



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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December 17, 2015

Dr. David Sam
President
Elgin Community College
1700 Spartan Drive
Elgin, IL 60123-1793

OCR Case No. 05-15-2426

Dear Dr. Sam:

This letter is to notify you of the disposition of the above-referenced complaint, filed with the U.S. Department of Education (Department), Office for Civil Rights (OCR), against Elgin Community College (College) on May 15, 2015. Specifically, the complaint alleged:

1. In XXXX, Student A was subjected to race and disability discrimination in her XXXX class.
2. The College does not have clear procedures for filing a sexual harassment grievance, does not follow their own procedures, and did not properly investigate an allegation of sexual harassment by a College staff member that Student A filed with the College police on or around XXXX.
3. The College subjected Student A to retaliation for filing internal discrimination complaints and complaints with OCR by refusing to put her name on an honor student banner in XXXX.

OCR is responsible for enforcing 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 from the Department. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131-12134, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. OCR also enforces Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d – 2000d-7, and its implementing regulation, 34 C.F.R. Part 100, which prohibit discrimination on the basis of race, color or national origin by recipients of Federal financial assistance. Additionally, OCR enforces Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681-1688, 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. These laws also prohibit retaliation. As a recipient of Federal financial assistance and a public entity, the College is subject to each of these laws.

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

During the investigation, OCR reviewed documents submitted by both parties, and interviewed the Complainant and College staff members. Prior to OCR's conclusion of its investigation, the College expressed interest in resolving Allegations 1 and 2 in accordance with Section 302 of OCR's *Case Processing Manual* (CPM). The College signed the enclosed Resolution Agreement on December 3, 2015, which, when fully implemented will resolve the issues raised in Allegations 1 and 2 of this complaint. With respect to Allegation 3, OCR determined that there is insufficient evidence to support the allegation that the College retaliated as alleged. The reasons for this determination are set forth below.

College Policies and Procedures

The College identified several different policies and procedures to address discrimination based on race, sex and disability: Equal Opportunity and Affirmative Action Statement (Administrative Procedure (AP) 3.402); Anti-Discrimination, Harassment, Violence and Retaliation Policy and Procedure (AP 3.403); Individuals with Disabilities Procedure (AP 3.501); and Complaint Procedure (AP 4.401). With the exception of the "Equal Opportunity and Affirmative Action Statement," these policies can be found on the College's website.¹

In addition to the various policies and procedures identified by the College, the College website also includes an "Equal Access/Equal Opportunity Statement,"² which states that the College prohibits discrimination on the basis of race, sex, national or ethnic origin, or disability unrelated to ability, in the recruitment and admission of students and the employment of faculty, staff, and students in the operation of college programs, activities and services. It also prohibits any form of sexual harassment.³ This website states that concerns should be reported to the Paralegal EEO/AA Officer for a confidential review of concerns as well as assistance towards a timely resolution. It further states that attempts will be made to mediate the grievances in an informal process, and in the event that the informal process proves unsatisfactory, the "managing director of human resources will provide guidelines and assistance necessary for the grievant to issue a formal complaint."

AP 3.402 is included in the College Catalog. The policy states the College does not discriminate, or tolerate discrimination, against any member of its community on the basis of race, color, national origin, sex/gender, and disability in matters of admission, employment, or in any aspect of the educational programs or activities it offers.

In April 2015, the College significantly revised AP 3.403, changing it from "Sexual Harassment" to "Anti-Discrimination, Harassment, Violence and Retaliation Policy and Procedure."⁴ The current AP 3.403 states that the College does not discriminate, or tolerate discrimination, against any member of its community on the basis of race, color, national origin, sex/gender/gender

¹ <http://elgin.edu/aboutus.aspx?id=13758>

² <http://elgin.edu/aboutus.aspx?id=266>

³ AP 3.402 identifies AP 3.403 as the policies and procedures regarding the investigation and resolution of alleged or suspected violations of the College's policy against discrimination, harassment, and retaliation.

⁴ Although the College amended AP 3.403 in April 2015, it did not update its website accordingly and an outdated version of AP 3.403 was available online at the time the Complainant filed her sexual harassment complaint.

identity, and disability in matters of admission, employment, or in any aspect of the educational programs or activities it offers. The policy explains harassment can be a form of discrimination. It advises anyone witnessing or experiencing conduct which may violate the policy to report the conduct to the Title IX Coordinator, a member of the President’s Task Force or a Responsible Employee, states that the College prohibits retaliation, and provides examples of prohibited retaliation.⁵ This policy defines sexual harassment, sexual assault and sexual violence, as well as provides examples of conduct prohibited under the policy against sex discrimination.⁶

AP 4.401 provides a complaint procedure for a student or students that have complaints regarding the policies, practices and procedures of the College, including complaints of race, sex and disability discrimination. This procedure states that when filing a complaint against a college employee, “every effort will be made to resolve the complaint informally at the point of origin” and requires the student “to communicate with the individual or group with whom s/he has a complaint, in an effort to informally resolve the issue,” within 20 school days of the situation. The complaint procedure does not provide any exceptions for circumstances in which informally resolving the complaint at the point of origin would be inappropriate. Under AP 4.401, if the attempt at informal resolution does not resolve the issue, the student forwards the complaint in writing to the supervisor of the individual named in the complaint, describing the incident or situation as specifically as possible, and including a statement of the relief necessary to resolve the situation. The supervisor must respond to the student in writing within ten (10) school days after the student forwards the complaint.

According to AP 4.408,⁷ a student⁸ has a right to appeal an informal disposition of a complaint or adjudication of a complaint and the appeal must be submitted, in writing within ten (10) school days of receiving the determination, to the Dean of Student Services and Development, who will forward it to the appropriate Vice President. The Vice President will inform the student of the decision within ten (10) days of receiving the appeal.

AP 3.501 states that the College “does not discriminate, or tolerate discrimination, against individuals on the basis of physical or mental disability.” AP 3.501 provides a process for which a student needing academic adjustments can request one by contacting the ADA/Section 504 Coordinator for students⁹ (who in XXXX also was the Associate Dean of Academic Support). The policy states that “accommodation assessments” will be made on a case-by-case basis and that “both the individual and the College are required to participate in good faith in an interactive

⁵ AP 3.403 states that the investigation will be completed in 60 days, unless the College determines in its discretion that more time is required, but does not discuss any factors that the College considers in determining whether more time is required or indicate that the parties will be given periodic updates.

⁶ The College’s website contains a page titled “Title IX Compliance,” at <http://elgin.edu/aboutus.aspx?id=21228>, which provides examples of sexual harassment, defines sexual assault and stalking, and states that “by filing a Title IX complaint, you have the right to ask for an internal investigation and reasonable accommodations.” It states that inquiries should be directed to the Title IX Coordinator, and identifies this person by name, phone number and email address, or to the Director of Admissions and Recruitment, also identified by name, phone number and email address, or to Campus Safety, for which a phone number is provided.

⁷ OCR reviewed AP 4.408 online at <http://elgin.edu/students.aspx?id=280>.

⁸ AP4.408 does not specify if both parties can appeal the decision.

⁹ The College has two ADA/504 Coordinators: one for students and one for visitors/employees.

process designed to reach agreement on what accommodations will be provided,” but the “final determination of reasonable accommodations rests with the College.”

Additionally, AP 3.501 states that “any person with a disability who is dissatisfied with a responsible department’s response to a disability accommodation request may file a complaint with the Director of Equal Opportunity who serves as the ADA Coordinator.” The policy includes a grievance procedure for a person who feels the College has not provided satisfactory academic adjustments or has otherwise been discriminated against on the basis of disability.¹⁰

Allegation 1: Race and Disability Discrimination

The Complainant is a student enrolled at the College and has been taking courses at the College XXXX. The Complainant has a documented disability with the College and has been approved to receive academic adjustments. The Complainant’s academic adjustment letter for her XXXX course was approved in XXXX and provides:

- She can have extra time on tests and quizzes (time and a half).
She can take tests/quizzes in a separate testing area (ECC Testing Center).
- She can record lectures.

The Complainant alleges that she was subject to race and disability discrimination in a XXXX course that began in late XXXX because the XXXX professor (Professor A) did not provide her with necessary academic adjustments and subjected her to disability and race harassment when he made inappropriate comments about African Americans and people with disabilities to her during class. The Complainant filed an internal grievance with the College on XXXX related to these allegations. On XXXX, the College sent written notice to the Complainant that her allegations of race and disability discrimination were not substantiated. The Complainant appealed this finding to the College’s President on or around XXXX stating, amongst other complaints, that the investigation was biased.

The Complainant also filed a complaint with OCR in XXXX that contained the same allegations of race and disability discrimination. OCR dismissed the complaint on XXXX, because the Complainant had filed an internal grievance with the College containing the same allegations, and her appeal was pending. On XXXX, the College President denied the Complainant’s appeal stating the Complainant did not cite to or provide any evidence in support of her arguments that the investigation was biased or that the determination was not supported by the information gathered during the investigation. On XXXX, the Complainant re-filed her complaint with OCR. She alleged the College’s investigation was biased and that the reasons the College provided as the basis for its finding that discrimination did not occur “do not make sense.”

Consequently, OCR investigated whether the College’s resolution of the internal grievance met OCR’s regulatory standards. The information shows that the Complainant filed an internal grievance with the College on XXXX, alleging among other complaints, that Professor A

¹⁰ AP 3.501 states that the College will make every effort to resolve the grievance and notify the complainant in writing within 30 days, unless the College determines that more time is required to evaluate the grievance, but does not discuss any factors that the College considers in determining whether more time is required.

discriminated against her when she did not receive her approved academic adjustments.¹¹ The Complainant asserted that Professor A did not allow her to take her XXXX XXXX test in the testing center, which was one of her approved academic adjustments.¹² She further asserted that even though a Caucasian student was allowed to take the test in a nearby classroom, she was not provided with that opportunity. Instead, she was told by XXXX to take the test in the classroom and “see how it goes.” In addition, the Complainant claimed that when she asked Professor A about a tutor for the class and what chapters she needed to study in XXXX, he responded with inappropriate references about people with disabilities, discussing XXXX. According to the Complainant, Professor A also made disparaging comments about African Americans generally and asked her specifically XXXX. She asserts he made these comments to her because XXXX.

The Complainant dropped the course shortly thereafter, on XXXX.

The College informed OCR that in response to the Complainant’s grievance, the XXXX and XXXX were assigned to investigate the complaint. OCR could not clearly identify which of the various policies the College used in evaluating the Complainant’s complaint. On XXXX, the College sent the Complainant an email informing her that a meeting to discuss the complaint had been scheduled for XXXX. The Complainant informed the College that she would be bringing someone to sit in on the meeting with her and expressed concern that XXXX had conducted a biased investigation into one of her prior complaints. The College informed the Complainant that she would not be allowed to bring anyone with her to the meeting. Because she was not allowed to bring anyone with her to the meeting, the Complainant chose not to attend. The College informed the Complainant that the investigation would proceed regardless of whether she attended the meeting.

The College did not identify any written policy prohibiting a student from bringing someone to a meeting and stated that this decision was based on past practices. OCR notes that AP 3.403 currently states that a student has a right to be assisted by a representative (however, this policy was not in effect in XXXX).

In its XXXX determination letter,¹³ the College stated that its investigation included a review of the allegations; email exchanges regarding meeting requests with her; interviews of: Professor A, the Dean of Professor A’s department (Dean), XXXX, and a student witness suggested by both the Complainant and Professor A¹⁴; a review of the police report; review of other email

¹¹ On XXXX, the Complainant sent the Human Resources Department a letter outlining her concerns. She also reported Professor A’s alleged discriminatory conduct to the College police. The Complainant’s letter and police report described the race and disability discrimination alleged in her OCR complaint as well as dissatisfactions with the way Professor A structured his class.

¹² OCR’s review of the email exchanges provided by the College suggests that Professor A had, in fact, informed the Complainant and another student that he would not provide them with their approved academic adjustments. However, the XXXX and the Dean spoke with Professor A and informed him that he was required to provide the approved academic adjustments to students with documented disabilities.

¹³ This was 110 days after the Complainant filed her initial grievance and approximately six weeks after the College had completed its final interview.

¹⁴ However, XXXX informed OCR that they attempted to call the student, but she could not hear anything and did not obtain any relevant information.

exchanges; and information the Complainant presented at a XXXX meeting. The College did not interview any other potential witnesses.

With regard to the Complainant's allegation she was not permitted to take her XXXX test in the testing center, yet a Caucasian student in the same class was provided a separate area next to the classroom to take his test, the College's XXXX letter states that Professor A offered the Complainant the same separate testing area as the Caucasian student, but the Complainant declined to use the space. The Complainant denies the space was offered to her and furthermore states that XXXX told her to take her test in the classroom and "see how it goes." Information obtained during OCR's investigation confirmed XXXX told the Complainant to take the test in the classroom and not in a separate testing area. The College asserts that the Complainant and the Caucasian student had different approved academic adjustments and the Complainant's approved academic adjustments did not require a separate testing area unless Professor A was unable to give her sufficient (extra) time to complete the test in the classroom; however, this caveat was not expressed in the College's academic adjustment letter.

The College's XXXX determination letter states that while the Complainant asserted that she was specifically asked about XXXX, Professor A stated that he discussed XXXX in the class, but XXXX. The letter further states that the discussion "was an open dialogue with the entire class" and their investigation "did not reveal any evidence that Professor [A]'s reference to XXXX was directed at [her] or was based upon [her] race." The XXXX letter does not address the Complainant's allegation that Professor A had made disparaging comments about African Americans generally.

Legal Standards

- *Disability Discrimination*

The regulation implementing Section 504 at 34 C.F.R. § 104.4(a) provides, in relevant part, 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 that receives Federal financial assistance from the Department. The regulation implementing Title II at 28 C.F.R. § 35.130 provides that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Section 504/Title II Notice of Non-discrimination:

The Section 504 implementing regulation at 34 C.F.R. § 104.8(a) requires each recipient that employs fifteen or more persons to take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees that the recipient does not discriminate on the basis of disability in violation of Section 504. The notification shall state that the recipient does not discriminate on the basis of disability in admission or access to, or treatment or employment in its program or activity. The notification shall also include an identification of the responsible employee designated to coordinate the recipient's efforts to comply with Section 504. Pursuant to § 104.8(b), the notification must be included in recruitment materials or

publications containing general information that is published or used by the recipient and made available to participants, beneficiaries, applicants or employees.

The Title II implementing regulation at 28 C.F.R. § 35.106 requires each recipient to make available to applicants, participants, beneficiaries, and other interested persons information regarding the implementing regulation and its applicability to services, programs, or activities of the public entity, and make such information available to them in such a manner as the head of the entity finds necessary to apprise them of the protections against discrimination based on disability.

Section 504/Title II Grievance Procedure:

The Section 504 and Title II implementing regulations at 34 C.F.R. § 104.7(b) and 28 C.F.R. § 35.107(b) require the recipient to adopt grievance procedures providing for the prompt and equitable resolution of complaints alleging any action prohibited by Section 504 or Title II. OCR has identified the following elements for evaluating whether a recipient's grievance procedures provide for prompt and equitable resolution of disability discrimination complaints:

- Notice to students and employees of the grievance procedures, including where complaints may be filed;
- Application of the procedures to complaints alleging harassment carried out by employees, other students, or third parties;
- Adequate, reliable, and impartial investigation of complaints, including the opportunity for both parties to present witnesses and other evidence;
- Designated and reasonably prompt time frames for the major stages of the complaint process;
- Written notice to 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.

Section 504/Title II Coordinator:

The Section 504 and Title II implementing regulations at 34 C.F.R. § 104.7(a) and 28 C.F.R. § 35.107(a) require the recipient to designate an employee to coordinate its efforts to comply with Section 504 and Title II. The recipient is required to identify this person in its nondiscrimination notice and to notify all students and employees of the name (or title), office address, email address, and telephone number of the designated employee or employees.

Academic Adjustments for Students with Disabilities

The Section 504 implementing regulation at 34 C.F.R. § 104.44(a) requires a recipient to make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of disability, against a qualified student with a disability. The Section 504 implementing regulation at 34 C.F.R. § 104.44(d), requires a recipient to take such steps as are necessary to ensure that persons

with disabilities are not denied the benefits of, excluded from participation in, or otherwise subjected to discrimination because of the absence of academic adjustments.

If the academic adjustment and/or modifications provided are not effective in meeting the student's needs, then it is the student's responsibility to notify the recipient as soon as possible. The student and the recipient should work together to resolve the problem, including as appropriate, by modifying the adjustments and/or modifications being provided or identifying other effective academic adjustments and/or modifications to be provided. In resolving a dispute as to whether an academic adjustment or modification was adequate for the student, OCR examines whether the recipient and the student acted in a reasonable manner under the circumstances; and whether the academic adjustments and auxiliary aids were of adequate quality and effectiveness.

- *Race Discrimination*

The regulation implementing Title VI, at 34 C.F.R. § 100.3(a), states that no individual may be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination on the basis of race, color, or national origin under any program or activity that receives Federal financial assistance. The Title VI regulation, at 34 C.F.R. § 100.3(b)(1)(i)–(iv) states, in relevant part, that a recipient may not, on the basis of race, color, or national origin, deny an individual any service or other benefit provided under the program; provide any service or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program; subject an individual to segregation or separate treatment in any matter related to his receipt of any service or other benefit; or deny an individual an opportunity to participate in the program through the provision of services, or otherwise, or afford him an opportunity to do so which is different from that afforded others.

- *Different Treatment Based on Race and Disability*

In analyzing whether unjustified different treatment on the basis of race or disability has occurred, OCR first determines if there are any apparent differences in the treatment of similarly situated students on the basis of race or disability. If so, then OCR evaluates the reasons, if any, offered by the recipient to explain any differences in treatment to determine whether the reasons are legitimate and non-discriminatory or whether the recipient's reasons are merely a pretext for unlawful discrimination. Additionally, OCR examines whether the recipient treated the student in a manner that was consistent with its established policies and procedures and whether there is any other evidence of discrimination based on race or disability.

- *Race and Disability Harassment*

Harassment based on race or disability is a form of discrimination prohibited by the above regulations. Race and/or disability harassment is intimidation or abusive behavior toward a student based on race and/or 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 recipient's program. 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. OCR considers the conduct in question from both an objective perspective and the subjective perspective of the individual allegedly subjected to harassment.

OCR determines whether conduct constitutes a hostile environment by examining the totality of the circumstances. These circumstances include the context, nature, scope, frequency, duration, and location of the harassment incidents, as well as the identity, number, and relationships of the persons involved.

To establish a violation of Title VI under a hostile environment approach, the evidence must establish that:

- 1) a hostile environment existed, *i.e.*, harassing conduct (physical, verbal, graphic, or written) on the basis of race occurred that was 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) the recipient had actual or constructive notice of the hostile environment; and
- 3) the recipient failed to respond adequately to address the hostile environment.

To establish a violation of Section 504 or Title II under a hostile environment approach, the evidence must establish, based on the totality of the circumstances, that:

- 1) a hostile environment existed, *i.e.*, harassing conduct on the basis of disability occurred that was sufficiently serious 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) the recipient had actual or constructive notice of the hostile environment; and
- 3) the recipient failed to respond adequately to address the hostile environment.

A recipient is responsible for addressing harassment incidents about which it has notice. Generally, 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. 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 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 some situations, if the recipient knows of incidents of harassment, the exercise of reasonable care should trigger an investigation that would lead to a discovery of additional incidents.

Once a recipient knows or reasonably should know of possible disability based harassment, it must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in a recipient’s investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the individual(s) involved, the size and administrative structure of the recipient, and other factors. In all cases, however, the inquiry should be prompt, thorough, and impartial. At the conclusion of a recipient’s investigation, both parties must be notified, in writing, about the outcome of the complaint, *i.e.*, whether harassment was found to have occurred.

The extent of a recipient's responsibilities if an employee or agent of the recipient harasses a student based on disability is determined by whether or not the harassment occurred in the context of the employee's provision of aid, benefits, or services to students. OCR will consider a variety of factors in determining whether or not the harassment has taken place in this context, including the type of and degree of responsibility given to the employee, the degree of influence the employee has over the particular student involved, where the harassment occurred, and the age and educational level of the student involved.

If a recipient delays responding to allegations of harassment or responds inappropriately, the recipient's own inaction may subject the student to a hostile environment. If it does, the recipient will be required to remedy the effects of both the initial harassment and the effects of the recipient's failure to respond promptly and appropriately.

If an investigation reveals that harassment created a hostile environment, then the recipient is required to take immediate and appropriate action reasonably calculated to end the harassment, eliminate any hostile environment that has been created, prevent its recurrence and, where appropriate, remedy the effects of the harassment on the individual(s) subjected to the harassment. 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 harassment. With respect to disability harassment, 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 may also be required to provide other services to the student who was harassed if necessary to address the effects of the harassment on that student. In addition to counseling and taking disciplinary action against the harasser(s), effective corrective action may require changes to the recipient's overall services or policies.

A recipient may need to provide training for its community to ensure that students, staff, and instructors can recognize harassment if it recurs and know how to respond depending on how widespread the harassment was and whether there have been any prior incidents. The recipient 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 recipient'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.

Conclusion

Prior to OCR's conclusion of its investigation, the College expressed interest in resolving Allegation 1. OCR has not yet made a determination whether the College's findings in the Complainant's internal race and disability discrimination grievance met OCR standards or whether additional investigation is warranted. To date, OCR has learned that the College has several policies and procedures for addressing discrimination grievances, but has not been able to identify which of the College's various policies was used to investigate the grievance. The information to date has not substantiated that the College's investigation provided the

Complainant with a comparable resolution process or legal standard as those provided by OCR. The College's letter did not address all of the Complainant's allegations of discrimination.

According to OCR policy decisions, OCR refrains from assessing the appropriateness of pedagogical decisions. OCR gives significant deference to the professional judgments of educational institutions with respect to genuinely academic or pedagogical decisions. OCR does not substitute its judgment for that of the educational institution with respect to those decisions. The facts surrounding discussions in Professor A's classroom questions the appropriateness of his pedagogical techniques and decisions. Because OCR policy forecloses review of pedagogical decisions, OCR took this into consideration in determining a remedy that is aligned with evidence collected to date.

Allegation 2: Title IX / Sexual Harassment Investigation

The Complainant alleges that in XXXX, she went to a College Staff member's (Staff Member A) office to discuss tutoring services and that Staff Member A sexually harassed her when he asked her to XXXX. On XXXX, she filed a sexual harassment complaint with the College police department.

According to the College, the complaint was forwarded to XXXX, who recused herself from the investigation because XXXX. The remaining members of the President's Task Force conducted the investigation of the complaint.

On XXXX, the College emailed the Complainant and informed her that a meeting had been scheduled with her on XXXX, in order to review her complaint. The Complainant responded that "the police can investigate" and declined to meet with the College. OCR did not find evidence that the College made any further attempts to contact the Complainant, to provide her with updates regarding the status of the investigation, or to allow her to review and respond to information provided by Staff Member A.

On XXXX, the Complainant emailed the College and requested the College's complaint form for harassment. At that time, the website listed AP 3.403 as the "Sexual Harassment" procedure and stated that any individual seeking to file a formal complaint alleging sexual harassment must complete the complaint form. In response to her request, on XXXX, the College emailed the Complainant the revised AP 3.403 (Anti-Discrimination, Harassment, Violence and Retaliation Policy and Procedure). The Complainant responded later that same day, "I asked for the complaint form." The College responded that the Complainant had been provided the administrative procedure. On XXXX, the Complainant again requested the complaint form in order to file a formal complaint. The College responded that they had provided the administrative procedure that addresses what the Complainant needs to do to initiate a complaint, stating that the College has addressed complaints from her in the past based on a letter, and that there is not a specific form.

On XXXX, the College sent the Complainant an email, attaching the written response to the Complainant's allegations of sexual harassment. The letter, dated XXXX, states that the Task Force determined that her allegations are "unproven."

The Complainant alleges that the College does not follow its own procedures and did not properly investigate her complaint.

Legal Standards¹⁵

The regulation implementing Title IX, 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 academic, extracurricular, research, occupational training, or other education program or activity. In particular, a recipient may not subject any person to separate or different rules of behavior, sanctions, or other treatment on the basis of sex, or otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

Title IX protects students from sexual harassment in a recipient's education programs and activities. If a recipient knows of the possible sexual harassment of a student by an employee, the recipient must promptly investigate the alleged harassment to determine if a sexually hostile environment has been created for the student and, if so, to eliminate the harassment, prevent its recurrence and address its effects.¹⁶

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. 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. One form of sexual harassment is sexual violence. Harassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents. Conduct is unwelcome if the student did not request or invite the conduct and regarded it as undesirable or offensive.

Sexual harassment creates a hostile environment when unwelcome conduct based on sex 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.

In determining whether a sexually hostile environment exists in violation of the Title IX regulations prohibiting sexual harassment, OCR considers whether, based on the totality of the circumstances, students were subjected to a sexually hostile environment by looking at:

¹⁵ The applicable legal standards described herein are more fully discussed in OCR's Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (2001 Guidance) dated January 19, 2001, and found online at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.html>, OCR's 2011 Dear Colleague letter on Sexual Violence (2011 DCL), dated April 4, 2011, which is available online at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>, and OCR's "Questions and Answers on Title IX and Sexual Violence" (2014 FAQs) dated April 29, 2014, which is available online at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

¹⁶ OCR provided guidance on sexual harassment in a Dear Colleague Letter in April 2011, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>, and in a Revised Sexual Harassment Guidance dated January 2001, <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

- 1) Whether there was specific unwelcome conduct of a sexual nature in a school-related program or activity;
- 2) Whether this conduct was sufficiently serious to deny or limit students' ability to participate in or benefit from the program or activity;
- 3) Whether the recipient had actual or constructive notice of the sexually hostile environment; and
- 4) Whether the recipient failed to respond adequately to redress the sexually hostile environment.

In analyzing the totality of the circumstances, OCR considers 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 single or isolated incident of sexual harassment may create a hostile environment if the incident is sufficiently severe.

A recipient is responsible for addressing sexual 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 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.

Generally, a recipient has "notice" of sexual harassment if a responsible employee actually knew or, in the exercise of reasonable care, should have known about the harassment. 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 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 some situations, if the recipient knows of incidents of harassment, the exercise of reasonable care should trigger an investigation that would lead to a discovery of additional incidents. In all cases, however, the inquiry should be prompt, thorough, and impartial.

Where the recipient learns that harassment based on sex occurred, the recipient must investigate the incident(s) promptly and respond appropriately. If a recipient delays responding to allegations of sexual harassment or responds inappropriately, the recipient's own inaction 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 its failure to respond promptly and appropriately. At the conclusion of an investigation, both parties must be notified, in writing, about the outcome of the complaint, i.e., whether harassment was found to have occurred. The responsibility to respond to harassment based on sex, 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.

The regulation protects students from harassment by College employees and third parties. Similar to disability-based harassment by an employee, as discussed above, the extent of a recipient's responsibilities if an employee or agent of the recipient harasses a student based on sex is determined by whether or not the harassment occurred in the context of the employee's provision of aid, benefits, or services to students. OCR will consider a variety of factors in determining whether or not the harassment has taken place in this context, including the type of and degree of responsibility given to the employee, the degree of influence the employee has over the particular student involved, where the harassment occurred, and the age and educational level of the student involved.

Additionally, prior to the outcome of an investigation, a recipient is required to assess whether the complainant requires protection or any other interim services as a result of the alleged harassing conduct, and if so provide them without cost to the complainant. Examples of interim services include academic support, counseling, changes to class schedules, assignments or tests, and increased monitoring, supervision or security at locations or activities where the harassing conduct occurred.

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.

Title IX Notice of Non-discrimination:

The Title IX implementing regulation at 34 C.F.R. § 106.9(a) requires each recipient to implement specific and continuing steps to notify applicants for admission and employment, students, employees, sources of referral of applicants, and all unions or professional organizations holding collective bargaining or professional agreement with the recipient that the recipient does not discriminate on the basis of sex in its education programs and activities and that Title IX requires it not to discriminate in such a manner. The notice must further state that inquiries to recipients concerning the application of Title IX and its implementing regulations may be referred to the Title IX coordinator or to OCR. The notice must be included in each announcement, bulletin, catalog or application form which the recipient makes available and be widely distributed to all students, employees, applicants for admission and employment, and other relevant persons.

Title IX Grievance Procedure:

The Title IX implementing regulation at 34 C.F.R. § 106.8(b) states that each recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student complaints of sex discrimination. OCR has identified the following elements for evaluating whether a recipient's grievance procedures provide for prompt and equitable resolution of harassment complaints:

- Notice to students and employees of the grievance procedures, including where complaints may be filed;
- Application of the procedures to complaints alleging harassment carried out by employees, other students, or third parties;
- Adequate, reliable, and impartial investigation of complaints, including the opportunity for both parties to present witnesses and other evidence;
- Designated and reasonably prompt time frames for the major stages of the complaint process;
- Written notice to 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.

To ensure that students and employees have a clear understanding of what constitutes sexual harassment, the potential consequences for such conduct, and how the school processes complaints, a school's Title IX grievance procedures should also explicitly include the following in writing, some of which themselves are mandatory obligations under Title IX:

- A statement of the school's jurisdiction over Title IX complaints;
- Adequate definitions of sexual harassment and an explanation as to when such conduct creates a hostile environment;
- Reporting policies and protocols, including provisions for confidential reporting;
- Identification of the employee or employees responsible for evaluating requests for confidentiality;
- Notice that Title IX prohibits retaliation;
- Notice of a student's right to file a criminal complaint and a Title IX complaint simultaneously;
- Notice of available interim measures that may be taken to protect the student in an educational setting;
- The evidentiary standard that must be used (preponderance of the evidence) i.e., more likely than not that sexual harassment occurred in resolving a complaint;
- Notice of potential remedies for students;
- Notice of potential sanctions against perpetrators; and
- Sources of counseling, advocacy and support.

Title IX Coordinator:

The Title IX implementing regulation at 34 C.F.R. § 106.8(a) requires that each recipient designate at least one employee to coordinate its efforts to comply with and carry out its

responsibilities under Title IX, including any investigation of any complaint communicated to the recipient alleging its noncompliance with Title IX. The recipient is required to notify all students and employees of the name (or title), office address, email address and telephone number of the designated employee or employees.

Conclusion

Prior to OCR's conclusion of its investigation, the College expressed interest in resolving Allegation 2. At that point, OCR had not deferred to the College's investigation of the sexual harassment allegation because it is not clear that the College provided the Complainant with a comparable resolution process under comparable legal standards to those provided by OCR. The College has several procedures for filing discrimination grievances. It is not clear that the College provided the Complainant with a prompt and equitable investigation into her allegation of sexual harassment.

Resolution of Allegations 1 and 2

The enclosed Resolution Agreement, when fully implemented, will address OCR's compliance concerns. The provisions of the Resolution Agreement are aligned with Allegations 1 and 2 and the information obtained during OCR's investigation, and are consistent with the applicable regulations. OCR will monitor the implementation of the Resolution Agreement until the College is in compliance with Section 504, Title II, Title VI, and Title IX regulations at issue in this case.

Allegation 3: Retaliation

On XXXX, the Complainant alleged that because she had filed an earlier discrimination complaint with the College, her name was not listed on a banner hung at the College identifying students who had made the honor roll, even though she qualified for the honor roll.

On XXXX, the Complainant informed OCR that the College added her name to the honor roll banner after OCR notified the College of the instant complaint.¹⁷ However, the College provided evidence that the Complainant's name was on the banner when it was initially hung, during the summer before the beginning of the XXXX academic year. The College provided OCR with an email that was sent to the marketing department in XXXX listing the student names for the banner; the Complainant's name was included in the XXXX email and the College asserted the banner has not been revised or replaced. The Complainant did not provide evidence to support that it had been revised or replaced.

Legal Standard

The regulations implementing Title II at 28 C.F.R. § 35.134 and Title VI, at 34 C.F.R. § 100.7(e), which is incorporated by reference into the regulations implementing Title IX at 34 C.F.R. § 106.71 and Section 504 at 34 C.F.R. § 104.61, prohibit a recipient or other person from intimidating, threatening, coercing, or discriminating against any individual because he or she made a complaint,

¹⁷ Letters of notification were mailed to both the College and the Complainant on XXXX.

testified, assisted, or participated in any manner in an investigation, proceeding or hearing under the regulations.

To establish a *prima facie* case of retaliation, OCR determines whether: (1) the individual engaged in protected activity by asserting or protecting a right or privilege secured by a law OCR enforces; (2) the recipient took an adverse action contemporaneous with or subsequent to the individual's protected activity; and (3) there was a causal connection between the protected activity and adverse action. If one of the elements cannot be established, then OCR finds insufficient evidence of a violation. If all of the above elements are established, OCR then determines whether the recipient can identify a legitimate, non-discriminatory explanation for the adverse action. If such an explanation is proffered, OCR examines whether the reason given is merely a pretext for retaliation.

Conclusion

In this case, the Complainant engaged in protected activities of which the College was aware in XXXX, when she filed complaints of disability and race discrimination with the College and on XXXX.

Because the Complainant engaged in protected activity, OCR next considers whether the failure to include the Complainant's name on an honor roll banner constitutes an adverse action. However, in this case, the Complainant and the College provided conflicting information about whether the alleged adverse action occurred. The Complainant alleges the College did not include her name on an honor roll banner. The College asserts that the Complainant's name was, in fact, on the banner.

In making a determination regarding compliance, OCR must often weigh conflicting evidence and determine whether the preponderance of the evidence substantiates the allegation. In this case, there is insufficient evidence to support that the College subjected the Complainant to an adverse action; she acknowledges that her name is currently on the banner and the College provided evidence that her name was on list of students to be included in the banner in XXXX. The College claims it did not revise or replace the banner and the Complainant did not provide evidence to substantiate that it was changed. Thus, there is insufficient evidence of retaliation, as alleged, and OCR is closing this allegation as of the date of this letter.

The 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.

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

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, 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 privacy.

The Complainant may file a private suit in Federal court, whether or not OCR finds a violation.

OCR would like to thank the College, as well as Ms. Amy Dickerson, for the cooperation and courtesy extended to OCR during our investigation. If you have any questions, please contact Janet Bonem, Equal Opportunity Specialist, at 312-730-1567 or Janet.Bonem@ed.gov, or Melissa Katt, Attorney, at (312) 730-1617 or Melissa.Katt@ed.gov.

Sincerely,

Dawn R. Matthias
Team Leader

Enclosure

cc: Amy Dickerson
Franczek Radelet, PC