



**UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS**

500 WEST MADISON ST., SUITE 1475
CHICAGO, IL 60661-4544

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May 1, 2012

Dr. Anne K. Temte
President
Northland Community and Technical College
1101 Highway One East
Thief River Falls, MN 56701-2598

Re: OCR Docket #05-11-2053

Dear Dr. Temte:

This is to advise you of the disposition of the above-referenced complaint filed with the U.S. Department of Education (Department), Office for Civil Rights (OCR), on November 29, 2010, against Northland Community and Technical College (College) alleging discrimination on the bases of sex and disability.

The complaint alleged that during the 2010-11 school year the College subjected the Complainant to a hostile environment on the bases of sex and disability (XXXXXXXXXX), when teachers and students in the College's Aviation Maintenance Technology Program (Program) subjected her to sexual harassment and disability harassment, and the College failed to stop the harassment.

OCR is responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §1681, and its implementing regulation, 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in any education program or activity operated by a recipient of Federal financial assistance. OCR also enforces Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance, and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12132, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. As the College receives Federal financial assistance from the Department and is a public entity, it is subject to the requirements of Title IX, Section 504 and Title II. Therefore, OCR has jurisdiction over this complaint.

As part of its investigation, OCR reviewed documents provided by the Complainant and the College, and interviewed the Complainant and College staff, including the College's Program Director (Program Director), a Program Instructor (Instructor), the College's Dean of Student Development (Dean), the Chief Operating Officer for the Program (Officer), and the College Counselor (Counselor). Based on this evidence, OCR finds sufficient evidence to conclude

that the College discriminated against the Complainant on the bases of sex and disability as alleged in the complaint. The reasons for this determination follow.

Case Summary

The College is a two-year community college with campuses in East Grand Forks and Thief River Falls, Minnesota. The Complainant was a student enrolled in the Program, which is located at the Thief River Falls campus, during the time period encompassed by this complaint. According to the College, the Complainant was the only female student enrolled in the Program during the Fall 2010 semester.

The Complainant has been diagnosed with XXXXXXXXXXXX, a degenerative disorder of the XXX. The Complainant registered with the College's Learning Services office prior to the beginning on the 2010-11 school year. On August 23, 2010, Learning Services approved the following academic adjustments for the Complainant:

- Extended time for tests and quizzes;
- Use of a CCTV machine;¹
- Size 14 font for all tests, quizzes and handouts; and,
- Use of a tape recorder during class.

On September 16, 2010, the Complainant's academic adjustments were modified to also allow her to circle multiple choice answers on tests and quizzes rather than use a scantron form.

College Policies

The College's Policy 1020 (Policy 1020) adopts the Minnesota State Colleges and Universities (MnSCU) 1B.1 Board Policy which prohibits discrimination and harassment based on sex or disability. The College's Policy 1020P (Policy 1020P) adopts the MnSCU 1B.1.1 Procedure and sets forth the process the College will follow to respond to alleged violations of Policy 1020, including allegations of harassment on the basis of sex or disability. It states, in part:

Administrators and supervisors shall refer allegations of conduct that they reasonably believe may constitute discrimination or harassment under [Policy 1020] to the designated officer, or in consultation with the designated officer may inquire into and resolve such matters. . . . The Office of the Chancellor, college or

¹ Used to magnify print or pictures.

university has an affirmative duty to take timely and appropriate action to stop behavior prohibited by [Policy 1020], conduct investigations and take appropriate action to prevent recurring misconduct.

Policy 1020P encourages persons who believe they have been subjected to harassment, or witnesses an individual being subjected to harassment, to report the harassing behavior to the designated officer and includes appropriate contact information for the designated officer. The designated officer under Policy 1020P is the College's Executive Director of Administrative Services (Executive Director).

A review of Policy 1020 and Policy 1020P revealed:

- The policies do not specifically state that sexual assault is a form of sexual harassment;
- It is unclear if the College uses a preponderance of the evidence standard in determining whether complaint allegations have been substantiated.
- While the policies allow for situations where, notwithstanding the complainant's request for confidentiality, the College must take action to protect the victim and other students, neither policy requires the College to so advise the complainant.

Complaints Alleging Discrimination and Harassment

During the Fall 2010 semester, the Complainant made several reports and/or complaints (hereinafter referred to as complaints) to the College alleging conduct that, if true, could have constituted a violation of Policy 1020. The College confirmed to OCR that the Executive Director received no notification of any of the complaints made by the Complainant during the Fall 2010 semester and did not conduct a harassment investigation of or otherwise resolve these complaints. The following is a summary of each of the complaints raised by the Complainant.

Complaint #1

According to the Complainant, on October 20, 2010, her Aviation Basics class performed a "de-birding" of a Boeing 727 plane, owned by the College and used to train students in the Program.² The Complainant told OCR that the students in the class de-birded the plane by standing on the bed of a truck, which she believed to be unsafe. The Instructor acknowledged to OCR that the students de-birded the plane by standing on a truck bed, but denied that this

² De-birding consists of removing bird nests from an airplane.

method was unsafe. The Complainant did not participate in the de-birding; instead, she left the class to inform the College's safety coordinator (Coordinator) of the situation and her concern about the safety of the process. The Complainant stated that as she walked to the College building, she overheard two Program students comment, "think she can go wherever she wants, retard b****." The Complainant stated that she continued on to the College building and did not turn around to see which students made the comment.

The College acknowledged that the Complainant contacted the Coordinator to discuss her concerns regarding the plane de-birding exercise. The Complainant agreed that she did not report the comments made by the Program students when she spoke with the Coordinator. According to the College, after speaking with the Complainant, the Coordinator contacted the Director, who then spoke with the Instructor and the students in the class. The College stated that the Instructor and students acknowledged using the truck bed as a platform to de-bird the plane. The College told OCR that none of the other Program students who participated in the plane de-birding exercise raised any safety concerns.

The Complainant stated that, after being contacted by the Director about the incident, the Instructor became visibly upset with the Complainant for reporting the incident to the Coordinator. According to the Complainant, the Instructor sought her out and berated her in front of other Program students. The Complainant told OCR:

He took me out into the open area right by the front door, literally raising his voice as to where anyone could hear him, telling me if I ever have another issue again before I ever call the f****ing safety coordinator again to talk to him.

The Instructor acknowledged expressing frustration with the Complainant for contacting the Coordinator before notifying him of her safety concerns, but denied yelling or cursing at the Complainant. The Director told OCR that he also spoke with the Complainant about the incident and that he, too, advised the Complainant that, in the future, she should direct any class safety concerns to the specific class instructor before notifying the Coordinator. The Director and Instructor both told OCR they believed the class instructor should be notified first because the instructor would be able to respond to any class safety issues much quicker than the Coordinator. The Director advised OCR that the de-birding method used by the Instructor, while safe, was not the safest method and indicated that in the future the students would be using a platform instead of a truck bed for this procedure.

The Complainant told OCR that she attempted to schedule a meeting with the Instructor that same day to raise objections to his treatment of her in connection with the incident, but he was unavailable so she spoke to the College administrative assistant (Assistant). She told the Assistant about the de-birding safety incident, as well as the fact that she had been called a "retard" and a "b****" by her classmates. The Complainant told OCR that she was very emotional when recounting the story to the Assistant. According to the Complainant, the

Assistant responded by telling her to “calm down” and “act like a grown up,” referred to the alleged comments by her classmates as “sticks and stones” and told her to “calm down girl.” The Assistant denied making the statements attributed to her by the Complainant, and said the Complainant did not report any offensive comments made by the Instructor or students. The Complainant told OCR that she met with the Director to discuss the alleged offensive comments made by her classmates during the de-birding incident. The Director acknowledged discussing the alleged comments with the Complainant and told OCR that the College did not investigate the alleged comments or take any other action concerning the complaint because the Complainant could not provide the names of the students who made the comments. The Complainant acknowledged that she was unable to provide the College with the names of the students who made the comments. She said there were between 25 and 30 students in the class.

Complaint #2

Sometime between October 20, 2010, and November 3, 2010,³ the Complainant discussed with the Director her concerns that she was not being included in class participation in her Nonmetallic Structures class and wondered if she was being excluded because she was the only female in class. According to the College, when speaking with the Director, the Complainant specifically complained about how she was being treated by students in the class who were assigned to work on group projects with her. The Complainant told OCR she reported to the College that students in her group, all males, told her that she was too “fragile” to do certain project assignments and did the assignments for her over her objections. She said she believed they said and did this because she was a woman and the male students were afraid she would hurt herself.

The Complainant also told the Director that students in the class were telling offensive jokes about women and using inappropriate language in class, but could not tell the Director the names of these students. The Director shared the Complainant’s concerns with the Dean, who then met individually with the Complainant. According to the Dean, he and the Complainant discussed her feelings of being excluded, as well as her concerns about the alleged offensive jokes and inappropriate comments being made by male students in the class. The Complainant told him she did not know the names of the students who made the alleged jokes and comments.

Neither the Director nor the Dean asked the Complainant for a description of the individuals or asked her to discreetly point out the individuals during a class session. They did not ask the Complainant to repeat the alleged jokes and comments or provide specific details about what was being said by the male students, did not contact the class instructor to ascertain the names of the students who were placed in the Complainant’s group or review the class roster

³ Neither the College nor the Complainant could provide the specific date of the complaint, although they agree the complaint was made.

with the Complainant, and did not ask the class instructor if the instructor had observed the behavior reported by the Complainant. The Complainant stated that she could have provided a description of the students or discreetly pointed out the students in class to the Director had he asked her to do so. She said there were between 20 and 30 students in the class.

The Dean advised OCR that he was unsure if, at the time of their discussion, he viewed the Complainant's concerns as a complaint of sexual harassment under Policy 1020P. The Dean added that had the concerns been viewed as a complaint of sexual harassment, it would have been difficult for the College to investigate the complaint since the Complainant did not know the names of the students who allegedly made the inappropriate comments.

The Dean told OCR that he asked the Complainant what she wanted the College to do in response to her concerns. According to the Dean and the Complainant, the Complainant asked the Dean to schedule a meeting with students in the Program where he would discuss the Complainant's concerns in broad terms, without specifically referencing her or any other students. The Dean told OCR that he agreed to organize such a meeting.

On November 3, 2010, the Dean held a meeting with students in the Program. The Dean estimated that at least 50 students attended the meeting. According to the Dean, he discussed the following topics:

- Creating understanding and awareness of people with different backgrounds and learning styles;
- College policies, including the Student Code of Conduct and the Non-Discrimination in Employment and Education Complaint Procedure, which include a prohibition against harassment;
- Complaints and resolving situations through creating awareness and education;
- Creating a quality learning environment; and,
- Services available from the Student Services and Student Life offices.

The Dean told OCR that at the conclusion of the meeting he asked the Complainant if the meeting had satisfied her concerns, and she responded that it had. The Complainant said she told the Dean she was pleased with the meeting, but did not tell him that the meeting had satisfied her concerns.

Complaint #3

According to the Complainant, on November 8, 2010, she observed a student viewing vulgar and sexually inappropriate content on a public computer in the College's computer lab. The Complainant told OCR that the male student (Student 1) had the computer speakers turned on while viewing the content, causing others in the computer lab to hear what was being said.

She said she saw and heard what Student 1 was watching. According to the Complainant, the student was watching a comedic performance which included vulgar and sexually offensive content. The Complainant told OCR that upon hearing and observing the offensive content, she immediately notified the Officer. The Officer told OCR that he went to the computer lab and asked Student 1 to show him what Student 1 was viewing. The Officer explained that Student 1 stated he was watching a comedic video on YouTube and showed the video to the Officer. The Officer added that he viewed the entire video, which lasted approximately five minutes, and found nothing offensive or sexually inappropriate in the video.

The Officer told OCR that the Complainant stood at the door of the computer lab while he viewed the video. The Officer stated that, after viewing the video, he spoke with the Complainant, told her he did not find anything in the video that was sexually inappropriate, and asked her if the video Student 1 played for him was the same video she saw and heard. According to the Officer, the Complainant did not respond to his question. The Officer told OCR that he also reminded Student 1 that the computer lab should not be used to view inappropriate materials. The Officer did not speak with any of the other students who were in the lab at the time. The Officer stated that he then asked the Complainant if she was satisfied with his response to her concerns, and she responded that she was.

The Complainant told OCR that she did not see the video Student 1 showed to the Officer and, therefore, could not confirm that it was the same video she initially saw and heard Student 1 watching. The Complainant agreed that after viewing the video shown to him by Student 1 the Officer told her that he did not find anything sexually inappropriate in the video. However, she said he did not ask her if the video he viewed was the same video she initially saw and heard and she did not tell the Officer she was satisfied with his response to her concerns.

The Dean told OCR that upon learning of the incident, he asked the College's Information Technology Department to disable all external speakers on the computers in the computer lab and to post signs in the computer lab regarding the appropriate use of College technology and the Internet. The Complainant confirmed that these steps were taken.

Complaint #4

According to the Complainant, also on November 8, 2010, upon entering her Aircraft Drawing class, she was asked by an unknown male student (Student 2) if she knew what a "chod" was. The Complainant told OCR that Student 2 then went on to explain to her that a "chod" was a one-inch wide penis. The Complainant stated that the other students in the room, all males, then began asking each other if they had chods, while telling her that she did not have a chod, but instead had a "cherry." The Complainant told OCR that she attempted to speak with the Officer and the Director about the incident that same day, but both were out of their offices at the time she visited.

On November 17, 2010, the Complainant reported the incident to the Dean. The Dean stated that he asked the Complainant for the names of the students who made the comments and the Complainant responded that she did not know the names of the students. The Dean told OCR that, although he reported the Complainant's complaint to the Director, the College was unable to investigate the complaint further because the Complainant could not identify the students who allegedly made the comments. The Dean told OCR that he did not ask the Complainant for a description of the individuals or attempt to have the Complainant discreetly point out the individuals during a class session. The Dean acknowledged that neither he nor the Director obtained a class roster or spoke with the instructor of the class about the incident. The Complainant acknowledged that she did not provide the names of the students to the Dean, but stated that she could have provided a description of the students or discreetly pointed out the students in class had he asked her to do so.

Complaint #5

According to the Complainant, on November 10, 2010, she entered her Nonmetallic Structures class and found students, all males, viewing "Eli's Book of Dirty Jokes" on the overhead screen. The Complainant told OCR that when she entered the class, one of the students (Student 3) quickly removed the content from the overhead screen. The Complainant stated that another student (Student 4) announced her arrival in class by stating, "great, lollipop is here," to which another student (Student 5) replied "lollipop? you mean lollif*** because she always f***s things up." The Complainant stated that yet another student (Student 6) then commented, "yeah lollif***. Why did she have to show up?" The Complainant stated that there was no question the students were referring to her when they used the term "lollipop."

The Complainant stated that she promptly went to the Director to inform him of what had just occurred, including by providing the identities of at least some of the students who were involved. According to the Complainant, without viewing the content on the overhead screen or speaking with the students in the class, the Director told the Complainant that he did not believe the students were referring to her when they used the term "lollipop" or made the other comments, even though she was the only female student in the class and Student 5 referred to "she" in connection with the term. The Complainant stated that the Director also told her that she needed to just "brush off" the comments.

The Director acknowledged that he told the Complainant he did not believe the students were referring to her as a "lollipop" before having an opportunity to speak with students or view the content on the overhead screen. When asked by OCR why he believed the students were not referring to the Complainant when using this term, the Director offered no reason for his belief. The Director denied telling the Complainant that she needed to "brush off" the students' alleged comments.

The Director stated that he spoke with the students alleged to have made the comments; they denied referring to the Complainant as “lollipop,” but admitted using the term. The students also admitted viewing “Eli’s Book of Dirty Jokes” on the class overhead screen. The Director stated that he informed the students that the College’s resources were not to be used in such a manner, but did not otherwise discipline the students.

The Director then spoke with the Dean about the incident. According to the Dean’s notes from the meeting, the Director told the Dean that “other students are getting tired of [the Complainant’s] behavior and feels (sic) that her constant complaining is bordering on bullying and harassing.” The Dean’s notes state that the Director also told the Dean that “students are talking about not returning to the program if she is going to be back.”

The College also provided OCR with a copy of notes taken by the Dean during a December 2, 2010, meeting between the Dean and Student 3, who admitted being the one who placed “Eli’s Book of Dirty Jokes” on the class overhead screen on the day in question. According to the Dean, the two did not meet to discuss the “Eli Book of Dirty Jokes” incident, but instead met to discuss concerns Student 3 had about the Complainant. The notes stated:

[Student 3] complained the [Complainant] is going around listening and recording other student’s conversations and trying to get people in trouble. [Student 3] stated that everyone in the program is upset by [the Complainant’s] actions. [Student 3] asked if it was okay for [the Complainant] to use a recorder. [The Dean] informed [Student 3] that sometimes a student can be granted an accommodation to use a recorder for educational purposes. [Student 3] stated that he understood, but wondered about using the recorder outside of the classroom. [The Dean] informed [Student 3] about his right not to be recorded in personal conversations.

The Complainant told OCR that she did not give the Dean permission to disclose to Student 3 that she had been allowed to tape record classes pursuant to an approved academic adjustment. The Complainant confirmed that she sometimes tape recorded others at the College outside of the classroom without their knowledge or consent.

According to the Dean, at a separate meeting on December 14, 2010, he discussed the “Eli Book of Dirty Jokes” incident with Student 3 and Student 4. When asked why it took over a month to discuss the incident, the Dean replied that December 14 was the first day available in his schedule, but did not explain why he did not discuss the incident during his meeting with Student 3 that occurred almost two weeks earlier. The Dean told OCR that Student 3 acknowledged his inappropriate behavior on November 10 and stated that he would not engage in such behavior in the future. No disciplinary action was taken against Student 3.

According to the Dean's notes from the meeting, Student 3 also told the Dean that he tries to avoid the Complainant because the Complainant, "tries to get people in trouble by recording and listening into others conversations." The Dean's notes indicate that the Dean "informed [Student 3] that he should not question [the Complainant] about [the November 10 incident] and such acts can be seen as a violation of the Student Code of Conduct." The Dean also told OCR that he advised the Complainant at some point that she did not have the right to tape other people's conversations outside the classroom.

According to the Dean, Student 4 admitted being part of the group viewing the inappropriate material on the overhead projector but denied calling the Complainant "lollipop."

The Dean stated that he did not view the Complainant's complaint regarding the November 10 incident as a complaint of sexual harassment pursuant to Policy 1020P because he did not believe the students' actions were directed at the Complainant, which the Dean believed was the deciding factor in determining whether the actions constituted sexual harassment.

Complaint #6

According to the Complainant, on November 16, 2010, while she was sitting in the computer lab, she overheard a group of three male Program students (Students 1, 5, and 6) refer to her as a "b*****" with "big ears" and heard Student 7 comment that "you have to watch what you say about her."

The Complainant met with the Dean on November 17, 2010, to report the incident. The Complainant provided the Dean with the names of two of the three students (Students 1 and 5) alleged to have made the comments. The Complainant did not know the name of the third student (Student 6). The Dean told OCR that he did not ask the Complainant for a description of Student 6.

On December 14, 2010, the Dean discussed the incident with Students 1 and 5. According to the College and the Dean's notes from the meeting, Students 5 and 1 denied making any of the comments and stated that they attempted to avoid the Complainant whenever possible. Student 1 did, however, report hearing other students talking negatively about the Complainant. The Dean told OCR that he did not ask Student 1 for the names of the students he had heard talking about the Complainant, or ask Student 1 to repeat to him the comments being made about the Complainant. The Dean also stated that he did not ask the students to identify Student 6, who was reportedly with them in the computer lab at the time of the incident.

According to the Complainant, also on November 16, 2010, while she was sitting in the computer lab, she heard Students 1, 4, and 7, talking about "wing bones." According to the College, the Complainant reported the conversation as follows:

Student 4: Said you mean this hand.

Student 7: You see where [Student 4] has his hand? His other hand is in his pants.

Student 1: You are sick [Student 4].

The Complainant provided the College the names of Student 1 and Student 4 in connection with this incident. The Complainant was not able to identify Student 7. The Dean did not ask the Complainant for a description of Student 7.

The Dean met with Students 1 and 4 on December 14, 2010, to discuss the November 16, 2010, incidents in the computer lab, among other issues. Student 4 admitted being involved in the “wing bones” conversation and agreed to refrain from making any further inappropriate statements. Student 1 denied making the statements in the computer lab described by the Complainant and generally denied making inappropriate comments about the Complainant. According to the notes, Student 1 said he attempted to avoid the Complainant whenever possible. Student 1 did, however, confirm that he had heard other students making negative comments about the Complainant. The Dean told OCR that he did not ask Student 1 for the names of the students he had heard talking about the Complainant, or ask Student 1 to repeat or describe the comments he had heard being made about the Complainant. The Dean also confirmed that he did not ask either Student 4 or Student 1 for the identity of Student 7.

Alleged Disability Harassment

The Complainant told OCR that she was also subjected to harassment and disparaging comments in the computer lab on the basis of her disability. According to the Complainant, on several occasions when she was in the computer lab, Program students made comments to her regarding the large font on the CCTV screen and questioned the ability of anyone who needed to use a CCTV to succeed in the Program and the aviation profession. According to the Complainant, the comments included the following statements:

- Holy f*** look at the size of the writing;
- I would not want a blind person working on my plane; and,
- Blind people shouldn't be allowed in the Program.

The Complainant told OCR that students made similar comments in Program classes during tests and quizzes when they viewed the large type used on the documents provided to the Complainant.

The Complainant told OCR that she spoke with the Director and asked him to move the CCTV from the computer lab to a “more secluded” location. She said she told him she wanted this done because of derogatory comments being made by other students in the computer lab regarding her disability. The Director denied receiving such a request or

receiving any complaints from the Complainant regarding negative comments being made to her because of her disability.

The Complainant stated that she also talked to the Counselor about negative comments being made by Program students regarding her disability. The Counselor confirmed that the Complainant told her students were making negative comments in class and in the computer lab regarding the Complainant's disability. According to the Counselor, she asked the Complainant if she wanted to file a harassment complaint under Policy 1020P. The Counselor stated the Complainant responded that she did not want to file a complaint. The Complainant agreed that the Counselor asked her if she wanted to file a complaint. However, she said she did not respond as the Counselor claimed. Rather, she said that she was unsure about filing a complaint because she did not believe the College would treat the complaint seriously based on her past experiences with complaints she brought to the attention of the College. The Counselor told OCR that she did not ask the Complainant for the identity of the students alleged to have made the comments, and did not discuss the Complainant's concerns with any College administrators. The Counselor acknowledged that she did not notify the Executive Director of the Complainant's allegations.

Additionally, the Complainant told OCR that in Fall 2010, the Instructor informed students in one of her classes (Aviation Basics) that the class would be tape recorded. The Complainant stated that the Instructor then asked if any student in the class objected to the classes being tape recorded. The Complainant told OCR that no student objected to this arrangement. However, the Complainant averred that she was upset with the Instructor because she believed he had violated her rights by revealing her status as a student with a disability to the class. According to the Complainant, although the Instructor did not specifically identify her as the individual that would be tape recording the class, "everyone knew he was talking about me." The Complainant stated that the Instructor's actions made her feel uncomfortable in the class and more hesitant to tape record class sessions. The Complainant also told OCR that, after the Instructor informed the students that the class would be tape recorded, she was confronted by some of her classmates. According to the Complainant, the students told her that they did not believe she should be allowed to tape class sessions and also told her they believed she would use her tape recording authorization to record non-academic conversations to get others in trouble.

The Instructor acknowledged to OCR that he informed the students that the class sessions would be tape recorded. The Instructor denied identifying the Complainant as the individual who would be recording the class, but admitted that he believed the students knew to whom he was referring. The Instructor also denied informing the class that the tape recording had been approved as an academic adjustment for the Complainant and said he made no reference to a person's disability as being the reason for the tape recording. The Instructor told OCR that he informed the students in the class because he believed "they had a right to know" their class sessions would be tape recorded, a right which the Instructor described as "ethical" and

not “legal.” When asked if he received training on the provision of academic adjustments to students with disabilities, the Instructor stated that he receives computer-based training once a year but did not mention any training on the College’s obligations towards students who have a disability. The Instructor told OCR that he has not been disciplined by the College for informing the students in the class that their class sessions would be tape recorded.

The Learning Services Director told OCR that it would be inappropriate for any course instructor to announce that a student would be tape recording a class, regardless of whether the Instructor specifically identified the student or stated that the tape recording was being done pursuant to an approved academic adjustment. The Learning Services Director stated to OCR that he delivers annual training to Program instructors on the provision of academic adjustments to students with disabilities, including the privacy rights of students with approved academic adjustments.

The Complainant stated that the sexual harassment and disability harassment she endured during the Fall 2010 semester made her uncomfortable in classes; made her less likely to participate in class activities and discussions; led her to cease using the CCTV as an academic adjustment; and made her more hesitant to tape record classes. The Complainant did not state that the harassment affected her grades. The Complainant reported that for reasons unrelated to the harassment, the Complainant did not enroll in classes at the College during the Spring 2011 semester. The Complainant enrolled in classes at the College for the Fall 2011 semester but has since left the College.

Applicable Regulations and Standards

Title IX Applicable Regulations and Legal Standards

The Title IX regulation, at 34 C.F.R. §106.31(a), states 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 educational program or activity operated by a recipient of Federal financial assistance. The regulation, at 34 C.F.R. § 106.8(b), provides that “[a] recipient shall adopt grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.”

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. Sexual harassment of a student can deny or limit, on the basis of sex, the student’s ability to participate in or to receive benefits, services or opportunities in the recipient’s program. Sexual harassment of students can, therefore, constitute a form of sex discrimination prohibited by Title IX.

Section 504 and Title II Applicable Regulations and Legal Standards

The regulation implementing Section 504, at 34 C.F.R. § 104.4(a), provides that no qualified person with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance. The regulation, at 34 C.F.R. § 104.7(b), provides that “[a] recipient that employs fifteen or more persons shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part.” The regulation implementing Title II, at 28 C.F.R. § 35.130(a), contains a similar prohibition against disability-based discrimination on the part of public entities, and at 28 C.F.R. § 35.130(a), contains a similar requirement that public entities establish grievance procedures providing for the prompt and equitable resolution of complaints alleging violations of Title II. The standards adopted by Title II were designed not to restrict the rights or remedies available under Section 504. OCR has determined that the Title II regulations applicable to the issues raised in this complaint do not provide greater protection than the applicable Section 504 regulations. OCR has, therefore, applied the Section 504 standards in analyzing the issues raised by the complaint.

Disability harassment under Section 504 and Title II is intimidation or abusive behavior toward a student based on disability that creates a hostile environment by interfering with or denying a student’s participation in or receipt of benefits, services, or opportunities in the institution’s program.

Harassment Based On Sex or Disability

Harassment creates a hostile environment when unwelcome conduct based on sex or disability in a recipient’s program or activity is sufficiently serious to deny or limit the student’s ability to participate in or benefit from the program or activity. OCR considers the conduct in question from both an objective perspective and the subjective perspective of the alleged victim of harassment. Conduct is unwelcome if the student did not request or invite the conduct and regarded it as undesirable or offensive. Harassing conduct may take many forms, including verbal acts and name calling, as well as nonverbal behavior, such as graphic and written statements, or conduct that is physically threatening, harmful, or humiliating. Harassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents. In analyzing claims of harassment, OCR considers the totality of the circumstances to determine whether the harassing conduct is sufficiently serious that it denies or limits a student’s ability to participate in or benefit from the recipient’s program based on sex or disability, thereby creating a hostile educational environment. These circumstances include the context, nature, scope, frequency, duration, and location of the incidents, as well as the identity, number, age and relationships of the persons involved.

A recipient is responsible for addressing harassment incidents about which it knows or reasonably should have known. In some situations harassment may be in plain sight, widespread, or well-known to students and staff, such as harassment occurring in hallways, during academic or physical education classes, during extra-curricular activities, or through graffiti in public areas. In these cases, the obvious signs of the harassment are sufficient to put the recipient on notice. In other situations, the recipient may become aware of misconduct, triggering an investigation that could lead to the discovery of additional incidents that, taken together, may constitute a hostile environment.

Where the recipient learns that harassment based on sex or disability occurred, the recipient must investigate the incident(s) promptly and respond appropriately. The responsibility to respond to harassment based on sex or disability, when it does occur, includes taking prompt and effective action reasonably calculated to end the harassment, eliminating any hostile environment that has been created, preventing it from recurring, and where appropriate, remedying the effects of the harassment on the student who was harassed. These duties are the 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. The corrective action taken by the recipient should be tailored to the specific situation. A series of escalating responses, including escalating consequences for the harasser, may be necessary if the initial steps are ineffective in stopping the harassment.

Colleges may have an obligation to respond to student-on-student harassment that initially occurred off school grounds, outside a College's education program or activity. If a student files a complaint with the College, regardless of where the conduct occurred, the College should process the complaint in accordance with its established procedures. Because students often experience the continuing effects of off-campus harassment in the educational setting, schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus. For example, if a student alleges that he or she was harassed by another student off school grounds, and that upon returning to school he or she was taunted and harassed by other students who are the alleged perpetrator's friends, the school should take the earlier harassment into account in determining whether there is a hostile environment. The College also should take steps to protect a student who was harassed off campus from further harassment or retaliation from the perpetrator and his or her associates. The regulation also protects students from harassment by College employees and third parties. In assessing whether a student was subjected to a hostile environment, OCR considers the relationship between the alleged harasser and the subjects of the harassment.

Finally, the institution should take steps to stop further harassment and prevent any retaliation against the person who made the complaint (or was the subject of the harassment) or against those who provided information as witnesses. At a minimum, the institution's responsibilities include making sure that the harassed students know how to report any

subsequent problems, conducting follow-up inquiries to see if there have been any new incidents or any instances of retaliation, and responding promptly and appropriately to address continuing or new problems. When responding to incidents of misconduct, the label used to describe an incident (*e.g.*, bullying, hazing, teasing) does not determine how an institution is obligated to respond. Rather, the nature of the conduct itself must be assessed for civil rights implications. So, for example, if the harassing behavior is on the basis of disability, and creates a hostile environment, an institution is obligated to respond in accordance with the applicable federal civil rights statutes and regulations enforced by OCR.

Analysis

Sexual Harassment

The Complainant was the only female student enrolled in the Program during the Fall 2010 semester. The Complainant reported being subjected to sexual harassment on repeated occasions in both the classroom setting and the computer lab. The sexual harassment described by the Complainant included vulgar and derogatory statements of a sexual nature directed toward her by Program students, vulgar and sexually explicit comments made by Program students in her presence, the display of vulgar and sexually explicit material on a classroom overhead display and a computer in the computer lab and patronizing behavior directed toward her by male students with whom she performed group projects in class. The College confirmed that the display of vulgar and sexually explicit material in one Program classroom reported by the Complainant occurred, that one Program student admitted making sexually inappropriate statements in the Complainant's presence, that more than one Program student confirmed overhearing other Program students make derogatory statements about the Complainant and that several Program students reported that they avoided the Complainant because she had complained about their behavior. OCR has determined that this evidence is sufficient to conclude that the Complainant was subjected to a hostile environment on the basis of sex at the College during the Fall 2010 semester. The evidence also establishes that the Complainant made numerous complaints to the College concerning the alleged sexual harassment. OCR next considered whether the College responded in an appropriate manner.

The College acknowledged meeting with the Complainant on multiple occasions to discuss the Complainant's allegations of sexually offensive comments and behavior by other Program students. In spite of these complaints, and Policy 1020P's requirement that administrators "shall refer allegations of conduct that they reasonably believe may constitute discrimination or harassment under [Policy 1020] to the designated officer or in consultation with the designated officer may inquire into and resolve such matters," the College did not classify any of the reports as a complaint of sexual harassment pursuant to Policy 1020P and did not refer the complaints to or consult with the Executive Director.

Further, the evidence indicates that the College failed to take prompt and effective steps reasonably calculated to end the harassment, eliminate the hostile environment, remedy its effects and prevent its recurrence. When the Complainant first reported incidents of alleged sexual harassment to the College in late October and early November 2010, she was unable to identify the students who engaged in the harassment. The College pointed to the Complainant's inability to provide the names of the individuals responsible for the alleged harassment in some of her complaints as a justification for its failure to conduct an investigation of the complaints. However, the College failed to assist the Complainant in identifying the alleged harassers or to independently obtain that information. For instance, in Complaints #2 and #4, neither the Dean nor the Director asked the Complainant for a description of the jokes being made in the classroom, did not try to assist her in identifying the alleged harassers, did not speak with the relevant class instructors about the Complainant's claims and did not interview any of the students in the classes to see if they could confirm the Complainant's allegations. Although the Dean conducted a meeting with Program students on November 3, 2010, in response to the Complainant's allegations of sexual harassment and discussed Policy 1020 and the Student Code of Conduct during the meeting, within two weeks of the meeting the Complainant had reported additional incidents of sexual harassment that occurred in the computer lab and two different classrooms. The College did not take escalating steps thereafter to eliminate the hostile environment.

For Complaints #3 and #6, even though the Complainant provided sufficient information to identify the individuals involved, the evidence shows that the College took insufficient steps to address the Complainant's allegations and conducted no follow-up inquiries based on information obtained from the individuals involved. Although the Dean spoke with two of the individuals identified by the Complainant in Complaint #6, the Dean did not inquire as to the identity of the other students involved in the incidents she identified, and did not investigate statements by at least one student acknowledging that derogatory statements were being made about the Complainant.

In Complaint #5, the Complainant reported walking in on a group of male Program students looking at vulgar and sexually explicit material on an overhead projector in the classroom. Although the students promptly turned off the projector, they proceeded to make a series of derogatory comments about the Complainant. Although the Director and the Dean were able to confirm the students' use of the overhead projector to observe inappropriate material and the use of some of the language reported by the Complainant, no students were disciplined for the incident. Moreover, despite confirming at least some of the behavior reported by the Complainant, the focus of the Director's report to the Dean following his inquiries was the male students' concerns about the repeated complaints being made by the Complainant and an apparent concern that the Complainant's presence in the Program could lead some of the male students to leave the Program. For example when the Dean first met with Student 3 after the incident was reported, he did not inquire about Student 3's role in the incident, but instead focused on Student 3's concerns about the repeated complaints being made by the Complainant.

In considering the totality of the circumstances, OCR finds the harassing conduct during the Fall 2010 semester was sufficiently serious so as to limit the Complainant's ability to participate in or benefit from the College's program based on sex, thereby creating a hostile educational environment and that the College failed to properly address the incidents of sexual harassment against the Complainant about which it had notice.

Furthermore, inasmuch as the College acknowledged that none of the claims of sexual harassment reported by the Complainant to College officials were referred to the Executive Director for investigation and that College officials did not consult with the Executive Director while responding to the complaints, OCR has determined that the College failed to provide the Complainant with a prompt and equitable grievance procedure in connection with her complaints of sexual harassment.

Therefore, OCR has determined that the College subjected the Complainant to sex discrimination in violation of Title IX and its implementing regulation.

Disability Harassment Allegations

The Complainant is a person with a disability who requested and was approved to receive academic adjustments from the College. Among the academic adjustments she was approved to receive were enlarged font documents, the use of a CCTV machine and the right to tape record class discussions. The Complainant claimed that during the Fall 2010 semester she was subjected to unwelcome comments about her disability and her academic adjustments by Program students in the computer lab and the classroom and by the Instructor. The Complainant was subjected to offensive name calling and adverse comments about her disability and use of academic adjustments. The Instructor acknowledged informing students in his Aviation Basics class that the class sessions would be tape recorded and acknowledged that he believed the students in the class knew he was speaking of the Complainant when he made the announcement. The Director and the Counselor acknowledged that the Complainant complained to them about being subjected to derogatory and offensive statements related to her disability (and resulting need for academic adjustments) by Program students. After carefully considering this evidence, OCR has determined that the evidence is sufficient to conclude that during the Fall 2010 semester, the Complainant was subjected to a hostile environment on the basis of disability.

OCR next considered whether the College knew or reasonably should have known about the hostile environment. The Director said he did not investigate the complaint because the Complainant could not provide the names of the students who allegedly engaged in disability harassment. While the evidence is disputed as to what the Complainant said to the Counselor about pursuing a disability harassment complaint, there is no dispute that the Counselor did

not share the information about the alleged disability harassment with other College officials, including the Executive Director.

The evidence also shows that the Instructor, a College employee, played a role in perpetuating the hostile environment when he informed the Program students in one of her classes that the class sessions would be tape recorded. The Instructor acknowledged to OCR that most of the students in the class likely knew that he was referring to the Complainant. The Instructor further stated that he discussed the issue of tape recording with the Dean prior to making the announcement and concluded that the information he received from the Dean warranted the announcement. The evidence shows that Program students subsequently complained to College staff about the Complainant's use of a tape recorder. The Complainant stated that after the Instructor's announcement to the class, she felt uncomfortable in class, became more reluctant to tape record class sessions, and felt more isolated from her classmates. This is confirmed by student statements to the Dean that they avoided the Complainant where possible. Therefore, OCR has determined that the evidence is sufficient to conclude that the College knew or reasonably should have known that the Complainant was being subjected to a hostile environment on the basis of disability.

The evidence shows that the College did not investigate or respond to the hostile environment. No disciplinary action was taken against the students or the Instructor (for sharing information about the Complainant's disability with his class). To the contrary, the Dean appears to have endorsed the Instructor's action. No other steps were taken by the College to end the hostile environment or remedy its effects.

In considering the totality of the circumstances, OCR has determined that the harassing conduct alleged was sufficiently serious so as to limit the Complainant's ability to participate in or benefit from the College's program based on disability, and that the College failed to properly address the disability harassment against the Complainant about which it had notice.

Furthermore, inasmuch as the College acknowledged that the claims of disability harassment reported by the Complainant to College officials were not referred to the Executive Director for investigation and that College officials did not consult with the Executive Director while responding to the complaints, OCR has determined that the College failed to provide the Complainant with a prompt and equitable grievance procedure in connection with her complaints of disability harassment.

Therefore, OCR has determined that the College subjected the Complainant to disability discrimination in violation of Section 504 and its implementing regulation and Title II and its implementing regulation.

After determining the College had subjected the Complainant to sex and disability discrimination, in violation of Title IX, Section 504, Title II, and their implementing

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regulations, OCR began discussions with the College which resulted in the College signing the enclosed agreement (Agreement). When fully implemented, the Agreement will remedy the compliance concerns identified by OCR.

OCR will monitor the College's implementation of the Agreement. We look forward to receiving the College's first report regarding its implementation of the agreement by May 14, 2012.

If you have any questions regarding this letter, you may contact me or Jason Frazer, Regional Attorney, at (312) 730-1653.

Sincerely,

Dave Blom
Team Leader

Enclosure

c: James Patrick Barone