



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

THE WANAMAKER BUILDING, SUITE 515  
100 PENN SQUARE EAST  
PHILADELPHIA, PA 19107-3323

REGION III  
DELAWARE  
KENTUCKY  
MARYLAND  
PENNSYLVANIA  
WEST VIRGINIA

**April 3, 2018**

Dr. John M. Anderson  
President  
Millersville University  
P.O. Box 1002  
Millersville, PA 17551-0302

**Re: OCR Complaint No. 03-16-2126**

Dear Dr. Anderson:

The Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) has completed its investigation of the complaint against Millersville University (the University). Specifically, the Complainant (XXXXXX) alleged that:

xx – paragraphs redacted – xx

OCR enforces:

- The Age Discrimination Act of 1975 (the Age Act), which prohibits discrimination on the basis of age by recipients of Federal financial assistance from the Department. The Age Act also prohibits retaliation.
- Title IX of the Education Amendments of 1972 (Title IX), as amended, 20 U.S.C. § 1681, and its implementing regulations at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex by recipients of Federal financial assistance. Title IX also prohibits retaliation.

The University receives Federal financial assistance from the Department and, therefore, is subject to these laws.

OCR applies a preponderance of the evidence standard to determine whether the evidence is sufficient to support a particular conclusion. Specifically, OCR examines the evidence in support of and against a particular conclusion to determine whether the greater weight of the evidence supports the conclusion or whether the evidence is insufficient to support the conclusion.

In reaching a determination, OCR reviewed documents provided by the Complainant and the University, interviewed the Complainant and University staff, and listened to an audio recording of the February 17, 2016 Administrative Hearing.

After carefully considering all of the information obtained during the investigation, OCR determined that the University violated Title IX with regard to allegations #2b and 2c. The University agreed to resolve the identified compliance concerns through the enclosed resolution agreement. OCR did not find sufficient evidence of a violation with regard to the remaining allegations. OCR's findings and conclusions are discussed below.

## **Legal Standards**

### **Hostile Environment Based on Sex**

The regulation implementing Title IX, 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 education program or activity operated by a recipient. 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 denies or limits a student's ability to participate in or benefit from the recipient's program.<sup>1</sup>

In determining whether this denial or limitation has occurred, OCR examines all of the relevant circumstances from an objective and subjective perspective, including: the type of harassment (e.g., whether it was verbal or physical); the frequency and severity of the conduct; the age, sex, and relationship of the individuals involved (e.g., teacher-student or student-student); the setting and context in which the harassment occurred; whether other incidents have occurred at the school district; and other relevant factors. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the harassment is physical. For example, a single instance of rape is sufficiently severe to create a hostile environment. Title IX also protects all students at recipient institutions from sex harassment, including male and female students.

If a recipient knows or reasonably should have known about sexual harassment that creates a hostile environment, a recipient must take immediate and appropriate action to investigate or otherwise determine what occurred. If an investigation reveals that discriminatory harassment has occurred, a recipient must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring. 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 peer sexual or third party 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 students to a hostile environment. If it

---

<sup>1</sup> See OCR's Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.html> (January 19, 2001).

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.

Even if the sexual harassment did not occur in the context of an education program or activity, a recipient must consider the effects of the off-campus sexual harassment when evaluating whether there is a hostile environment on campus or in an off-campus education program or activity because students often experience the continuing effects of off-campus sexual harassment while at school or in an off-campus education program or activity.

The Title IX regulation, at 34 C.F.R. § 106.8(b), requires recipients to adopt and publish grievance procedures providing for the prompt and equitable resolution of complaints alleging any action that would be prohibited by Title IX, including sex discrimination, sexual harassment, and sexual assault/violence. Title IX does not require a school district to provide separate grievance procedures for sexual harassment complaints, including sexual assault/violence complaints.

A recipient may use student disciplinary or other separate procedures for these complaints; however, a recipient's grievance procedures for handling discrimination complaints must comply with the prompt and equitable requirements of Title IX. OCR has identified a number of elements in evaluating whether a school's grievance procedures are prompt and equitable, including whether the procedures provide for:

1. notice to students and employees of the procedures, including where complaints may be filed;
2. application of the procedures to complaints alleging discrimination or harassment carried out by employees, students, and third parties;
3. provision for adequate, reliable, and impartial investigation of complaints, including an opportunity for both the complainant and respondent to present witnesses and other evidence;
4. designated and reasonably prompt timeframes for major stages of the complaint process;
5. notice to parties of the outcome of the complaint; and
6. an assurance that the institution will take steps to prevent recurrence of any sex discrimination or harassment found to have occurred, and to correct its discriminatory effects on the complainant and others if appropriate.

#### Age discrimination

The Age Discrimination Act of 1975 prohibits discrimination based on age in programs or activities that receive federal financial assistance. When investigating an allegation of different treatment based on age, OCR first determines whether there is sufficient evidence to establish an initial, or prima facie, case of discrimination. Specifically, OCR determines whether the

---

University treated the Student less favorably than similarly situated individuals of a different age. If so, OCR then determines whether the University had a legitimate, nondiscriminatory reason for the different treatment. Finally, OCR determines whether the reason given by the University is a pretext for unlawful discrimination.

### Retaliation

When investigating a complaint of retaliation, OCR determines whether: (1) an individual suffered an adverse action by the recipient; (2) the recipient knew that the individual engaged in a protected activity or believed the individual might engage in a protected activity in the future; and (3) there is some evidence of a causal connection between the adverse action and the protected activity. If one of the above elements cannot be established, then OCR cannot find a violation. In determining whether an action taken by a recipient is adverse, OCR considers whether the alleged adverse action caused lasting and tangible harm, or had a deterrent effect. Merely unpleasant or transient incidents usually are not considered adverse. An activity is “protected” when an individual opposes an act or policy that is unlawful under one of the laws that OCR enforces, or the individual has participated in a proceeding under one of the laws OCR enforces.

There are several ways to establish a causal connection, and proof of a causal connection may be established through either direct or circumstantial evidence. One method of establishing a causal connection is proximity in time. Specifically, the time span between when the individual engaged in a protected activity and when the recipient took the materially adverse action could, standing alone, or in conjunction with other evidence, establish that the materially adverse action was taken because of the protected activity. Other evidence of a causal connection may include the recipient’s treatment of the complainant compared to other similarly situated individuals, the recipient’s deviation from established policies or practices, and changes to the treatment of the complainant after the protected activity occurred.

Once all of the above elements have been established, the burden is on the recipient to articulate a legitimate, non-retaliatory rationale for the adverse action. Generally, the recipient’s non-retaliatory reasons must be both (1) clear and reasonably specific and of such a character to justify the recipient’s action; and (2) the recipient’s response must be proportional to the recipient’s alleged concerns.

OCR then determines whether the rationale offered by the recipient is a pretext for retaliation. This can be shown either: (1) directly, by establishing that a retaliatory reason more likely motivated the recipient; or (2) indirectly, by, for example, establishing that the stated reason has no basis in fact, the stated reason was not the true reason or the stated reason was insufficient to explain the recipient’s action.

### **Review and Analysis of University’s Policies and Procedures**

As part of our investigation, OCR reviewed the University’s policies for resolving complaints of sexual misconduct, which are contained in the University Code of Conduct and the University’s Title IX/Sexual Misconduct Policy. OCR found that these policies are available on the

University’s website, and in the University’s handbooks and faculty handbooks as well. The policies notify persons whom to contact if they experience or become aware of sexual harassment or any type of sexual misconduct. The policies specify that they apply to the conduct of students, employees, applicants, and visitors/third parties. The sexual misconduct policy explains how to file a complaint and refers to the Code of Conduct for the steps of a formal hearing process. The Code of Conduct contains a section on sexual misconduct hearings, and states that all hearings for allegations of sexual misconduct will be conducted in a “timely” fashion. The sexual misconduct policy requires that the outcome of all complaints be issued to both the complainant and respondent in writing.

The policies also provide for an impartial hearing process with the ability for both parties to present witnesses and evidence. However, OCR identified concerns with impartiality because our investigation revealed that some University staff members held multiple roles in the adjudication of the Title IX complaint in which the Complainant was accused of sexual misconduct. OCR also noted that the University’s Title IX policy does not contain an assurance that the University will take steps to end the sexually hostile environment and prevent its recurrence. In response to the issues identified in OCR’s investigation and discussed below, the University is amending these policies pursuant to the attached Resolution Agreement.

**XXXXXX**

XX – paragraphs redacted – xx

### **Conclusion**

To resolve the compliance concerns identified above, the University entered into the attached Resolution Agreement, signed on March 8, 2018. Once the Resolution Agreement is fully implemented, the University will be in compliance with Title IX with respect to the issues addressed in this letter. OCR will monitor the University’s implementation of the Resolution Agreement until the University is in compliance with the statutes and regulations at issue in the case.

This concludes OCR’s investigation of the complaint. This letter should not be interpreted to address the University’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.

The Complainant has the right, pursuant to the regulation at 34 C.F.R. § 110.39 implementing the Age Act, to file a civil action for injunctive relief in federal court following the exhaustion of administrative remedies. Administrative remedies are exhausted if: (1) 180 days have elapsed since the complainant filed the complaint with OCR, and OCR has made no finding, or (2) OCR issues any finding in favor of the recipient. A civil action can be brought only in a United States district court for the district in which the recipient is found or transacts business. A

complainant prevailing in a civil action has the right to be awarded the costs of the action, including reasonable attorney's fees, but these costs must be demanded in the complaint filed with the court. Before commencing the action, the complainant shall give 30 days notice by registered mail to the Secretary of the Department of Education, the Secretary of the Department of Health and Human Services, the Attorney General of the United States, and the recipient. The notice shall state the alleged violation of the Age Act, the relief requested, the court in which the action will be brought, and whether or not attorney's fees are demanded in the event the complainant prevails. The complainant may not bring an action if the same alleged violation of the Age Act by the same recipient is the subject of a pending action in any court of the United States.

Please be advised that the University must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, or participates in an OCR proceeding. If this happens, the individual may file a retaliation complaint with OCR.

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

We appreciate the University's cooperation in the resolution of this complaint. If you have any questions regarding this letter, please contact Linda Thomas, the OCR investigator assigned to this complaint, at 215-656-8553 or via email at [Linda.Thomas@ed.gov](mailto:Linda.Thomas@ed.gov).

Sincerely,

/s/

Melissa M. Corbin  
Team Leader  
Philadelphia Regional Office

Enclosure

cc: Jeff Hawkins, Esq.