professor [REDACTED] retaliated against her and never even contacted her for further information.

Impact on Stephanie and Costs

36. The stress from the discrimination and retaliation took a toll on Stephanie. She was depressed and anxious, and her doctor recommended that she take a break from school. Although she was not due until April 28, and her baby was not born until May 4, she was unable to attend classes after March 29. The note from her doctor requesting temporary medical leave is attached to this complaint as Exhibit P.
37. Stephanie has completed three of her four semesters; her final semester will begin on January 28, 2013. She still plans to graduate on time, but is burdened because she now needs to take an additional course during the upcoming Spring 2013 semester to make up the credits she lost when she was forced to drop Anthropology 210. This will be especially burdensome since Stephanie now has a young baby.
38. Stephanie has lost \$495 in tuition and \$93 in books she bought for Anthropology 210. In addition, she traveled to and from BMCC on Mondays solely for Anthropology 210 (\$4.50 round trip), and incurred \$27 in subway costs for the six class meetings she attended. Finally, Stephanie no longer receives her Out-In-Two scholarship, which was \$1,600 per semester.

LEGAL ALLEGATIONS

39. As outlined in the Factual Allegations above, BMCC failed to comply with Title IX and its implementing regulations regarding pregnant and parenting students.

40. Title IX provides in relevant part that:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a).

41. Title IX's implementing regulations make clear that, "[i]n the case of a recipient which does not maintain a leave policy for its students . . . a recipient shall treat pregnancy . . . as a justification for a leave of absence for so long a period as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began." 34 C.F.R. § 106.40(b)(5). The regulations further provide other requirements to ensure the equitable treatment of pregnant and parenting students.
42. Title IX also prohibits retaliation against those who complain of sex discrimination. *See Jackson v. Birmingham Bd. of Educ.*, 200 U.S. 321 (2005) (holding Title IX's private right of action encompasses claims of retaliation against an individual because he complained of sex discrimination). Thus, as part of a school's Title IX obligations, it must take steps to prevent any retaliation against the student who made the complaint. *See* U.S. Department of Education, Office for Civil Rights, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS OR THIRD PARTIES 17 (Jan. 2001), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>. OCR has determined that failing to respond to a complaint of sex discrimination can constitute retaliation. *See* Medical College of Georgia, No. 04-10-2053 (July 29, 2010).
43. BMCC violated Title IX's prohibition on pregnancy discrimination and retaliation by
- a. maintaining a policy that allows individual professors to set rules regarding leave and make-up work, without clear guidelines regarding compliance with civil rights laws;
 - b. refusing to address the impact that BMCC's hands-off leave and make-up policy had in Stephanie's case, which allowed Professor [REDACTED] to institute an inflexible rule that would fail to treat her absence as excused and "reinstate[Stephanie] to the status which she held when the leave began" 34 C.F.R. § 106.40(b)(5); and
 - c. failing to investigate and remedy Professor [REDACTED]'s retaliation against Stephanie.

RELIEF REQUESTED

44. Stephanie requests that:

- a. OCR investigate BMCC to determine whether it is allowing discrimination on the basis of sex under its education program. *See* 42 U.S.C. § 1681(a).
- b. OCR take all necessary steps to remedy any unlawful conduct identified in its investigation or otherwise on the part of BMCC, as required by Title IX and its implementing regulations. 34 C.F.R § 106.3(a).
- c. If any violations are found, OCR secure an assurance of compliance with Title IX from BMCC, as well as full remedies for the violations found. *See* U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS, *OCR Case Processing Manual* § 304 (Jan. 2010), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.html#I_8 (setting forth guidelines for resolution agreements).
- d. OCR monitor any resulting agreements with BMCC to ensure that compliance with Title IX is achieved.
- e. BMCC apologize to Stephanie and commit, moving forward, to address the needs of its pregnant and parenting students.
- f. BMCC reinstate Stephanie as an Out-In-Two Scholarship recipient, and that her academic records reflect her scholarship as well as her placement on the Dean's list.
- g. In addition to the policy changes that would bring BMCC into compliance with Title IX, BMCC must reimburse Stephanie for the quantifiable costs she has had to bear as a result of BMCC's discriminatory treatment. As a result of BMCC's discrimination and retaliation, Stephanie has incurred \$3,815 in costs related to being forced to drop out of Anthropology 210.
- h. Finally, the National Women's Law Center is a non-profit organization that has taken on representation of the Complainant pro bono and has put in a significant amount of time working to resolve this matter, including attorney time in drafting the complaint, and phone calls with our client. We have complete documentation of our time spent and expenses, and will make them available to OCR upon request.

Respectfully submitted,

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Date: January 17, 2013