



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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June 22, 2015

IN RESPONSE, PLEASE REFER TO: 03-15-2058

L. Marshall Washington Ph.D.
President, New River Community and Technical College
Office W206
221 George Street, Suite 2
Beckley, West Virginia 25801

Dear Dr. Washington:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed by XXXXXX (the Complainant) against the New River Community and Technical College (College) alleging discrimination on the bases of race, color, national origin, and sex. Specifically, the Complainant alleged that:

1. XXXXXX; and
2. XXXXXX.

OCR enforces Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d, and its implementing regulation, at 34 C.F.R. Part 100. Title VI prohibits discrimination on the basis of race, color, or national origin by recipients of Federal financial assistance. OCR also enforces Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulation, 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex by recipients of Federal financial assistance from the Department. As a recipient of Federal financial assistance from the Department, the College is subject to Title VI, Title IX and their implementing regulations.

During the investigation, OCR reviewed documentation provided by the Complainant and the College and interviewed the Complainant and College staff. Based on this information, OCR XXXXXX did identify compliance concerns regarding the College's applicable Title IX procedures, which the College has agreed to resolve. The basis for OCR's determination is set forth below.

Legal Standard

Race Discrimination/Racially Hostile Environment

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

The regulation implementing Title VI, at 34 C.F.R. Section 100.3 (a), (b)(1)(ii), (iii), (iv) and (vi), states that no person in the United States shall, on the ground of race, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program to which this part applies. Furthermore, a recipient may not subject an individual to segregation or separate treatment in any matter related to his receipt of any service under the program, restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, or deny an individual an opportunity to participate in the program through the provision of services or otherwise afford him an opportunity to do so which is different from that afforded others under the program.

As with other types of discrimination claims, OCR will first apply a standard different treatment analysis to allegations involving racial incidents perpetrated by representatives of recipients. Under this analysis, a recipient violates title VI if one of its agents or employees, acting within the scope of his or her official duties, has treated a student differently on the basis of race, color, or national origin in the context of an educational program or activity without a legitimate, nondiscriminatory reason so as to interfere with or limit the ability of the student to participate in or benefit from the services, activities or privileges provided by the recipient. In applying this standard different treatment analysis, OCR will address the following questions

1. Did an official or representative (agent or employee) of a recipient treat someone differently in a way that interfered with or limited the ability of a student to participate in or benefit from a program or activity of the recipient?
2. Did the different treatment occur in the course of authorized or assigned duties or responsibilities of the agent or employee?
3. Was the different treatment based on race color, or national origin?
4. Did the context or circumstances of the incident provide a legitimate, non-discriminatory, non-pretextual basis for the different treatment?

Where, based on the evidence obtained in the investigation, questions 1-3 are answered "yes" and question 4 is answered "no," OCR will conclude that there was discrimination in violation of title VI under this standard different treatment analysis. If questions 1, 2 or 3 are answered "no," or if questions 1 through 4 are answered "yes," OCR will find no violation under this theory. If warranted by the nature and scope of the allegations or evidence, OCR will proceed to determine whether the agent's or employee's actions established or contributed to a racially hostile environment as described below.

Recipients are responsible under Title VI for providing students with a nondiscriminatory educational environment. A racially hostile environment that violates Title VI is found to exist when there is (1) racially harassing conduct that is sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient, (2) actual or constructive notice of the racially hostile environment to the recipient, and (3) failure by the recipient to respond adequately to redress the racially hostile environment. Harassment based on race, if sufficiently

severe, denies or limits a student's ability to participate in or benefit from the recipient's program. When a recipient has notice of racial harassment, it must take immediate and appropriate steps to stop the harassment and prevent it from happening again. The judgment and common sense of teachers and administrators are important elements of any response. The recipient is responsible for taking all reasonable steps to ensure a safe learning environment.

In considering allegations of discrimination that involve issues of speech or expression, OCR must consider the protections of the First Amendment of the U. S. Constitution, and that OCR's enforcement of regulations must be consistent with the requirements of the First Amendment. The offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment. A racially hostile environment may be created by oral, written, graphic or physical conduct related to an individual's race, color and/or national origin that is sufficiently severe, persistent or pervasive so as to interfere with or limit the ability of an individual to participate in or benefit from the recipient's programs or activities. Because OCR's responsibility is protecting students from discrimination, not regulating the content of speech or curriculum, OCR is sensitive to First Amendment concerns that may arise in the course of addressing harassment complaints and takes special care to avoid actions that would impair First Amendment rights. However, recipients have significant latitude in controlling the educational environment and may address racially harassing and abusive conduct that creates a hostile environment.

OCR considers a racially hostile environment to be one in which there are acts of a racial nature that are sufficiently severe, pervasive, or persistent to create an intimidating, abusive, threatening or offensive educational environment. Acts of a racial nature may include verbal statements and physical conduct imposed on the basis of an individual's or group's race, color, or national origin. To determine whether a hostile environment existed, OCR considers the totality of the circumstances, including factors such as the context, nature, scope, frequency, duration and the location of the alleged incident, as well as the number, identity and relationship of the individuals involved. OCR evaluates the severity, pervasiveness and persistence of the alleged incident in light of the age and impressionability of the students.

OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt, thorough and effective. If harassment is found, it should take reasonable timely, age-appropriate, and effective corrective action, including steps tailored to the specific situation. The response must be designed to stop the harassment, eliminate the hostile environment if one has been created and remedy the effects of the harassment on the student who was harassed. The recipient must also take steps to prevent the harassment from recurring including disciplining the harasser where appropriate.

Although Title VI does not require a recipient to have specific anti-discrimination or anti-harassment policies, in evaluating a recipient's response to a racially hostile environment, OCR will examine disciplinary policies, grievance policies, and any applicable anti-harassment policies.

OCR also will determine whether the responsive action was consistent with any established institutional policies or with responsive action taken with respect to similar incidents.

Sex Discrimination/Sexually Hostile Environment

The Title IX implementing regulation, at 34 C.F.R. § 106.31(a), provides that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance. Specific obligations are set forth at § 106.31(b), including a recipient's obligation to ensure that its students are not denied or limited in their ability to participate in or benefit from the recipient's programs or activities on the basis of sex.

Under Title IX, colleges and universities that receive Federal financial assistance are responsible for providing students with a nondiscriminatory educational environment. Sexual harassment that creates a hostile environment is a form of sex discrimination prohibited by Title IX. Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, such as sexual assault or acts of sexual violence. Sexual harassment of a student creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the recipient's program.

OCR considers a variety of related factors to determine if a sexually hostile environment has been created and considers the conduct in question from both an objective and a subjective perspective. Factors examined include the degree to which the misconduct affected one or more students' education; the type, frequency, and duration of the misconduct; the identity of and relationship between the alleged harasser and the subject or subjects of the harassment; the number of individuals involved; the age and sex of the alleged harasser and the subject of the harassment, the size of the school, location of the incidents, and the context in which they occurred; and other incidents at the school. The more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true if the harassment is physical. A single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment. Once a recipient knows or reasonably should know of possible sexual harassment, it must take immediate and appropriate action to investigate or otherwise determine what occurred. If an investigation reveals that sexual harassment created a hostile environment, a recipient must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment, prevent the harassment from recurring and, as appropriate, remedy its effects. These duties are a recipient's responsibility, regardless of whether a student has complained, asked the recipient to take action, or identified the harassment as a form of discrimination. A recipient has notice of harassment if a responsible employee actually knew or, in the exercise of reasonable care, should have known about the harassment. If a recipient delays responding to allegations of sexual harassment or responds inappropriately, the recipient's own action may subject the student to a hostile environment. If it does, the recipient will be required to remedy

the effects of both the initial sexual harassment and the effects of the recipient's failure to respond promptly and appropriately. A recipient's obligation to respond appropriately to sexual harassment complaints is the same regardless of the sex or sexes of the parties involved. Title IX requires a school to protect the complainant and ensure his or her safety as necessary, including taking interim steps before the final outcome of any investigation.

Title IX requires a recipient to take steps to ensure equal access to its education programs and activities and protect the complainant as necessary, including taking interim measures before the final outcome of an investigation. The recipient should take these steps promptly once it has notice of a sexual violence allegation and should provide the complainant with periodic updates on the status of the investigation. The recipient also should ensure that the complainant is aware of his or her Title IX rights and any available resources, such as victim advocacy groups, housing assistance, academic support, counseling, health and mental health services, and legal assistance.

In situations where reported sexual harassment may constitute a criminal act, a recipient should notify a complainant of the right to file a criminal complaint, and should not dissuade a complainant from doing so either during or after the recipient's internal Title IX investigation. The Title IX regulation, at § 106.71, incorporates by reference the procedural provisions of Title VI of the Civil Rights Act of 1964, at 34 C.F.R. § 100.7(e), which include a prohibition against retaliation because a person complained about discrimination or otherwise asserted rights under these laws.

If the alleged harasser is an agent or employee of a recipient, acting within the scope of his or her official duties (i.e., such that the individual has actual or apparent authority over the students involved), then the individual will be considered to be acting in an agency capacity and the recipient will be deemed to have constructive notice of the harassment.

To comply with Title IX's regulatory requirements at 34 C.F.R. §106.8(b), a recipient's sex discrimination grievance procedures must apply to complaints of sex discrimination in the recipient's education programs and activities filed by employees, students or third parties against employees, other students, or third parties. While Title IX does not require a recipient to provide separate grievance procedures for sexual harassment complaints, a recipient's grievance procedures for handling discrimination complaints must provide effective means for preventing and responding to sexual harassment.

In evaluating whether grievance procedures are prompt and equitable under Title IX, OCR considers whether the procedures provide for:

- widely distributed notice of the procedure, including where complaints may be filed;
- application of the procedure to complaints alleging harassment carried out by employees, other students, or third parties in education programs or activities;
- referral of inquiries to OCR;

- adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence;
- designated and reasonably prompt timeframes for the major stages of the complaint process;
- notice to the parties of the outcome of the complaint; and
- an assurance that the recipient will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

Facts Established by the Investigation

xxx – paragraphs redacted – xxx

Analysis and Conclusion

A recipient, such as the College, has a duty to provide a nondiscriminatory environment that is conducive to learning. The existence of a racially or sexually hostile environment that a recipient creates, encourages, accepts, tolerates, or leaves uncorrected constitutes different treatment on the basis of race or sex in violation of Title VI or Title IX. OCR will find that a recipient violates Title VI and/or Title IX when it determines, based upon a review of evidence, that: 1) a student was subjected to harassment on the basis of race and/or sex; and 2) the harassment rose to a level (was so severe, persistent, and pervasive) that it denied or interfered with the Complainant's ability to participate in or benefit from the educational program, services, activities, or privileges provided by the Institute; and 3) the recipient had actual or constructive notice of the harassment; and 4) the recipient failed to take prompt and remedial action to end the harassment and prevent its reoccurrence.

OCR considers the totality of all relevant circumstances to determine whether the alleged harassing conduct is sufficiently severe, persistent, or pervasive to rise to the level of a hostile environment so as to interfere with or limit the ability of a student to participate in or benefit from the recipient's programs or activities. Factors considered include the context, nature, scope, frequency, duration, and location of the alleged harassment, as well as the age, identity, number, and relationships of the persons involved. OCR evaluates the conduct and circumstances from both a subjective and objective perspective.

Once a recipient is on notice of the existence of a hostile environment, an appropriate response includes taking immediate steps to determine what occurred, ending any harassment and eliminating the hostile environment, and preventing harassment from occurring again, and remedying the effects of the harassment.

Prongs 1 and 2 – Harassment and Hostile Environment on the Basis of Race and/or Sex

In considering whether the Complainant and/or other students in the course were subjected to harassment on the basis of race and/or sex that was severe, persistent, or pervasive enough to

create a hostile environment under Title VI and/or Title IX, OCR considered information provided by the Complainant and the College, including video evidence provided by the Complainant and the documentation of the College's investigation in response to the Complainant's grievance.

xxx – paragraphs redacted – xxx

College's Policies and Procedures

The College has several relevant policies and procedures, which OCR reviewed to determine compliance with Title IX's requirement that recipients of federal funding adopt and publish grievance procedures that provide a prompt and equitable resolution to complaints of sex discrimination. Although Title IX does not require recipients to maintain separate grievance procedures to address complaints of sexual harassment, any such procedures must comply with Title IX if a recipient chooses to utilize such a procedure. Here, the College does use a separate policy and set of procedures for sexual harassment complaints.

The College's policies governing complaints of sex discrimination include its Policy 18 which describes the College's grievance process, Operating Rule 17, and Procedure 27. In reviewing these policies and regulations, OCR noted several compliance concerns with the College's complaint resolution procedures, including lack of a clear statement that the procedures apply to complaints alleging discrimination carried out by employees, other students, or third parties; lack of a clear statement that parties to a complaint may present witnesses and other evidence; and lack of notice to both parties of the outcome of an investigation.

In addition, OCR notes that the College has designated one individual to serve as Title IX Coordinator for students and another employee to serve as Title IX Coordinator for employees. However, information identifying the Title IX coordinators could only be found in one publication – the Student Handbook. Other documents and policies reference the "Title IX coordinator" but do not provide contact information, including that person's name or title, office address, and telephone number, consistent with the requirements of Title IX at 34 C.F.R. § 106.8(a).

The College has agreed to address these procedural compliance concerns by entering into the enclosed agreement with OCR. These compliance concerns did not impact the outcome of the internal complaints filed by the Complainant which formed the basis of this matter.

Consistent with our usual practice, OCR will monitor the implementation of the Agreement until we have determined that the College is in compliance with the regulations implementing Title IX with respect to the concerns identified in this investigation.

This letter sets forth OCR's determination in an individual OCR case and should not be construed to address any other issue(s) regarding the College's compliance other than those addressed in this letter. 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. You may 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 you 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, we 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.

OCR is committed to a high-quality resolution of every case. If you have questions or concerns about OCR's finding, you may contact Dannelle Walker, Team Attorney, at (215) 656-5711, or by email at: dannelle.walker@ed.gov.

Sincerely,

/s/

Melissa M. Corbin
Team Leader

Enclosure

cc: Leah Taylor, Vice President for Administrative Services