

October 16, 2017

Chancellor James B. Milliken
City University of New York
205 East 42nd Street
New York, New York 10017

Re: Case No. 02-17-2149
City University of New York – City College of New York

Dear Chancellor Milliken:

This letter is to notify you of the determination made by the U.S. Department of Education, Office for Civil Rights (OCR), with respect to the above-referenced complaint filed against the City University of New York (CUNY) – City College of New York (the College). The complainant alleged that a College research study coordinator discriminated against him, on the basis of his age, by prohibiting him from participating as a subject in a research study on November 28, 2016 (Allegation 1). The complainant also alleged that the College failed to respond to complaints he made to College personnel on January 3, 2017, in which he alleged that a College security officer discriminated against him, on the bases of his (a) race, color, and national origin, and (b) age (Allegation 2).

OCR is responsible for enforcing the Age Discrimination Act of 1975 (the Age Discrimination Act), 42 U.S.C. § 6101 et seq., and its implementing regulation at 34 C.F.R. Part 110, which prohibit discrimination on the basis of age in programs and activities receiving financial assistance from the U.S. Department of Education (Department). OCR also is responsible for enforcing Title VI of the Civil Rights Act of 1964 (Title VI), as amended, 42 U.S.C. § 2000d et seq., and its implementing regulation at 34 C.F.R. Part 100, which prohibit discrimination on the basis of race, color, or national origin in programs and activities receiving financial assistance from the Department. The College is a recipient of financial assistance from the Department. Therefore, OCR has jurisdictional authority to investigate this complaint under the Age Discrimination Act and Title VI.

OCR interviewed College personnel and reviewed documentation that the complainant and the College submitted. OCR made the following determinations.

The complainant was enrolled in a psychology program at the College during the fall 2016 semester. The complainant was XX years old at the time.

With respect to Allegation 1, the complainant alleged that a College research study coordinator (the coordinator) discriminated against him, on the basis of his age, by prohibiting him from participating as a subject in a research study on November 28, 2016. The complainant informed OCR that he registered for a three-credit research study in the psychology department on October 20, 2016. The complainant asserted that during a telephone call on November 26, 2016, the coordinator confirmed his participation and assured him that he would also receive a confirmation notice by email. The complainant stated that he subsequently received an email cancelling his participation in the study. The complainant further informed OCR that after attempting to register for the study a second time, the coordinator emailed him another cancellation notice without explanation. The complainant stated that the coordinator subsequently advised him via email that he was not qualified to participate in the research study “due to his age.” The complainant asserted that the research study was for participants age 18 or older; and, that the online registration system would not have permitted him to sign up if he were not qualified to participate in the study.

OCR determined that for all of the College’s research studies involving human subjects, the investigator responsible for coordinating the study, after obtaining the required internal approvals, creates a description of the research project and requirements for participation as a subject. The project description and participation requirements are then posted in the Experiment Management System (EMS), an online database. In EMS, the department sponsoring a research study participates in a “subject pool” to solicit participants. Students can access EMS to view the criteria for participation, and sign up if interested in participating as a subject in a particular study. Upon signing up for a research study, the potential participant automatically receives an email confirmation from EMS. After the automatic email confirmation is sent, investigators may conduct additional screening and/or clarification of responses to determine whether a participant actually meets the stated qualifications for participation. If the participant does not meet the study requirements, the investigator can remove the participant from the applicant pool, thereby terminating the individual’s participation in the study.

The College confirmed that the complainant registered to participate in a research study called “XXXXXXXXXX of XXXXXXXXXXXXXXXXXXXXXXXX and XXXXXXXXXXXX on XXXXXXXXXXXXXXXXXXXXXXXX” on October 20, 2016. The College acknowledged that the automatic email confirmation that the complainant received on October 20, 2016, stated the eligibility requirement for the study was 18 years or older; however, the College stated that this was an error. The College asserted that the purpose of the study was to test the effects on XXXXXXXXXXX XX XXXX XXX XXX XXXXXXXXXXX XXXXXXXXXXX XXXXX. The study consisted of a listening XX XXXXXXXXXXXXXXX XXXXX,XXXXXXXXXXXX XXX XXXXX XXXX, XXX DDDDDDDDDDD XXXXX XXX XXXX XXX XXXX XX XXX. According to the application to conduct the study, one of the criteria was that subjects must be aged 18 to 35. The application stated that the rationale for excluding subjects older than 35 was that older subjects have a difficult time XXXXXXXXXXXXXXXXXXX XXXXXXX XX XXXXXXX XXXXXXXXXXXXXXX.

The College informed OCR that the coordinator was responsible for leading the research study as an investigator and pre-screening applicants for eligibility to participate in the study. During the pre-screening process, the coordinator determined that the complainant did not qualify for

participation in the research study since he did not meet the study's age requirement of 18 to 35. The coordinator explained that on his prescreening form, the complainant only indicated an age range of 30-39 rather than his exact age; and, that during a telephone call on November 26, 2016, the complainant refused to give his exact age and became upset when she informed him of the study's age criteria. After the complainant refused to disclose his exact age, the coordinator removed the complainant from the applicant pool; and, in an email dated November 26, 2016, the complainant was informed of the cancellation of his sign-up for the study.¹ The coordinator informed OCR that if the complainant had indicated his exact age on the prescreening form, he would have received an automated notification from EMS indicating that he did not meet the age criteria for the research study.

The College asserted that it made reasonable efforts to otherwise provide the complainant an opportunity to earn the three credits he would have earned had he participated in the study, by offering him the three psychology credits if he reported to the proper building on the day of the study, despite his ineligibility for the study. The coordinator stated that approximately ten students were not allowed to participate in research studies during academic year 2016-2017 because they did not meet the criteria.

The regulation implementing the Age Discrimination Act, at 34 C.F.R. § 110.10, provides that persons may not, on the basis of age, be excluded from participation in, denied the benefits of, or be subjected to discrimination in programs operated by recipients of Federal financial assistance; however, the regulation, at 34 C.F.R. §110.12, states that a recipient is permitted to take an action otherwise prohibited by 34 C.F.R § 110.10 if the action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity. An action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity if: (a) age is used as a measure or approximation of one or more other characteristics; (b) the other characteristic or characteristics must be measured in order for the normal operation of the program or activity to continue, or to achieve any statutory objective of the program or activity; (c) the other characteristic or characteristics can be reasonably measured or approximated by the use of age; and, (d) the other characteristic or characteristics are impractical to measure directly on an individual basis. Here, OCR has determined that the use of age-based criteria as set forth in the College's research study reasonably takes into account age as a factor necessary to the College's normal operation of a program or activity, which includes facilitating research in various disciplines by conducting studies involving human subjects.

Based on the foregoing, OCR determined that although the coordinator prohibited the complainant from participating as a subject in a research study on November 28, 2016, on the basis of his age, the use of age-based criteria under the circumstances did not constitute a violation of the Age Discrimination Act, as the action reasonably took into account age as a factor necessary to the normal operation of the College's program or activity. Accordingly, OCR will take no further action with respect to Allegation 1.

¹ The College submitted to OCR an email dated November 26, 2016, in which the coordinator stated, "After viewing your pre-screen, the appointment has been automatically cancelled because you are not at the age criteria to participate for this study. The age criteria are from 18-35 years old. You cannot be over 35 years old to participate in this study."

With respect to Allegation 2, the complainant alleged that the College failed to respond to complaints he made to College personnel on January 3, 2017, in which he alleged that a College security officer discriminated against him, on the bases of his (a) race, color, and national origin, and (b) age.² The complainant asserted that he filed several complaints alleging discrimination with the Senior Vice Chancellor for Legal Affairs, Director of Public Safety at CUNY, Director of Public Safety of the College, Chief Diversity Officer and Dean of Faculty Relations (the Chief Diversity Officer), and the Chancellor of CUNY, by email on January 3, 2017; January 5, 2017; January 12, 2017; and January 31, 2017. The complainant also asserted that none of the College administrators responded to his emails.

The regulation implementing Title VI, at 34 C.F.R. § 100.3(a), provides that no person shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity that receives Federal financial assistance. The regulation implementing the Age Discrimination Act, at 34 C.F.R. § 110.10(a) provides that persons shall not, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in programs operated by recipients of Federal financial assistance. Further, the regulation, at 34 C.F.R. §110.25, provides that each recipient shall designate a responsible employee to coordinate its efforts to comply with and carry out its responsibilities under the Age Discrimination Act and the regulations, provide notice of information regarding the provisions of the act, and adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by the Age Discrimination Act or its implementing regulation.

OCR determined that the College uses CUNY's system-wide Policy on Equal Opportunity and Non-Discrimination (the policy) to investigate complaints of discrimination, which prohibits discrimination or harassment on the bases of race, color, national origin, and age, among other protected bases. The policy states that members of the College community, as well as visitors, may raise concerns of discrimination or harassment to the Chief Diversity Officer, with or without filing a complaint. In addition to requiring the College to address complaints made directly to the Chief Diversity Officer, the policy requires that each president, vice president, dean, director, or other person with managerial responsibility, including department chairpersons and executive officers, must promptly consult with the Chief Diversity Officer if he or she becomes aware of conduct or allegations of conduct that may violate the policy.

According to the policy, once the Chief Diversity Officer is made aware of a concern, either by a complainant or a responsible administrator, the Chief Diversity Officer will meet with the complainant and inform him or her of the options available, including seeking an informal resolution or the College's conducting a full investigation. If a complainant wishes to file a formal complaint, the Chief Diversity Officer will provide a complaint form, which the complainant should use to submit a written complaint. To investigate the complaint, the Chief

² Specifically, the complainant alleged that he complained that the security guard detained him for allegedly making a XXXXX threat against the coordinator, dismissed his responses and exculpatory evidence, and confiscated his cell phone and laptop, on or about November 28, 2016.

Diversity Officer interviews the complainant and respondent and any witnesses they identify³; determines whether any other individuals have relevant information regarding the events in question, and interviews them; and, reviews documentary evidence that may be relevant to the complaint. The policy states that investigations should be completed within 60 days of the receipt of the complaint. The Chief Diversity Officer must report his or her findings to the College President; and, if either party to the complaint is a student, the Chief Diversity Officer must also report the findings to the Chief Student Affairs Officer. The President will review the investigation report; and “when warranted by the facts, authorize such action as he or she deems necessary to properly correct the effects of or to prevent further harm to an affected party or others similarly situated.” Both parties are to be notified in writing of the outcome of the complaint investigation and any action taken as a result of the complaint.

OCR determined that the complainant sent an email on January 3, 2017, to the assistant to the CUNY Director of Student Advocacy (the director), in which he stated that he wished to bring to the director’s attention discrimination he experienced by a research assistant⁴ and campus safety personnel. The complainant’s email referred generally to discrimination, and he alleged racial profiling and discrimination on the basis of his “ethnic origin.” He did not allege discrimination on the basis of age or any other protected basis. In an email response sent on January 5, 2017, the director informed the complainant that in order to file an official complaint of discrimination, he should contact the Chief Diversity Officer, and provided relevant contact information.⁵ In an email sent on January 18, 2017, the director forwarded the complainant’s original email to the Chief Diversity Officer.⁶ The Chief Diversity Officer replied to the director the following day, confirming receipt of the email and agreeing to follow up;⁷ however, neither the Chief Diversity Officer, nor anyone else at the College thereafter took any action with respect to the complainant’s email or otherwise followed-up on his concerns.

On October 13, 2017, the College agreed to implement the enclosed resolution agreement to voluntarily resolve Allegation 2 without further investigation by OCR. OCR will monitor the implementation of the resolution agreement. If the College fails to comply with the terms of the resolution agreement, OCR will resume its investigation of Allegation 2.

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

³ The policy provides that both the complainant and respondent are given the opportunity to provide the names of possible witnesses.

⁴ This refers to the incident at issue in Allegation 1.

⁵ The College provided an email dated January 5, 2017, in which the university director stated, “Your complaint of discrimination should be made to City College’s Chief Diversity Officer who will investigate your complaint.”

⁶ The College provided the email dated January 18, 2017, from the university director to the Chief Diversity Officer, also copying the College’s General Counsel’s Office, stating that, “Below is correspondence regarding a complaint we received from a City College student. Since he was making a charge of discrimination and racial profiling, I referred him to you to file his complaint. He contacted my Office again today and indicated that he has not received a response.”

⁷ The College submitted to OCR an email dated January 19, 2017, from the Chief Diversity Officer that stated, “Thank you for bringing this student complaint to my attention. I will reach out to the student.”

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 individual may file a 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 that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions, please contact Jane Tobey Momo, Senior Compliance Team Attorney, at (646) 428-3763 or jane.momo@ed.gov; Jessica Daye, Compliance Team Investigator, at (646) 428-3812 or jessica.daye@ed.gov; or Felice Bowen, Compliance Team Leader, at (646) 428-3806 or felice.bowen@ed.gov.

Sincerely,

/s/

Timothy C.J. Blanchard

Enc.

cc: XXXXXXXXXXXXX, Esq.