



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS – REGION IX

June 15, 2011

Sharon D. Herzberger
President
Whittier College
13406 E. Philadelphia Street
Whittier, California 90601

(In reply, please refer to case no. 09-11-2013)

Dear President Herzberger:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against Whittier College (College). OCR investigated whether the College:

1. subjected the Complainant¹ to different treatment because of her shared ancestry and ethnic characteristics (Jewish) by not selecting her for the 2010-11 Women's Basketball team after she tried out in October 2010; and
2. failed to respond adequately to a complaint filed by the Complainant's father with the University on October 19, 2010 stating that the College had discriminated against her by not selecting her for the 2010-11 Women's Basketball team because she is Jewish.

OCR investigated the complaint under the authority of Title VI of the Civil Rights Act of 1964 its implementing regulations. Title VI prohibits discrimination on the basis of race, color or national origin in programs and activities operated by recipients of Federal financial assistance. The College receives funds from the Department and is subject to Title VI and the regulations.

OCR gathered evidence by reviewing documents and records, and interviewing the Complainant and College witnesses. Based on the information collected, as explained

¹ The College was provided the name of the Complainant previously. It is being omitted to protect privacy.

further below, OCR concludes that there is insufficient evidence establishing a violation of Title VI with respect to Issue 1.

With regard to issue 2, under OCR procedures (Article III, Section 302), a complaint may be resolved at any time when, before the conclusion of an investigation, the recipient expresses an interest in resolving the complaint. On May 9, 2011, the College communicated to OCR that it was interested in resolving Issue 2 in this complaint. OCR informed the College that resolving the complaint prior to the completion of the investigation was voluntary. OCR also informed the Complainant of the College's interest in resolving the complaint.

To resolve Issue 2, the College, without admitting to any violations of Federal laws enforced by OCR, voluntarily signed an Agreement to Resolve (ATR) which commits to the following: 1) develop a nondiscrimination policy and discrimination complaint procedure for students for all areas of OCR jurisdiction; and 2) provide training to its relevant staff and notice to its students and staff on the nondiscrimination policy and discrimination complaint procedure available to students.

The facts gathered during the investigation of Issue 1, the applicable legal standards, and the reasons for our determination are summarized below.

- The Complainant is a XXXXXXXXX, second year student enrolled in the College's undergraduate program. The College is a four-year residential College inspired by a Quaker heritage.
- In 2009, the College's Women's Basketball head coach and one of the assistant coaches, XXXXXXXXX, (assistant coach 1) watched the Complainant play for a summer team after she sent to the College basketball videos of herself. For the 2009-10 school year, the head coach recruited the Complainant to play the point guard position on the College's Women's Basketball team. Assistant coach 1 supported the decision to recruit the Complainant.
- From October 15-17, 2010, twenty students, including the Complainant, tried out for the College's 2010-11 Women's Basketball team. The head coach selected fifteen students to play on the team. The Complainant and one other Jewish student were the only potential returning players whom the head coach did not select for the team. According to the Complainant, they also were the only Jewish students who tried out for the team. The information provided by the College showed that it was not aware whether any other Jewish students were on the 2009-10 Women's Basketball team or tried out for the 2010-11 team.
- After the tryouts ended, on the evening of October 17, 2010, the College's head coach informed all the students that he briefly would meet with each student individually to tell them whether they were selected for the team. He also told the students that he would be available the following day if anyone wanted to discuss the decision. The head coach and two assistant coaches met with the Complainant and the head coach informed her that they did not see a role for her

on the team. The Complainant informed OCR that the head coach could not provide her with an explanation for the decision except to say that it was her overall game.

- On October 18, 2010, the Complainant met separately with the head coach and asked for an explanation. The head coach recalls telling her that her overall basketball skills were not where they needed to be to help the team. The Complainant disagreed with their assessment and the head coach informed OCR that he told her that she was not strong enough to help them.
- The Complainant reported to OCR that, during the October 18 conversation, the head coach told her that “he was not comfortable having her on the team.” The Complainant and her father took this statement as raising an inference of anti-Semitism, and were concerned that the referenced “discomfort” was over having a Jew on the team.
- OCR interviewed the head coach concerning the October 18 conversation and he neither recalled nor denied making this statement. However, he told OCR that if he had made such a comment, he would have put it into the context of being uncomfortable having her in the point guard role and that the statement was in no regard a reference to her being Jewish.
- The Complainant also alleged that assistant coach 1 influenced the head coach not to select her for the 2010-11 Women’s Basketball team because the Complainant is Jewish. In addition, the Complainant alleged that a few months after the 2009-10 basketball season started, before she sustained an injury, assistant coach 1 began treating her differently than other players because she learned that the Complainant is Jewish. The Complainant alleged that assistant coach 1 deliberately ignored the Complainant when she talked to a group of players, and had a rude demeanor and body language that indicated she did not like her. The Complainant told OCR that in contrast, assistant coach 1 was very pleasant to the other players on the team. OCR interviewed assistant coach 1 and she did not believe that she treated the Complainant differently from other players and the head coach also did not notice any different treatment by the assistant coach towards the Complainant. Assistant coach 1 told OCR that the Complainant was “a really nice kid” who struggled on the team because of her basketball abilities.
- The Complainant did not hear any direct or explicit comments hostile, benign, or otherwise by any of the coaches, any other staff members or students about her shared ancestry or ethnic characteristics. The Complainant did not allege that the coaches treated her differently in any other manner.

- The Complainant alleged that the College's Women's Basketball recruiting form for the 2009-10 season asked for her religion and that she stated "Jewish." The College provided OCR with a copy of the blank recruiting form and there is no question or designation for religion, race, or national origin. The College also provided OCR with the information the Complainant submitted to the College and it did not include any information about her religion, race, or national origin.
- OCR interviewed the head coach and assistant coach 1 and they informed OCR that they were not aware that the Complainant, or the other returning player who was not selected, were Jewish prior to this complaint. The head coach told OCR that he also is Jewish. The head coach, XXXXXXXXXXXXXXX, told OCR assistant coach 1 is not Jewish.
- The head coach and assistant coach 1 informed OCR that the College did not select the Complainant for the 2010-11 Women's Basketball team because she did not have the overall skills and ability to help the team. They stated that the Complainant was unable to effectively lead the team from the point guard position during the 2009-10 basketball season, both prior and subsequent to her injury, during practice and games, and during the 2010-11 tryouts. They believed that the Complainant's decision-making ability as a point guard was not at a level they needed and she was struggling in both the defensive and offensive plays. While she did place in the top three when running a timed mile during tryouts, it did not translate to success on the court.
- As mentioned above, the College also did not select for the 2010-11 Women's Basketball team one other returning player who is Jewish and tried out for shooting guard (Student). The head coach and assistant coach 1 selected the Student for the 2009-10 Women's Basketball team without seeing her play because she was not on a team during the prior season. The head and assistant coach 1 informed OCR that they did not select the Student for the 2010-11 team because she was not a good defender and struggled with having a quick release for her shots. In addition, they stated that the Student was inconsistent during the tryout period and had not improved in the offseason. OCR was unable to interview the Student because she did not respond to OCR's phone messages.
- The College reported to OCR that it did not receive any complaints from the Student, parent, or others concerning its decision not to select the Student for the team.

Under the Title VI regulations at 34 C.F.R. §100.3(a) and (b), a college may not treat individuals differently on the basis of race, color, or national origin with regard to any aspect of services, benefits, or opportunities it provides. Section (b)(1) states that a college may not, directly or through contractual or other arrangements, on the basis of race, color or national origin, deny an individual an opportunity to participate, or afford an opportunity to participate which is different from that afforded others.

To determine whether a student has been discriminated against on the basis of shared ancestry and ethnic characteristics under Title VI, OCR looks at whether there is evidence that the student was treated differently than students of other shared ancestry and ethnic characteristics under similar circumstances, and whether the treatment has resulted the denial or limitation of services, benefits, or opportunities. If there is such evidence, OCR examines whether the college provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination. For OCR to find a violation, the preponderance of the evidence must establish that the college's actions were based on the student's shared ancestry and ethnic characteristics.

OCR found insufficient evidence with respect to Issue 1 to establish a violation of Title VI. OCR does not find by a preponderance of the evidence that the coaches did not select the Complainant for the 2010-11 Women's Basketball team because she is Jewish. The concerns of the Complainant and her father are based on three matters: a statement attributed to the head coach about the level of "comfort" with the Complainant's presence on the College's basketball team; alleged antipathy by assistant coach 1 XXXXXXXXXXXXXXXXXXXXXXX and the fact that the only other potential returning player cut also is Jewish. While these factors raise an initial inference of discrimination, further examination of the facts does not support a conclusion of discrimination.

First, the asserted statement is one given to many meanings. Even assuming it was made, the nondiscriminatory explanation provided by the head coach was easily as plausible as the one suggested by the Complainant. No source, including the Complainant or her father, who is a basketball coach himself, suggested that either cut student were such obviously gifted players that only a discriminatory coach could find them unqualified. The evidence OCR reviewed showed that in addition to assistant coach 1, the head coach and a second assistant coach also had concerns with the both students' basketball skills. Further the key decision-maker is Jewish. While it is certainly possible for an individual to discriminate against a member of his or her own ethnic group, it is less likely to happen than by individuals of other groups. Some question also was raised about assistant coach 1, who is not Jewish. The evidence of animus ascribed to her, however, is quite ambiguous. XXXXXXXXXXXXXXXXXXXXXXX and OCR could not confirm that either coach actually had knowledge of the Complainant's ethnicity. In sum, beyond some initial inferential evidence of discrimination, very little evidence was presented by the Complainant or discovered by OCR that would suggest that the reason she was not selected for the team was related to her shared ancestry or ethnic characteristics rather than her basketball skills.

The basic question is whether the College made an adverse decision to cut the Complainant for reasons related to her shared ancestry or ethnic characteristics or whether it was related to a permissible nondiscriminatory reason. A preponderance of the evidence presented to OCR failed to establish a connection between the shared ancestry and ethnic characteristics of the Complainant and the decision not to select her for the team. Other nondiscriminatory reasons were more likely and logical explanations for the decision.

This concludes OCR's investigation of this complaint. Based upon the College's assurance that the provisions contained in the ATR to address Issue 2 are being or will be implemented, OCR considers the above-referenced complaint resolved as of the date of this letter. OCR is informing the College of this resolution by concurrent letter. OCR will monitor the College's full implementation of the commitments contained in the ATR.

This letter is a letter of finding 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.

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

If you have any questions about this letter, please call Gemini McCasland at (415) 486-5536.

Sincerely,

/s/

Arthur Zeidman

Director

San Francisco Enforcement Office

Enclosure