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OFFICE FOR CIVIL RIGHTS  
WESTERN DIVISION

DENVER OFFICE  
*Arizona, Colorado, New Mexico, Utah, Wyoming*

June 4, 2010

Dr. Kerry Hart  
President  
Morgan Community College  
920 Barlow Rd.  
Fort Morgan, CO 80701

Re: Morgan Community College  
OCR Case Number 08102019-C

Dear Dr. Hart:

We are notifying you of our decision in this case. The Complainant alleged Morgan Community College discriminated against him on the bases of sex and disability. Specifically, the Complainant alleged the College:

- discriminated because the Complainant failed to conform to sex stereotypes by banning him from the Student Center and telling him to dress like a man;
- failed to promptly and equitably respond to peer-on-peer sexual harassment;
- discriminated based on disability when the College attempted to require that the Complainant remove a medical device; and
- retaliated against the Complainant for contacting OCR by confronting the Complainant about potentially filing a complaint, requiring the Complainant to prove his identity in order to check out books and computers from the Library, and expelling him from the College.

Our investigation revealed that the College failed to adequately respond to the Complainant's reports of peer-on-peer sexual harassment. We also found that the College retaliated against the Complainant for contacting our office by confronting him about potentially filing a complaint and subsequently expelling him from the College. In addition, while investigating the complaint, we found that the College did not have a designated Title IX compliance officer or grievance procedures that comply with Title IX requirements.

Upon being advised of these findings, the College voluntarily agreed to enter into a resolution agreement to resolve the matter. A signed original of the agreement is enclosed with this letter. With regard to the other allegations, we found insufficient evidence that the College discriminated or retaliated against the Complainant as alleged. The reasons for our conclusion are set forth below.

We investigated this complaint pursuant to Title IX of the Education Amendments of 1972 and its implementing regulation, which prohibit discrimination on the basis of sex in education programs and activities that receive funds from the U.S. Department of Education; Section 504 of the

Rehabilitation Act of 1973 and its implementing regulation, which prohibit discrimination on the basis of disability in programs and activities funded by the Department; and Title II of the Americans with Disabilities Act of 1990 and its implementing regulation, which prohibit discrimination on the basis of disability by public educational entities. In addition, individuals filing a complaint, participating in an investigation, or asserting a right under Title IX, Section 504, and Title II are protected from intimidation and retaliation by these laws. The College is subject to Title IX, Section 504, and Title II because it is a recipient of Federal financial assistance from the Department and a public entity.

### Alleged Sex Discrimination

The Complainant's allegations regarding discrimination based on sex raise the issue of whether his treatment relates to his failure to conform to sex stereotypes. The regulation implementing Title IX at 34 C.F.R. § 106.31 prohibits recipients from subjecting individuals to different treatment on the basis of sex. Based on applicable Federal case law, this prohibition extends to subjecting an individual to different treatment for not conforming to sex stereotypes. The Supreme Court, in *Price Waterhouse v. Hopkins*, recognized that discrimination based on sex includes allegations of the use sexual stereotypes in making adverse decisions. *Hopkins*, 490 U.S. 228 (1989).<sup>1</sup>

In evaluating an allegation of different treatment, we determine what action the recipient took against the alleged injured party, whether it followed its policies and procedures for taking such action, and whether similarly situated individuals were treated differently. If the alleged injured party was treated differently, we determine whether the recipient has a legitimate, non-discriminatory reason for the different treatment and, if so, whether the stated reason is a pretext for discrimination.

There is no dispute that the Complainant, a male student, dressed in typical female clothing during the 2008-09 school year and fall semester of 2009.

### *Alleged Ban from the Student Center*

The Complainant alleges that he was banned from the College's Student Center on October 27, 2009, because he wore female clothing rather than stereotypical male clothing. The College

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<sup>1</sup> The Court held:

[a]s for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.

*Id.* at 251, 109 S.Ct. at 1791 (internal quotation marks removed). "The same standards apply to discrimination claims brought under Title VII and Title IX." See, *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75, 112 S.Ct. 1028, 1037 (1992); *Kastl v. Maricopa County Community College District*, 2004 WL 2008954 \* 3 (D.Ariz.) (allowing amendment of complaint involving transgender employee alleging discrimination on the basis of sex stereotypes under Title VII and Title IX).

confirmed that the Director of the Student Center banned the Complainant from the Center. The following account is according to the Director. She overheard the Complainant make what she believed to be inappropriate comments of a sexual nature while talking to students in the Center. She called him into her office to discuss the incident and told him not to use such language. She then overheard him using inappropriate language again immediately after he left her office and told him he was banned from the Center for the rest of the day. Despite her instruction, she found him in the Center later in the day; at which time, she told him he was banned from the Center for the rest of the year. Although the Complainant claims the language he used was not that offensive, he does not dispute the Director's explanation of what happened, including the comments he made and his failure to follow the Director's instructions.

The College does not have a policy or procedure for banning students from the Center for a day or a school year. In the past two years, the Complainant has been the only student who has been banned from the Center for a day or the rest of the year.

The College explained that the Complainant was banned because he did not follow the instructions of the Director of the Center. The College said the Complainant had violated the College's Student Code of Conduct which requires students to comply with the verbal or written directions of College officials. The College noted that the Complainant's use of indecent language also violated the Code. We confirmed that the Code included the cited policies and found that it gives College administrators broad discretion in disciplining students for these infractions.

Based on our review of the evidence, we determined that the College provided a legitimate, non-discriminatory and non-pretextual reason for banning the Complainant from the Center. Therefore, we found insufficient evidence to establish that the College discriminated against the Complainant as alleged.

#### *Alleged Comment to Dress Like a Man*

The Complainant contends that the Dean of Student Successes told him to straighten-out and dress like a man after complaining to the Dean about being harassed by another student because of his attire. The Dean acknowledged discussing the Complainant's report of harassment, but denied telling the Complainant to dress like a man as alleged. Because there were no witnesses to this conversation, we could not corroborate the Complainant's assertion. Therefore, we could not establish that this action occurred.

#### *Alleged Failure to Respond to Peer-on-Peer Harassment*

Under applicable Title IX case law and OCR guidance, educational institutions are responsible for taking immediate and effective steps to end sexual harassment when it occurs, prevent its recurrence, and remedy its effect. The protection against sexual harassment derives from the general prohibition against sex discrimination in the Title IX regulation. This protection extends to sexual harassment based on an individual not conforming to sex stereotypes.

The Complainant stated that on several occasions during the 2008-09 school year and during the fall 2009 semester, he went to ADA Coordinator and informed him that other male students were harassing him because of the women's clothing he was wearing. The Complainant said he identified the students to the Coordinator and informed him that one of the students hit his car in the College's parking lot. The Coordinator acknowledged that the Complainant reported the harassment to him but said he was not responsible for handling such complaints. He said he referred the Complainant to the Dean. The Dean acknowledged that the Complainant verbally reported the harassment. The Dean said he talked to the identified students and told them not to use the alleged language. The Complainant contends that the harassment continued. The Dean acknowledged that the Complainant continued to report incidents of harassment but no further action was taken. We also found that the reported incidents of harassment contained sufficient information to indicate that the harassment, as alleged, was triggered by the Complainant's failure to conform to a male stereotype. Based on this information, we found that the College failed to adequately respond to the Complainant's reports of peer-on-peer sexual harassment and to take effective steps to prevent future harassment. The College voluntarily agreed to resolve this issue by entering into an agreement with us as explained above.

During our investigating of this issue, we reviewed the College's notification of its Title IX compliance officer. The regulation implementing Title IX at 34 C.F.R. § 106.8 (a) requires the College to designate an employee to coordinate its efforts to comply with Title IX, including the investigation of any complaint and to notify all its students and employees of the name, office address and telephone number of the employee.

We reviewed the College's student handbook and its website. Our review found that the College provides five different versions of its notice of non-discrimination. The five different notices each give different instructions. They state, variously, that complaints should be filed with the Affirmative Action Office, the Dean of Student Successes, the President's Designee, the ADA Coordinator, or Health and Human Services. Additionally, only one of the notices includes the title, phone number, and address of a designated Title IX compliance coordinator. Therefore, we found that the College does not provide a consistent and complete notice of its compliance coordinator. The College voluntarily agreed to resolve this issue by entering into an agreement with us as explained above.

We also reviewed the College's Title IX grievance procedures. The regulation implementing Title IX at 34 C.F.R. § 106.8 (b) requires the College to adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints. We reviewed the College's policies and procedures and found that on page 41 of the Student Handbook under the section titled "Services for Students with Disabilities," the College describes unwanted sexual behavior and directs students to report to the Affirmative Action office. Although the paragraph states that it is the sexual harassment procedure, we find that the paragraph does not provide sufficient information on how the College will respond to complaints of harassment. When asked about its procedures for complaining about sexual harassment, the College explained that all complaints, including complaints alleging sexual harassment, are filed according to the Student Grievance Procedure on page 47 of the student handbook. We found that these procedures do not require the College to investigate complaints of harassment or discrimination. Based on this information, we found that the College does not provide for the

equitable resolution of sex discrimination complaints. The College voluntarily agreed to resolve this issue by entering into an agreement with us as explained above.

### **Alleged Disability Discrimination**

The Complainant alleges that the Coordinator approached him and asked him to remove a device that, unbeknownst to the Coordinator, was a medical device related to his disability (epilepsy). The regulation implementing Section 504 at 34 C.F.R. § 104.42 (b)(4) allows the College to make post admission inquiries regarding a person's disability that may require accommodation on a confidential basis. There is no suggestion by either the College or the Complainant that the Complainant asked for accommodations related to his epilepsy; both parties agree that the Complainant had put the College on notice of his epilepsy.

The Coordinator admits approaching the Complainant in the Student Center and asking him about something that the complainant was wearing, which appeared to him to perhaps be part of a Halloween costume. However, the Coordinator denies asking the Complainant to remove the device. The Coordinator states he asked the Complainant several questions about the device before the Complainant started to volunteer disability-related information. The Complainant stated to OCR that he was uncomfortable having to discuss the medical device and his epilepsy in front of other students and wished the Coordinator had asked to speak with him in private. We interviewed another student who reported that students all over campus were talking about the interaction.

There is a dispute as to whether the Coordinator asked what were intended to be disability-related questions in a public forum or merely listened while the Complainant volunteered such information in response to neutral questions. While this is admittedly a close call, we do not have sufficient credible evidence on which to find the College violated Section 504 or Title II here. Any person, including the Complainant, is free to volunteer disability-related information in a public place and it is not incumbent upon the College official to stop that from happening. We do not have sufficient credible information to establish that the Coordinator intended his questions to elicit disability-related information. If, during the conversation, he learned the device was related to the Complainant's disability, the Coordinator should have stopped questioning the Complainant in public and taken steps to ensure confidentiality. We simply cannot determine with precision exactly how the conversation flowed and, so, cannot find the College violated the law under these circumstances.

### **Alleged Retaliation**

The regulation implementing Title IX at 34 C.F.R. § 106.71, which incorporates 34 C.F.R. § 100.7(e), provides that no recipient shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or because he or she has made a complaint, testified, assisted, or participated in any manner in an investigation conducted by OCR. The regulations implementing Section 504 and Title II incorporate this same regulatory provision.

In analyzing a retaliation claim, we determine whether the individual engaged in an activity protected by Title IX, Section 504, or Title IX of which the recipient had knowledge; the recipient took adverse action against the individual; a causal connection existed between the protected activity and the adverse action; and, the recipient had a legitimate, non-retaliatory, non-pretextual reason for its action.

The Complainant alleged that the College took actions, as set forth below, in retaliation for complaining about sexual harassment, for contacting our office, and for eventually filing a complaint with this office. We determined that the Complainant engaged in these activities, which are protected under the statutes we enforce, and the College was aware of these activities. Therefore, we examined each of the following alleged retaliatory actions.

#### *Confrontation Regarding Filing OCR Complaint*

The Complainant alleged that the Coordinator confronted him about filing a complaint after overhearing a telephone call from our office.

It is undisputed that on the day the Director banned the Complainant from the Center, the Complainant called our office's customer service line and then went to the Coordinator's office. While in the Coordinator's office, the Complainant received a return call from our office, which the Coordinator overheard. The Coordinator then left his office to tell the Dean that the Complainant was on the phone with our office. The Coordinator admitted that at the conclusion of the call, he confronted the Complainant and asked "[w]hy did you lie about why you were banned from the Student Center?" Based on this information, we determined the Coordinator's action could have been intimidatory and in violation of our retaliation prohibition. The College voluntarily agreed to resolve this issue by entering into an agreement with us as explained above.

#### *Requiring Proof of Identity*

The Complainant stated that because he complained about sexual harassment, he was required to prove his identity prior to being able to check out a computer from the Library. It is undisputed that the Librarian required the Complainant to provide proof of his residence in order to check out a laptop. The College submitted a copy of its library computer loan policy, which requires persons checking out a computer to be a current student, have an active computer login, provide current and accurate contact information, show a valid driver's license or government issued identification, and sign an agreement.

According to the Librarian, when the Complainant came to check out a laptop, he did not have his driver's license with him and informed her that he was homeless. Since the Complainant was homeless, she did not know what to do, so she let him borrow the laptop for one week and asked her supervisor how to handle the situation. When the Complainant returned the laptop after the one week, she told the Complainant that he would need to have the shelter write a letter stating he was staying there in order to confirm his residence. The Complainant brought a letter from the shelter the following week and was able to checkout a laptop. Based on this information, we found that the Librarian's action was not adverse; therefore, we could not establish that the College retaliated as alleged.

### *Expulsion*

The Complainant alleged that he was expelled from the College because he filed a complaint with this office. We sent the College notice of this complaint on December 3, 2009 and the fall 2009 semester ended on December 11, 2009. It is undisputed that the College expelled the Complainant on January 19, 2010, the first day of class of the spring 2010 semester, and issued him a “no trespass” letter. We found that this constitutes an adverse action. Also, based on the close proximity in time between the notice of the complaint and this action, we infer a causal connection.

The College stated that the Complainant was expelled because he made malicious statements about library and administrative staff in violation of Student Code of Conduct sections 7, 11, and 14. We verified the incident involving the Complainant and the Librarian that occurred at the start of the spring semester.

However, we found that the College did not follow its procedures for expulsion regarding the cited infraction as found in the student handbook on page 46. Specifically, the policy states, “in the case of suspension or expulsion, the sanction shall be imposed no earlier than six days after service of the Notice.” The policy allows students to attend classes during the six days and during any appeal. The College imposed the expulsion and no trespass order without the giving the Complainant the six days. Additionally, the only other student expelled in the last two school years was given the opportunity, as provided in the Colleges policies, to correct the alleged action and respond to the charges. The Complainant was not given a similar opportunity. Although the College stated that the Dean met with the Complainant immediately following the incident and the Complainant left his office, the Dean admits that he was not contemplating expulsion until after the meeting. Therefore, the College failed to follow its expulsion policy and treated the Complainant differently than a similarly situated student. Consequently, we find the College’s reasons for expelling the Complainant was not legitimate. The College voluntarily agreed to resolve this issue by entering into an agreement with us as explained above.

This concludes our investigation of this complaint. We will continue to monitor the College’s compliance with the Agreement until all the terms are satisfied. This letter addresses only the issues listed above and should not be interpreted as a determination of the District’s compliance or noncompliance with Title IX, Section 504, and Title II or any other federal law in any other respect. Accordingly, we are closing the investigation of this complaint effective the date of this letter.

Please note that the complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

The College is prohibited from intimidating or harassing anyone who files a complaint with our office or who takes part in an investigation.

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, personal information, which if released, could constitute an unwarranted invasion of privacy.

This letter is a letter of finding(s) issued by OCR to address an individual OCR case. Letters of findings contain fact-specific investigative findings and dispositions of individual cases. Letters of findings are not formal statements of OCR policy and they 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.

If you have any questions, please contact Ms. Heidi Kutcher, Attorney Advisor and the primary contact for this case, at 303-844-4572. Thomas Rock, Supervisory Team Leader can also be reached at (303) 844-5927.

Sincerely,

A handwritten signature in cursive script that reads "Mary Lou Mobley". The signature is written in black ink and is positioned above the printed name and title.

Mary Lou Mobley  
Regional Director  
Denver Regional Office

Enclosure