



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION II

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October 17, 2014

Kevin E. Drumm, Ph.D.
President
State University of New York, Broome Community College
P.O. Box 1017
Binghamton, New York 13902

Re: Case No. 02-14-2323
State University of New York, Broome Community College

Dear Dr. Drumm:

This letter is to notify you of the determination made by the U.S. Department of Education, New York Office for Civil Rights (OCR), with respect to the above-referenced complaint filed against the State University of New York, Broome Community College (the College). The complainant alleged that the College failed to respond appropriately to her complaint of sexual harassment (Allegation 1). The complainant also alleged that in retaliation for her complaint of sexual harassment, the Vice President of the College advised other students and staff that the complainant engaged in a relationship with a faculty member (Allegation 2).

OCR is responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX), as amended, 20 U.S.C. § 1681 *et seq.*, and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in programs and activities receiving financial assistance from the U.S. Department of Education (the Department). The University is a recipient of financial assistance from the Department. Therefore, OCR has jurisdictional authority to investigate this complaint under Title IX.

The regulation implementing Title IX, at 34 C.F.R. § 106.71, incorporates by reference 34 C.F.R. § 100.7(e) of the regulation implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, which provides that:

No recipient or other person shall intimidate, threaten, coerce or discriminate against any individual for the purpose of interfering with any right or privilege secured by regulations enforced by OCR or because one has made a complaint, testified, assisted or participated in any manner in an investigation, proceeding or hearing held in connection with a complaint.

During its investigation, OCR interviewed the complainant, the complainant's parents, and College staff. OCR also reviewed documentation that the complainant and the College submitted. OCR made the following determinations.

OCR reviewed the College's policies and procedures to determine whether they comply with the requirements of Title IX. Specifically, OCR examined whether the College had: (a) designated and provided notice of a Title IX Coordinator; (b) provided notice that it does not discriminate on the basis of sex; and (c) adopted and published grievance procedures providing for the prompt and equitable resolution of student and employee complaints of discrimination/harassment on the basis of sex.

Designation and Notice of Title IX Coordinator

The regulation implementing Title IX, at 34 C.F.R. § 106.8(a), requires that each recipient designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX (the Title IX Coordinator). Pursuant to the regulations, the recipient is required to notify all students and employees of the name, office address, electronic mail (email) address and telephone number of the designated coordinator.¹

OCR determined that the College has designated its Affirmative Action Officer as the College's Title IX Coordinator. The College publishes the name, title, office address, telephone number, and email address of the Title IX Coordinator in its Student Handbook, and publishes the same contact information except for the email address in its Employee Information Handbook. Both handbooks are distributed electronically every year to students and staff, and are available on the College's website.²

Nondiscrimination Notice

The regulation implementing Title IX, at 34 C.F.R. § 106.9(a), requires that a recipient implement specific and continuing steps to notify applicants for employment, students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of sex in the education programs or activities it operates; that the prohibition against discrimination extends to employment; and that inquiries to recipients concerning the application of Title IX and its implementing regulation may be referred to the Title IX coordinator or to OCR. The regulation implementing Title IX, at 34 C.F.R. § 106.9(b), requires recipients to include the notice of nondiscrimination in each announcement, bulletin, catalog, or application form which it makes available to the persons described above, or which is otherwise used in the recruitment of students or employees.

OCR determined that the College's nondiscrimination notice appears in the following publications: Student Handbook; Employee Information Handbook; Discrimination Complaint Procedure; and Policy 1.4 Non-Discrimination. The notice states that the College does not discriminate on the basis of sex in the education programs or activities it operates; that the prohibition against discrimination extends to employment; and that inquiries concerning the application of Title IX and its implementing regulation may be referred to the College's Title IX Coordinator, and may be referred to OCR, as required by Title IX, at 34 C.F.R. § 106.9.

Grievance Procedures

The regulation implementing Title IX, at 34 C.F.R. § 106.8(b), requires that each recipient adopt and publish grievance procedures providing for prompt and equitable resolution of student, employee, and third party complaints that allege any action which would be prohibited by the regulation, including sexual harassment and sexual violence. Title IX does not require a recipient to provide separate grievance procedures for sexual harassment or sexual violence complaints. A recipient may use student disciplinary or other separate

¹ See OCR's *Questions and Answers on Title IX and Sexual Violence* <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

² https://www.sunybroome.edu/policy?p_p_id=20&p_p_lifecycle=0&p_p_state=maximized&p_p_mode=view&p_p_col_id=column3&p_p_col_pos=1&p_p_col_count=2&_20_struts_action=%2Fdocument_library%2Fview&_20_folderId=142904.

procedures for these complaints; however, any procedures used to adjudicate complaints of sexual harassment or sexual violence, including disciplinary proceedings, must afford the complainant a prompt and equitable resolution. OCR has identified a number of elements in determining if grievance procedures are prompt and equitable, including whether the procedures provide for: (a) notice to students and employees of the procedures, including where complaints may be filed; (b) application of the procedures to complaints alleging discrimination or harassment carried out by employees, students, and third parties; (c) adequate, reliable, and impartial investigation, including an opportunity to present witnesses and evidence; (d) designated and reasonably prompt timeframes for major stages of the grievance process; (e) notice to parties of the outcome of the complaint and any appeal; and (f) assurance that the institution will take steps to prevent further harassment and to correct its discriminatory effects on the complainant and others if appropriate.³

In response to OCR's request for copies of grievance procedures required by the regulation implementing Title IX, the College provided its Disciplinary Hearing Committee policy; and the Discrimination Complaint Procedure.⁴

Disciplinary Hearing Committee Policy

The Disciplinary Hearing Committee (DHC) policy can be found in the College's Student Handbook, which is posted on the College's website.⁵ The policy applies to complaints against students only, and is the primary method by which students receive disciplinary sanctions. The Code of Conduct, which precedes the DHC in the Student Handbook, provides that certain conduct by students, including behavior defined as sexual harassment, such as "[w]ritten, verbal, sexual and/or physical intimidation or harassment," may result in disciplinary sanctions. Under the Code of Conduct, students found to have engaged in sexually harassing behavior may be subject to discipline, including disciplinary warning(s), probation, suspension or expulsion, as a penalty for such conduct. The Code of Conduct also provides that alleged violations of the Code of Conduct and other non-academic regulations are handled by the Vice President of Student Affairs. The Vice President investigates the alleged conduct and decides the disciplinary sanction based on the outcome of the investigation. The DHC does not specify a timeframe for completion of this process and does not state whether parties will be notified of the outcome in writing.

OCR determined that the DHC policy provides for notice to students of the procedures, including where complaints may be filed. However, it does not provide for an adequate, reliable, and impartial investigation of complaints involving sexual harassment. Specifically, it does not provide for (a) an opportunity for either the complainant or accused to present witnesses and evidence; (b) the opportunity for the complainant or the accused to have representation; (c) designated and reasonably prompt timeframes for major stages of the grievance process; (d) notice to parties of the outcome; (e) the opportunity for the complainant to appeal the determination⁶; (f) application of the procedure to discrimination by employees or third parties; or (g) assurance that the institution will take steps to prevent further harassment and to correct its effects if appropriate.

³ See *OCR's Revised Sexual Harassment Guidance: Harassment of Students by School Employees, other Students, or Third Parties* (2001) ("OCR's 2001 Guidance"). See also, *OCR's "Dear Colleague" Letter*, dated April 4, 2011; which is available at: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html> (Apr. 4, 2011). See also *OCR's Questions and Answers on Title IX and Sexual Violence*, at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

⁴ The College also provided a document entitled "Sexual Harassment and Methods for Dealing with Sexual Harassment." OCR determined that this document is not a grievance procedure. Rather, it is a statement of policy, which defines sexual harassment, and states that students and employees may bring sexual discrimination or harassment complaints to: (1) someone in a supervisory capacity, such as deans, department chairs, etc.; or (2) file a complaint with the Affirmative Action Officer/Title IX Coordinator.

⁵ <http://www3.sunybroome.edu/student-handbook/#oid62>

⁶ The DHC states that students who have been determined to be in violation of the Code of Conduct by the Vice President of Student Affairs, and have had sanctions imposed, can appeal the Vice President for Student Affairs' decision before the DHC.

Discrimination Complaint Procedure

The Discrimination Complaint Procedure (DCP) can be found in the Student Handbook and Employee Information Handbook, both of which are on the College's website. The DCP states that it may be used by students, faculty, staff, campus organizations and other individuals who believe they have been subjected to discrimination, including complaints of discrimination based on sex and sexual harassment; and contains a definition of sexual harassment.⁷ The DCP contains a provision for maintaining confidentiality to the extent possible, and prohibiting retaliation for filing complaints of sexual harassment.

The DCP states that a complainant may contact the Title IX Coordinator, another college representative, such as a counselor, advisor, or someone who works in an advisory or administrative capacity at the College, a human resources officer, a director, a department chair, a dean or a supervisor in order to file a complaint under the policy. The DCP provides for an informal and formal method for resolving complaints. The informal method (which is not available in connection with sexual violence complaints) may include working directly with the other party to assure that the offending behavior stops and/or having the Title IX Coordinator or a college representative serving as an informal mediator.

A complainant may file a formal complaint with any of the above-listed individuals. The complaint is then forwarded to the Title IX Coordinator. The Title IX Coordinator provides assistance to the complainant in preparing his/her complaint and informs the complainant of internal and external avenues through which a complaint may be filed, including applicable time limits. The Title IX Coordinator also provides a copy of the complaint to the respondent, within two days after receiving it. The DCP provides for mediation of formal complaints, except in the instance of sexual violence. The DCP states that if within 20 days of the filing of the formal complaint, the Title IX Coordinator is able to resolve the complaint through mediation, she shall close the case, sending written notice to the complainant and the respondent. The DCP states that if the mediation is unsuccessful, the Title IX officer shall continue the formal complaint process by conducting an investigation; and shall have access to all information about the case in conducting the investigation. Both parties are permitted to have representation, and to present witnesses during the investigation. The DCP further provides that if the evidence supports that there is no basis for a complaint alleging discrimination, the Title IX officer shall make a written recommendation to the President, (with written notice to the complainant, and the respondent), that the case be closed. It further provides that the complainant may file a formal complaint with a state or federal agency if he or she is dissatisfied with the outcome. However, the DCP does not state the standard of proof used to evaluate complaints; or what actions will be taken if the Title IX Coordinator determines that sexual harassment has occurred, such as actions to remedy the effects on the complainant, or to prevent the recurrence of the harassment.

OCR determined that the DCP provides for (a) notice to students, employees and third parties of the procedures, including where complaints may be filed; (b) application of the procedure to discrimination by employees, students, and third parties; (c) designated and reasonably prompt timeframes for major stages of the grievance process; and (d) notice to parties of the outcome. OCR determined, however, that the DCP does not provide an assurance that the institution will take steps to prevent further harassment and to correct its effects if appropriate.

On October 16, 2014, the College agreed to implement the enclosed resolution agreement, which addresses the above-referenced compliance concerns identified with respect to the College's notice of its Title IX Coordinator and grievance procedures.

⁷ The DCP also applies to complaints alleging discrimination on the basis of race, color, creed, religion, age, national origin, disability, marital status, sexual orientation, or veteran status.

With respect to Allegation 1, the complainant alleged that the College failed to respond appropriately to her complaint of sexual harassment. Specifically, the complainant alleged that a student (Student 2) subjected her to sexual harassment, in or around April 2014, when he made unwanted, harassing sexual comments by posting video footage of the complainant on his Facebook© page along with the statements “she looks just like my ex,” and “I want to do her.”⁸

The complainant alleged that the College failed to respond appropriately when she initially complained of the harassing conduct to College personnel, on or about April 12, 2014; and similarly failed to respond appropriately after she filed a formal complaint with the College’s Title IX Coordinator on May 9, 2014.

Title IX and its implementing regulation prohibit discrimination based on sex, including sexual harassment. Sexual harassment is unwelcome conduct of a sexual nature and can include sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct. Hostile environment sexual harassment is sexually harassing conduct that is sufficiently severe, persistent or pervasive to limit a student’s ability to participate in or receive benefits, services or opportunities in the recipient’s program. If a recipient knows or reasonably should have known about sexual harassment that creates a hostile environment, Title IX requires the recipient to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.

OCR determined that on or about April 11, 2014, after the complainant learned from other students in her XXXXXXXXXXXXXXXX XXXX that Student 2 had posted video footage of her and Student 3, and made sexually harassing comments on his Facebook© page, the complainant, Student 3 and other students notified a Communications Department professor (Professor 1) about Student 2’s posts. OCR further determined that on or about April 12, 2014, Professor 1 notified the XXXXXXXXXXXXXXXX XXXXXXXXXXXX XXXXXXXXXXXX (Professor 2) about the students’ concerns.⁹ On the same day, the complainant’s XXXXXXXX contacted the Vice President for Student Affairs (the Vice President) and the Dean of Liberal Arts/Learning Assistance Services (the Dean) by email, to report Student 2’s conduct.¹⁰

On April 14, 2014, XXX XXXXXXXXXXXXXXXX XXXXXXXX¹¹, Student 3 with her XXXXXXXX, Professors 1 and 2, the Vice President, the Dean, and several campus security officials met to discuss Student 2’s videos and internet posts. On April 16, 2014, the complainant, XXX XXXXXXXXXXXXXXXX XXXXXXXX, Professors 1 and 2, the Vice President, and several campus security officials met to discuss Student 2’s conduct. OCR determined that the Vice President stated during both meetings that she would meet with Student 2, and would notify the group of the outcome of her meeting with Student 2. OCR determined that at the meeting on April 16, 2014, the Vice President gave the complainant contact information for the College’s Title IX Coordinator; however, the complainant was not advised during the meeting that she could file a formal complaint.

The Vice President advised OCR that she attempted to address the complainant’s and Student 3’s concerns regarding Student 2’s conduct in several ways. Specifically, she verified that Student 2 did not have any classes with the complainant or Student 3, and determined that the only activity in which they all participated was the Communications Club. The Vice President met with Student 2 on April 18, 2014, and advised him that other

⁸ The complainant also alleged that Student 2 also posted sexually derogatory statements about another student (Student 3).

⁹ OCR also determined that on April 12, 2014, the XXXXXXXXXXXXXXXX XXXXXXXX contacted the Vestal Police Department about Student 2’s actions. The complainant advised OCR that the police officer took statements from her, her XXXXXXXX and Student 3 about Student 2’s internet activities. The XXXXXXXXXXXXXXXX XXXXXXXX stated that after the police officer conducted additional research on his department’s computer about Student 2, the police officer seemed alarmed, and began to lecture the complainant and Student 3 about taking safety precautions; and calling 911 if they become concerned. The XXXXXXXXXXXXXXXX XXXXXXXX stated that the officer confirmed that “they had real reason to be concerned,” but that confidentiality prevented him from telling them additional information about Student 2.

¹⁰ OCR determined that the XXXXXXXXXXXXXXXX XXXXXXXX also shared other information about Student 2, found on the internet, that did not pertain to the complainant, but which they nevertheless found disturbing.

¹¹ The complainant was unable to attend the meeting.

than limited and appropriate discussion in class, he should have no contact with the complainant and Student 3 on campus and outside the classroom; and should not make any internet postings regarding either student. The Vice President further advised Student 2 that offensive visual, verbal and physical conduct of a sexual nature is not allowed; that he was no longer allowed to participate in the Communications Club; that he should not retaliate; and that he should seek counseling from a campus counselor. In a letter to Student 2, dated April 21, 2014, the Vice President advised Student 2 that his actions were a violation of the College's sexual harassment policy and Student Code of Conduct and she was imposing a warning as a disciplinary sanction. On April 24, 2014, Student 2 signed and acknowledged receipt of the Vice President's certified letter. OCR determined that the College did not notify the complainant of the outcome of the Vice President's investigation.

OCR determined that following the Vice President's imposition of discipline on Student 2, the College permitted the complainant and Student 3 to take their finals in an alternate location so that they would not have contact with Student 2. OCR determined that as a result of concerns the complainant expressed at the meeting that occurred on April 16, 2014, the College also had a security officer escort the complainant to an awards dinner during the first week of May 2014.

OCR determined that on several occasions between April 18 and May 9, 2014, the complainant and XXX XXXXXXXX made telephone calls and sent emails to the Vice President; and contacted the President of the College during the week of April 21, 2014 to inquire about the College's determination and whether any actions had been taken regarding Student 2's conduct; however, they did not receive responses to any of their inquiries.

On or about May 9, 2014, the complainant met with the College's Title IX Coordinator and filed a formal complaint of sexual harassment regarding Student 2's actions. The complainant advised OCR that she did so because she believed the Vice President was not taking appropriate action regarding her concerns.¹² OCR determined that the College took no action in response to the complainant's filing the complaint with the Title IX Coordinator on or about May 9, 2014.

Based on the foregoing, OCR determined that the College failed to respond appropriately to the complainant's complaints regarding Student 2's alleged sexually harassing conduct. Specifically, OCR determined that in response to the initial complaint of sexual harassment, made on April 12, 2014, the Vice President investigated the matter by considering information provided by the complainant and Student 3, and rendered a determination which resulted in discipline of Student 2. However, the College did not notify the complainant of the outcome. In addition, while the College took some steps to address the harassment, such as removing Student 2 from the Communications Club, and posting a security guard at the awards event in May 2014, the College did not take any steps to remedy any effects of the harassment on the complainant; or to prevent the recurrence of the harassment.¹³ In addition, the College did not notify the complainant of her right to file a formal Title IX complaint of sexual harassment when she specifically requested that information on April 16, 2014. OCR determined that the College failed to take any action in response to the complainant's complaint of sexual harassment, filed with the College's Title IX coordinator on May 9, 2014; and therefore did not respond promptly and equitably.

On October 16, 2014, the College agreed to implement the enclosed resolution agreement, which addresses the compliance concerns identified with respect to Allegation 1.

¹² The complainant advised OCR that the Vice President's initial response in the meeting on April 16, 2014 led them to believe that their concerns about Student 2 were not being taken seriously. Specifically, during the meeting on April 16, 2014, the Vice President advised them that Student 2 "had not broken any laws," that the College "had no reason to interfere with Student 2's internet activities," and that "everything Student 2 did was within his constitutional rights".

¹³ The complainant graduated from the College in May 2014, although Students 2 and 3 continued to attend the College during the fall 2014 semester.

With respect to Allegation 2, the complainant alleged that in retaliation for her sexual harassment complaint, the College's Vice President advised other students and staff that she and Professor 1 were engaged in an inappropriate relationship. In analyzing whether retaliation occurred, OCR must first determine: (1) whether the complainant engaged in a protected activity; (2) whether the recipient was aware of the complainant's protected activity; (3) whether the complainant/injured party suffered an adverse action contemporaneous with, or subsequent to, the recipient's learning of the complainant's involvement in the protected activity; and (4) whether there is a causal connection between the protected activity and the adverse action from which a retaliatory motivation reasonably may be inferred. When there is evidence of all four elements, OCR then determines whether the recipient has a legitimate, non-retaliatory reason for the challenged action or whether the reason adduced by the recipient is a pretext to hide its retaliatory motivation.

OCR determined that the complainant engaged in protected activity when she reported an allegation of sexual harassment to the College on April 12, 2014. OCR determined that the College was aware of this protected activity.

OCR confirmed that on at least one occasion the Vice President spoke to a faculty member, Professor 1, regarding his interactions with the complainant; namely, the Vice President visited Professor 1 during class on or about April 21, 2014, and asked him if he was having a relationship with the complainant. Professor 1 subsequently advised the complainant of this conversation. The Vice President denied asking Professor 1 if he was involved in an inappropriate relationship; rather, she stated that she cautioned him that if he were in a relationship with the complainant, it would be a violation of the faculty code of conduct. The Vice President informed OCR that she approached Professor 1 based on information from a campus security officer who was familiar with the complainant's complaint. The officer advised her that Professor 1 appeared to have a close personal relationship with the complainant, and as such, was involved in the complainant's complaint.

OCR must often weigh conflicting evidence in light of the facts and circumstances of each case and determine whether the preponderance of the evidence substantiates the allegation. Here, OCR did not find that the complainant's assertion that the Vice President made statements to faculty and students that she and Professor 1 were engaged in an inappropriate relationship were supported by a preponderance of the evidence. Although the Vice President acknowledged that she cautioned Professor 1 regarding any possible relationship with the complainant, OCR found no evidence to establish that the Vice President advised any student or staff member of an alleged relationship between the complainant and Professor 1; or had any discussion about any alleged relationship with anyone other than Professor 1. Based on the foregoing, OCR determined there was insufficient evidence to substantiate that the College's Vice President advised other students and staff that the complainant and Professor 1 were engaged in an inappropriate relationship, as the complainant alleged. Accordingly, OCR determined that there was insufficient evidence to substantiate the complainant's allegation that in retaliation for her sexual harassment complaint, the Vice President advised other students and staff that she and Professor 1 were engaged in an inappropriate relationship. Therefore, OCR will take no further action with respect to Allegation 2.

As stated above, on October 16, 2014, the College agreed to implement the enclosed resolution agreement, which addresses the compliance concerns identified in this letter with respect to the College's notice of its Title IX Coordinator, grievance procedures, and Allegation 1. OCR will monitor the implementation of the resolution agreement. If the College fails to implement the terms of the resolution agreement, OCR will resume its investigation of the complaint.

This letter should not be interpreted to address the College's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and 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. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the College may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the complainant may file another complaint alleging such treatment.

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

If you have any questions about OCR's determination, please contact James Moser, Compliance Team Attorney, at (646) 428-3792 or james.moser@ed.gov; or John Collins, Senior Attorney, at (646) 428-3810 or john.collins@ed.gov.

Sincerely,

/s/

Timothy C. J. Blanchard

Encl.

cc: XXXXXXXX XX XXXXXXXX XXXX