



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGION IX
CALIFORNIA

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SAN FRANCISCO, CA 94102

July 17, 2017

Dr. Samia Yaqub
President
Butte-Glenn Community College District
3536 Butte Campus Drive
Oroville, California 95965

(In reply, please refer to case no. 09-13-2096.)

Dear President Yaqub:

This letter is to inform you that the U.S. Department of Education (the Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the Butte-Glenn Community College District (District). The District consists of one community college, Butte College (College), and several satellite campuses. For purposes of this letter, the term College will be used to refer to both the College and the District.

OCR is responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX), as amended, 20 U.S.C. §1681 *et seq.*, and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in programs and activities receiving financial assistance from the Department. The College is a recipient of financial assistance from the Department. Therefore, OCR had jurisdiction to investigate this matter.

The Complainant alleged that the College failed to respond promptly and equitably to notice that she had been subjected to sexual violence by another College student. The Complainant also alleged that the College's grievance procedures were not compliant with Title IX and that, as such, the process for complainants alleging violations of Title IX with respect to sexual harassment was not equitable.

OCR investigated the following issues:

- A. Whether the College complied with Title IX requirements regarding development and dissemination of notice of nondiscrimination pursuant to 34 C.F.R. §§ 106.8(a) and 106.9;
- B. Whether the College complied with Title IX requirements regarding the designation and notice of a Title IX Coordinator pursuant to 34 C.F.R. § 106.8(a);
- C. Whether the College's sexual harassment and sexual violence policies and procedures, as written, comply with Title IX pursuant to 34 C.F.R. § 106.8(b);

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

- D. Whether the College provided a prompt and equitable response to incidents of sexual harassment and sexual violence of which it had notice, including the Complainant's report of sexual violence, pursuant to 34 C.F.R. §§ 106.31 and 106.8; and
- E. Whether the College's failure to provide a prompt and equitable response to notice of sexual harassment and sexual violence allowed the Complainant and/or affected students to be subjected to or to continue to be subjected to a sexually hostile environment pursuant to 34 C.F.R. §§ 106.31 and 106.8.

LEGAL STANDARDS

Sexually Hostile Environment and Duty to Respond Promptly and Equitably

The regulation implementing Title IX, at 34 C.F.R. § 106.31, provides that “. . . no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any . . . education program or activity” operated by recipients of Federal financial assistance. Sexual harassment that creates a hostile environment is a form of sex discrimination prohibited by Title IX. Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, including acts of sexual violence.

When a student sexually harasses another student, the harassing conduct creates a hostile environment if it is so severe, persistent, or pervasive that it denies or limits a student's ability to participate in or benefit from the recipient's program or activities. If a recipient knows or reasonably should know about student-on-student harassment, Title IX requires the recipient to respond in a prompt and equitable manner by taking immediate action to eliminate the harassment, prevent its recurrence, and address its effects.

When responding to alleged sexual harassment, a recipient must take immediate and appropriate action to investigate or otherwise determine what occurred. The inquiry must be prompt, reliable, and impartial. Pending the outcome of a response to a report or an investigation of a complaint, Title IX requires a recipient to take steps to protect the complainant from further harassment as necessary, including taking interim measures. The recipient also should take steps to prevent any retaliation against the student who made the complaint and/or those who provided information.

A recipient must consider the effects of off-campus misconduct when evaluating whether there is a hostile environment on campus or in an off-campus education program or activity. This includes a review of misconduct that did not occur in the context of an education program or activity but may have had such an impact.

Grievance Procedures and Notice of Nondiscrimination

34 C.F.R. § 106.8(a) requires each recipient to designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under the regulation implementing Title IX, including investigation of any complaint communicated to the recipient alleging any actions which would be prohibited by Title IX. 34 C.F.R. § 106.8(b) requires that a recipient adopt and publish grievance procedures providing for the prompt and equitable resolution of student and employee complaints alleging any action prohibited by Title IX.

Finally, 34 C.F.R. § 106.9 requires each recipient to implement specific and continuing steps to notify applicants for admission and employment, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in any educational program or activity which it operates, and that it is required by Title IX and its implementing regulation not to discriminate in such a manner. The notice of nondiscrimination must include a statement that inquiries concerning Title IX may be referred to the Title IX Coordinator or to OCR (34 C.F.R. § 106.9(b)) and, the College must provide adequate notification of the contact information, including the name (or title), address, and phone number for the Title IX Coordinator (34 C.F.R. § 106.8).

BACKGROUND AND SUMMARY OF INVESTIGATION

To investigate this matter, OCR conducted an on-site visit and interviewed the Vice President for Student Services, who is the College's Title IX Coordinator (Title IX Coordinator), the Director of Admissions and Records, who has served as the College's Judicial Council Hearing Officer, the College's mental health counselor, the Safe Place and Wellness Program (Safe Place) Coordinator, hearing panel members for the Complainant's appeal hearing, the Complainant and Complainant's family members, the XXXXXXXXX Coach, and the College's former President (President). OCR reviewed the College's response to oral reports and written complaints of sexual harassment and/or sexual violence during the 2013-2014, 2014-2015, and 2015-2016 school years. OCR also reviewed College policies and procedures related to sexual harassment and sexual violence in effect during the 2012-2013 through 2016-2017 school years; school climate data; other relevant documents provided by the College in the course of OCR's investigation; and relevant publicly available information.

FACTUAL FINDINGS AND ANALYSIS

A. Whether the College complied with Title IX requirements regarding development and dissemination of notice of nondiscrimination pursuant to 34 C.F.R. §§ 106.8(a) and 106.9.

OCR examined the existence and dissemination of the College's notice of nondiscrimination from August 2012 (the school year in which the Complainant reported the alleged sexual assault) through March 25, 2017. OCR found that the College had adopted a Nondiscrimination Policy, Board Policy (BP) 3410, which prohibits discrimination on the basis of several protected categories, including sex. BP 3410 is available on the College's website. The College publishes a statement of nondiscrimination, including on the basis of sex, in the annual Course Catalog (Catalog),¹ Career & Technical Education Programs Brochure (CTE Brochure)² and online on its Human Resources homepage.³ For the entire time period reviewed, the notices in the Catalog, CTE Brochure, and on the Human Resources homepage refer inquiries concerning Title IX to the Title IX Coordinator and include his office address and phone number. However, these notices fail to provide that Title IX inquiries may also be made to OCR.⁴

Accordingly, OCR found that the College has adopted a notice that prohibits sex discrimination and that the notice has been properly distributed in compliance with 34 C.F.R. § 106.9. However, because the

¹ See <http://www.butte.edu/departments/curriculum/catalog/documents>.

² See http://www.butte.edu/resources/pr_resources/Career_Tech_Bro.pdf.

³ See http://www.butte.edu/departments/hr/equal_employment.html.

⁴ The 2011-2012 Catalog does include the required statement along with OCR's address and phone number.

notice did not include all required information, OCR found that the College was not compliant with Title IX and its implementing regulation, at 34 C.F.R. § 106.9, as to this issue.

B. Whether the College complied with Title IX requirements regarding the designation and notice of a Title IX Coordinator pursuant to 34 C.F.R § 106.8(a).

OCR found that the Title IX Coordinator has been designated as the Title IX Coordinator since March 2009 and identified as such on its website and in written materials with the required contact information. The Title IX Coordinator has attended trainings on responding to complaints of sexual harassment and sexual violence, including the Campus Training and Technical Assistance Institute for Campus Disciplinary and Judicial Boards, hosted by the U.S. Department of Justice (DOJ) Office on Violence Against Women and a training from an outside entity. Accordingly, OCR found that the College was in compliance with 34 C.F.R. § 106.8(a) because it designated a Title IX Coordinator who has received training.

C. Whether the College’s sexual harassment and sexual violence policies and procedures, as written, comply with Title IX and the regulation pursuant to 34 C.F.R § 106.8(b).

OCR reviewed the College’s multiple and overlapping BPs and Administrative Procedures (APs) in effect from September 2012 until May 2017.

Prior Policies and Procedures in effect at the time of the OCR Complainant’s report and subsequent complaint process⁵:

The following policies and procedures were in place in September 2012 when the Complainant filed her sexual assault complaint:

- BP 3430, “Prohibition of Harassment” (adopted November 2008-in effect until May 21, 2013);
- BP 3540, “Sexual and Other Assaults on Campus” (adopted November 12, 2008-still in effect as of May 31, 2017);
- Procedure 5.7, “Sexual Harassment (Uniform Complaint Procedure)” (in effect Spring 2003-still in effect as of May 31, 2017);
- Procedure 5.8, “Unlawful Discrimination (Uniform Complaint Procedure)” (in effect Spring 2003-still in effect as of May 31, 2017); and
- BP 5500, “Standards of Conduct” (in effect December 10, 2008-still in effect as of May 31, 2017) and AP 5500, “Standards of Conduct – Student Discipline” (adopted December 10, 2008- in effect until July 2013).

OCR found that none of the policies or procedures was posted on the College’s website at the time the Complainant provided notice to the College regarding the alleged sexual assault in September 2012. BP/AP 5500, the student discipline procedure, provided the only process for a student to complain about being sexually harassed or sexually assaulted by another student. In his March 27, 2013 interview, the Title IX Coordinator acknowledged to OCR that BP/AP 5500 did not meet Title IX standards and required revision because they did not provide an equitable process for complainants. AP 5500 provided respondents with written notice of the allegations and applicable code sections, a

⁵ The policies and procedures at the time did not have uniform adoption dates and/or effective dates.

statement of facts supporting the allegations, the right to respond in writing or meet with the Title IX Coordinator, notice of the outcome of the investigation, and a right to present evidence and witnesses during any appeal hearing conducted by the judicial panel after receiving the Title IX Coordinator's determination. Complainants were afforded none of these rights.

BP 3430, which described the College's prohibition against sexual harassment, did not meet Title IX requirements because it referred students to two separate grievance procedures – AP 3430 and AP 3435 – to file complaints, both of which were in draft form and had not been finalized or adopted by the College. Similarly, BP 3540, which described the College's prohibition against sexual assault, did not contain a grievance procedure or cross-reference another procedure for resolving complaints because a grievance procedure for sexual assault had not been adopted or finalized by the College. Both policies were also deficient because they did not apply to notice of sexual harassment that occurred off-campus property in an activity or program of the College or that had an on-campus impact.

The Title IX Coordinator told OCR that Procedures 5.7, "Sexual Harassment, Uniform Complaint Procedure" and 5.8, "Unlawful Discrimination, Uniform Complaint Procedure," applied only to complaints filed against employees, even though this limitation is not stated in the procedures. OCR found that even as applied to sexual harassment complaints filed against employees, these procedures did not provide an equitable process because complainants, whether students or employees, were not afforded an equal opportunity to present witnesses or other relevant information. Furthermore, Procedures 5.7 and 5.8 applied only to individuals who believed that they had personally suffered unlawful discrimination or faculty or administrators who learned of unlawful discrimination in their official capacity. As such, a student who learned of, observed, or witnessed sexual harassment by an employee would be prohibited from filing a complaint and obtaining redress, even though the regulation at 34 C.F.R. 106.8(b) requires a grievance procedure to address "any action" which would be prohibited by Title IX.

OCR also identified a concern because only BP 3430 required reporting of sexual harassment by supervisors. In addition, none of the policies or procedures identified other employees who were responsible to report sexual harassment, such as an employee who has the duty to report to appropriate College officials any misconduct by students or employees.⁶ Accordingly, OCR found the College out of compliance with Title IX requirements with respect to policies and procedures in effect during this time period.

Recent Policies and Procedures:

OCR also reviewed the policies and procedures in effect subsequent to the final decision being issued in the Complainant's case:

- Revised BP 3430 and new AP 3430, "Prohibition of Harassment" (adopted May 22, 2013-still in effect as of May 31, 2017),
- New AP 3435, "Discrimination and Harassment Investigations" (adopted July 2013-still in effect as of May 31, 2017);

⁶ Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, Title IX, 62 Fed. Reg. 12034 (Mar. 13, 1997) (rev. 62 Fed. Reg. 66092, Jan. 19, 2001).

- BP 3540, “Sexual and Other Assaults on Campus” (adopted November 12, 2008-still in effect as of May 31, 2017) and new AP 3540, “Sexual Assaults” (adopted April 2013-still in effect as of May 31, 2017);
- Procedures 5.7, “Sexual Harassment,” and 5.8, “Unlawful Discrimination” (adopted Spring 2003-still in effect as of May 31, 2017); and
- BP 5500 (adopted December 10, 2008-still in effect as of on May 31, 2017) and revised AP 5500, “Standards of Conduct: Student Discipline and Title IX Procedures” (adopted July 2013-still in effect as of May 31, 2017).

The current procedures for investigating sexual harassment and sexual assaults are contained in AP 3435, AP 3540, and Procedures 5.7 and 5.8, which overlap with each other, as a stated purpose of all four procedures is to investigate and respond to sexual harassment complaints. However, there are no cross-references between the procedures or adequate notice of which procedure the College will use for any complaint of sexual harassment and/or violence. For example, AP 3435 (discrimination and harassment investigations) and AP 3540 (sexual assaults) do not cross-reference Procedures 5.7 and 5.8 (sexual harassment and unlawful discrimination complaints), which set forth a different process and timeline for investigating and resolving unlawful discrimination and harassment.

The difference between the complaint filing options has significance. For example, Procedures 5.7 and 5.8 contain a two-step appeals process to the College’s Board of Trustees and Chancellor’s Office that is available for complainants only, whereas the appeal process under AP 3540 is contained in AP 5500 and provides a hearing conducted by the Judicial Council – a panel of faculty, administrators and students -- for complainants and respondents with a final decision by the College President. Under AP 3435 investigations are conducted by the Human Resources (HR) Director whereas under AP 3540 investigations are conducted by the Title IX Coordinator. AP 3435 and Procedures 5.7 and 5.8 state that investigations will be completed within 90 days whereas AP 3540 states that investigations will be completed within 40 days. Procedures 5.7 and 5.8 do not discuss interim remedies, whereas under AP 3540, limited interim remedies, such as no contact orders and temporary suspensions, are considered.

In addition, the College’s procedures for addressing student-to-student sexual harassment do not provide for an adequate, reliable, and impartial investigation. AP 3430 refers complainants to AP 3435 for the procedures for reporting and investigating sexual harassment complaints. However, AP 3435 applies only to complaints against employees. AP 3435 states that student-to-student complaints are investigated by the Title IX Coordinator, but does not include an investigative process. Rather, it refers to AP 5500, which only contains an appeal procedure for complaints already investigated with a determination made by the Title IX Coordinator. Procedures 5.7 and 5.8 also apply to complaints of sexual harassment, but do not include a description of the investigative process.

In addition, none of the policies or procedures provides a reasonably prompt timeline for completion of the informal resolution process or information about the investigative process. In this regard, AP 3435 states only that informal resolution could include but is not limited to “mediation, rearrangement of work/academic schedules, providing informal counseling and/or training, etc.” Procedures 5.7 and 5.8 state only that, “[e]fforts at informal resolution need not include any investigation unless the responsible District officer determines that an investigation is warranted by the seriousness of the charges.”

OCR also found that BP 3430 and AP 3435 and Procedures 5.7 and 5.8 do not include consideration of the effects of off-campus misconduct when evaluating whether there is a hostile environment on campus and do not apply to incidents taking place in an off-campus education program or activity.

Procedures 5.7 and 5.8 do not provide equitable notice to the parties of the outcome of the investigation because the College's investigative report and written notice of the outcome and appeal rights are sent to the complainant, but not the respondent.

While AP 3540 and AP 3435 contain language that the College will take steps to prevent recurrence of sexual assault and harassment, AP 5500 and Procedures 5.7 and 5.8 do not contain this assurance. There are no cross-references between AP 3540/3435 and Procedures 5.7/5.8.

When a recipient chooses to provide an appeal process, it must ensure the process is equitable. For complaints against employees, AP 3435 and Procedures 5.7 and 5.8 provide an appeal for a complainant, but not a respondent. The appeal hearing procedure for student-to-student sexual harassment and sexual violence complaints raises concerns about the way in which certain provisions, if invoked, would impact the requesting party. In this regard, AP 5500 provides an appeal process for student complainants and respondents to a Judicial Council made up of faculty and student members. It requires each party to present his/her own case to the Judicial Council; if a student chooses not to attend, the student may only present his/her case in writing. For the absent party, the Judicial Council uses its discretion to determine whether or not to call the absent party's witnesses and which questions to ask. OCR found that such provisions would create an inequity if the Judicial Council chooses not to call witnesses on behalf of the absent party, instead of ensuring a reliable and equitable process for review and presentation of evidence for both parties.

Accordingly, for the reasons stated herein, OCR found that the College's current procedures and policies, as identified above, are not compliant with Title IX.

- D. Whether the College provided a prompt and equitable response to incidents of sexual harassment and sexual violence of which it had notice, including the Complainant's report of sexual violence, pursuant to 34 C.F.R. §§ 106.31 and 106.8; and**
- E. Whether the College's failure to provide a prompt and equitable response to notice of sexual harassment and sexual violence allowed the Complainant and/or affected students to be subjected to or to continue to be subjected to a sexually hostile environment pursuant to 34 C.F.R. §§ 106.31 and 106.8.**

OCR Complainant's Sexual Violence Complaint

During the 2012-2013 academic year, the Complainant was a XXXXXXXXX at the College's XXXX campus, played on the XXXXXXX XXXXXXX XXXXXXXXXXXX team, and had a 3.56 GPA. On September XX, 2012, the Complainant attended an off-campus party at the residence of XXX XXXXXXX XXXXXXX XXXXXXX. The Complainant had been drinking alcohol and alleged that she was raped by another student (Respondent), who was previously unknown to her, XX X XXXXXXX at the party. Sometime between 11:30 pm and 1:00 am, Student II and Student VIII began knocking on XXX XXXXXXX door. Shortly thereafter, the Respondent came out and Student II found the Complainant XXXX XX XXX XXXXXXX XXXX. Student II helped the Complainant leave the party and took her to a friend's house where the Complainant vomited and passed out.

At XXXXXXXXXXXX XXXX XX on September XX, 2012, the Complainant's sister and sister's XXXXXX picked up the Complainant and drove her XX XXX XXXXXXXXXXX XXXXX. The Complainant's mother arrived sometime after 11:00 am. Later that day, Student II texted the Complainant the first name of the Respondent and stated that he was XX XXX XXXXXXXXXXX team. The Complainant's sister then saw a text saying "U ok?" on the Complainant's phone from XXXXXXX XXXXXXX XXXXXXX (Student III). Subsequently, Student III called the Complainant's phone, and Complainant's mother called him back. She told OCR that a man took the phone from Student III, identified himself as the Respondent, used vulgar language, and said he and the Complainant had engaged in sexual acts but not sexual intercourse.

Later on September XX, 2012, the Complainant's mother took her to the hospital where she met with a social worker, a rape crisis advocate and a police officer from the Chico Police Department (Police Department). The Complainant's hospital documents include notes from her sexual assault exam, which include that the Complainant had bruises XX XXX XXXXX XXXXX, XXXXXXXXXXX XXX XXXX, XXX X XXXXXXXXXXX XXX XXXXXXX XX XXX XX XXX XXXX XX XXX XXXX, XXX XXX XXXXXXX XXXXX XX XXX XXXX.

On October X, 2012, the Complainant and her mother went to the Safe Place, which serves as an information and support center for the College's students regarding sexual assault. They met with the Safe Place Coordinator (Coordinator) and reported that the Respondent had raped the Complainant; the Coordinator obtained permission from the Complainant to contact campus police and informed the Complainant that the Title IX Coordinator was responsible for conducting investigations.

The Coordinator stated to the Complainant that she understood the Complainant's immediate concerns to be that she did not feel safe on campus, she had received an allegedly harassing call from the Respondent and Student III, and she wanted no contact with the Respondent. The Coordinator contacted the Complainant's instructors and arranged for her to pick up assignments, complete classwork, and take examinations at the Safe Place office. She also arranged for the Complainant to have an escort to classes, park her car next to the Safe Place office so that she did not have to walk to campus from student parking areas, and have after-hours access to the XXXXXXXXXXX XXXX used by athletes so that XXX XXXXXXXXXXX time did not overlap with XXXXXXXXXXX XXXXXXXXXXX. The Complainant returned to two of her classes with an escort. She stopped attending one class because of the number of XXXXXXXXXXX XXXXXXXXXXX in the class.

The Title IX Coordinator first learned about the incident on October X, 2012 from another administrator who had been contacted by the Athletic Director. The Title IX Coordinator later learned that the Respondent first reported the rape allegation to his XXXXXXXXXXX Coach on September XX, 2012, who notified the Athletic Director on the same day. The Title IX Coordinator told OCR that the incident should have been reported directly to him. On October X, 2012, the Coordinator scheduled a meeting for the Complainant to meet with the Title IX Coordinator on October X, 2012.

On October X, 2012, the Complainant was interviewed by a detective (Detective) from the Police Department. On October X, 2012, the Complainant's mother, father, sister, and the Coordinator met with the Title IX Coordinator. The Complainant told OCR that she did not feel emotionally capable of attending. The Title IX Coordinator told OCR that during this meeting he gave the family a copy of the student misconduct policy and procedure, BP and AP 5500, which he acknowledged to OCR did not include a process for a student to file a sexual harassment or assault complaint.

On October X, 2012, the Complainant's sister took pictures of additional bruising that had appeared on the Complainant's body, informed the Coordinator, and sent them to the Detective.

On October X, 2012, the Title IX Coordinator contacted the Detective by phone. He informed OCR that in the weeks that followed he spoke with the Detective frequently and considered the Detective to be an expert on sexual assault investigations.

On October X, 2012, the Title IX Coordinator also interviewed the Respondent. According to the interview notes, the Respondent denied the allegation, said it was consensual and that he did not have intercourse with the Complainant; XXXXXXXX XX XXXXXXXXXXXX XXX XXXXXXXX. He "was pretty sure the Complainant had been socially drinking," and added that he was not drunk, was "fully in control" of himself and remembered what happened.

The Respondent said that he called his XXXXXXXX Coach on the morning after the incident when he learned of the allegation, and the XXXXXXXX Coach advised the Respondent to call him back if the police contacted him. The Respondent talked to the XXXX Coach who "said everything would be alright." The Respondent told the Title IX Coordinator that he had not met the Complainant prior to the night in question but that she had a reputation XXX XXXX XX XXXXX XXXX XXX XXXXXXXXXXXX XXXXX XXXXXX XXX XXX XXXX XX XXXXXXXX. The Respondent provided the names of four friends/teammates (Students III, IV, V and VI) as witnesses.

On October X, 2012, the Complainant's sister received the following text message from Student II:

...I just want to apologize again for being hesitant about helping. It's just that night u picked her up and I told everyone that I told u everything that happened that night everyone like ridiculed me saying like 'y would u tell her, [the Complainant] prob wouldn't even have remembered if u didn't say anything' and I felt peer pressured to just act like it never happened which is so pathetic and stupid I never should have hesitated and just helped u guys out right away so I'm Srry for that and I would love to call that number and tell them all I saw

As a part of the text Student II also asked the Complainant's sister for the phone number to a crime reporting line, and the sister provided it.

On October X, 2012, the Title IX Coordinator interviewed the XXXX XXXXXXXX Coach, who relayed that the Respondent told him about the rape allegations on September XX, 2012. The Title IX Coordinator solicited the XXXX Coach's opinion about the Respondent's credibility and character. The XXXX Coach told the Title IX Coordinator there had been some talk about the incident by XXXXXXXX XXXXXXXX, but he had instructed them to stop. The Title IX Coordinator stated to OCR that he did not follow-up because he thought the XXXX Coach would be in a better position to address the gossip.

The Title IX Coordinator interviewed the Respondent's witnesses individually on October X and XX, 2012. All four had been at the party in question but none of them had observed the Complainant or the Respondent in XX XXXX XXX XXXXXXXX. Two witnesses said that the Respondent told them he had had sexual intercourse with the Complainant. Student IV stated that the incident "is the talk of the weight room" XXXX XX XXXXXXXX XXXXXXXX, that he had learned of the allegation from XXX XXXXXXXX XXXX, and that the information had "spread like wildfire."

The Title IX Coordinator solicited the opinions of each of the four witnesses about the Respondent's reputation, and whether they believed that the Respondent had the capacity to engage in the alleged conduct. He also solicited information about the Complainant's past sexual activity. XXXXXXXX XXX XXX XX XXXX XXX XXXXX XX XXXXXXXXXXXX XXXX XXXX XXX XXXXX XXXXXX XXXX XXX XXXXXXXXXXXX XXX XXXXXXXX XX XXXXXXXX XXXXXXXXXXXX XXXX XXX XXX XXXXXXXXXXXX XX XXXXXXXX XX XXX XXXX.

On October XX, 2012, the Title IX Coordinator interviewed the Complainant, who was accompanied by her mother and sister and the Coordinator. The Complainant's sister discussed the details of the incidents, in part, because the Complainant was having great difficulty restating what occurred. The Complainant told the Title IX Coordinator that she was not going to one of her classes and she only felt safe on campus if a friend or family member was walking with her. The Complainant stated that her friends, including Student II and VIII, who had helped her after the incident, were afraid to talk to the Detective and would not talk to the Title IX Coordinator. The Title IX Coordinator did not inquire further. The Title IX Coordinator told OCR that he perceived the Complainant's demeanor during this interview as cool, non-responsive and fidgety.

During the interview, the Complainant's sister offered to provide the Title IX Coordinator the text messages she had exchanged with Student II and Student III on September XX and October X, 2012, but he said he did not need them. The Title IX Coordinator acknowledged to OCR that he did not review the text messages prior to reaching his determination. The Complainant requested that the Title IX Coordinator interview XXX XXXXXXXXXXX Coach because he had known the Complainant XXXXX XXX XX XX XXXXX XXXXX, was aware of the changes in her behavior after the incident, and could speak to her credibility. The Complainant requested that he review the photographs that showed her bruises, which she said resulted from the Respondent XXXXXXX XXX XXXXXXX XXXXXXX XXX XXXXXXXXXXX. XXX XXXXXXXXXXX XXXX XXXX XXX XXXX XXXXXXX XXX XXXXXXX XXXXXXXXXXXXXXXXXXX XXX XXXXX XXX XX XXXXXXX XXX XX XXXXXXXXXXX XXX XXXXXXXXXXX XXXX XXXXX XXX XXXXXXXXXXXXXXXXXXX XXXXXXXXXXXX XX XXX XXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXX XX XXX XXXXXXXXXXX. While OCR questions whether information about sexual reputation would ever be relevant and not likely to create significant prejudice and inequity in an investigation, the Title IX Coordinator did solicit such information about the Complainant from Respondent's witnesses. The Title IX Coordinator also did not provide an opportunity for the Complainant to rebut such information in the interview.

The Title IX Coordinator informed OCR that after the October XX, 2012 interview he made several unsuccessful attempts to schedule an in-person interview with Student II. Student II provided an email account of the incident to the Title IX Coordinator and answered specific follow-up questions via email. The Title IX Coordinator did not interview other witnesses for the Complainant who observed her behavior immediately after the incident and in the subsequent weeks, including Student VIII, her mother and sister, her sister's XXXXXXX, the Coordinator, and the XXXXXXXXXXX Coach. The Title IX Coordinator told OCR that he consulted with the Coordinator but considered her an advocate and disregarded her opinion.

OCR interviewed the XXXXXXXXXXX Coach, who stated that prior to the incident the Complainant was a free-spirited, independent person. In the period immediately following the incident, XX XXX XXX XXXX XXXXXXX XX XXXXXXXXXXX, and the Complainant's behavior changed dramatically; she appeared withdrawn, steered clear of social interactions XXXX XXXXX XXXXXXX and would start crying XXXXXXX XXXXXXX. The XXXXXXXXXXX Coach said the team's practice typically included XXXXXXXXXXXXXXXXXXX XXXXXXX XX XXX XXXXXXX XXXXX XXXXXXXXXXX XXX XXXXXXX XXXXX. After the incident, XX XXXXX XXX XXXXXXXXXXX XXXXXXX XXX

XXXXXXXXXXXX XXX XXX XXXXXXXXXXXXXXX and began walking the Complainant XX XXX XXX XXXXX XXXXXXXX. The Complainant did not return to the XXXXXXXXXXXX team after the season concluded.

During the week of October XX-XX, 2012, the Complainant reviewed the Title IX Coordinator's interview notes from the interviews he had conducted to date, including the statements about her alleged sexual reputation. The following week she provided notes about discrepancies she had identified.

On October XX, 2012, the Title IX Coordinator spoke with the XXXX Coach a second time. He inquired as to whether there had been any rumors, retaliation or intimidation by XXXXXXXX XXXXXXXX toward the Complainant. The XXXX Coach told him that there had not.

On October XX, 2012, the Title IX Coordinator conducted a follow-up interview with the Respondent to clarify information that had been provided by the other witnesses. On the same day, the Title IX Coordinator spoke with the Detective. Among other things, the Detective stated that the photos provided by the Complainant were inconclusive, in part because they were of poor quality and lacked a date and time stamp. The Title IX Coordinator told OCR that since the Detective told him that the photographs of the bruises were not conclusive proof of forced sexual contact, he disregarded them, even though proof of forced sexual contact was not an element required by the District's policy for reaching a determination of sexual violence, including rape.

The Coordinator told OCR that as the College's investigation proceeded, the Complainant informed her that she needed other interim measures, such as a mutual no-contact order and restrictions on the Respondent's movement so that the Complainant could walk around campus and go to public spaces, without fear of running into him. However, the Coordinator did not have the authority to implement those specific measures. Under the College's policy, the Title IX Coordinator had the authority to do so, but he informed OCR that he did not consider additional interim measures for the Complainant. The Complainant reported to OCR that the measures that had been implemented were inequitable because she felt forced to isolate herself in the Safe Place office or risk encountering the Respondent on campus.

On or about October, XX, 2012, the Complainant and her family requested a meeting with the President because they felt that the Complainant's voice had not been heard adequately in the meeting with the Title IX Coordinator. On October XX, 2012, the President met with the Complainant and her sister and mother. The President informed OCR that she offered a similar opportunity to the Respondent but he declined. At the outset of the meeting, the President informed the Complainant that the meeting notes would become part of the investigation record. Among other things, the Complainant told the President that she was "terrified" to go to XXXXXXXXXXXX XXXXXXXX because of the proximity XX XXX XXXXXXXX XXXXX to the weight room. She noted that she had reviewed the witness statement from XXX XXXXXXXX XXXXXXXX who said that the incident is "the talk of the weight room". The Complainant stated that she felt unable to continue in her normal activities; XXX XXXXXXX XXX XXX XXXXXXX XXXXXXXX XXX XXXXX XXX XXXXXXXX XXXX XXX XXX X XXXX XXXX XXXXX XX XXXXXXX XXX XXXXXXXX, XXXXX XXXXX XXXX XXXXXXX, XXX XXX XXX XXXXX XXXXXXX XXXXXXXX XXXXXXXX. She asked to have the Respondent's path restricted around campus and for the College to issue a stay away order. The College did not respond to the Complainant's request.

The Complainant said during this meeting that the Title IX Coordinator had interviewed only student witnesses who would support the Respondent's story. She also told the President that she believed her friends were being manipulated by other students and/or threatened to not cooperate in the investigation. The Complainant again provided the names of three witnesses, Student II, Student VII,

and Student IX. The Complainant and her family told the President that the Title IX Coordinator had not reviewed certain relevant evidence, for example, the text exchanges with Student II and Student III. She also stated that XXX XXXXXXXXXXXX Coach had not been interviewed, although the Title IX Coordinator had interviewed the Respondent's XXXX Coach.

Shortly after this meeting, the President instructed a staff person to XXXXX XXX XXXXXXX XXXXXXX XXX XXXXXXX XXXX XXX XXX. The Title IX Coordinator told OCR that he disagreed with this step XXXXXXX XX XXX XXXX XX XXXX XXXX XXXXXXXXXXXX XX XXX XXXXXXX.

The Title IX Coordinator informed OCR that prior to the completion of his investigation he referred the Respondent to the College's Mental Health Counselor (Counselor) – a licensed marriage and family therapist – to have the Counselor assess the Respondent's character and credibility. OCR reviewed the Counselor's office visit notes, which are dated November X, 2012. The Counselor told OCR that she assessed the Respondent's character and credibility based on his demeanor and the information he provided during the meeting. The meeting lasted 45 minutes, after which the Counselor opined to the Title IX Coordinator that the Respondent did not present as a threat to anyone else at the time. The Title IX Coordinator informed OCR and the parties that he relied on Counselor's assessment in making his determination, even though the notes reflect that the assessment was completed after he issued his written determination (see below). The Title IX Coordinator confirmed to OCR that he was aware that the Complainant was seeing a private therapist. However, he did not request permission to consult with the therapist or gather character and credibility information about the Complainant from an expert who was similarly situated. Nevertheless, he told OCR in an interview that he reached a conclusion that the Complainant had XXXXXXXX XXXXXXX issues.

On November X, 2012, the Title IX Coordinator issued a one and a half page determination letter to the Complainant and Respondent. The letter included information from Student II's email statement, and the names of the witnesses interviewed, specifically the Complainant, the Respondent, the XXXX XXXXXXXX Coach, and Students III, IV, V and VI. It stated that the Title IX Coordinator consulted with the Detective and Counselor in reaching his determination. The Title IX Coordinator determined, based on "all available evidence" that there was "insufficient evidence for disciplinary action." The letter stated that the Respondent's continued enrollment at the College was conditional, and that he was required to stay away from the Complainant and not engage in harassment or retaliation.

OCR asked the Title IX Coordinator how he reached his determination. He stated he evaluated whether the Respondent sexually assaulted the Complainant based on the definition of rape from California Penal Code section 261 and utilized a preponderance of the evidence standard. When asked to describe the preponderance of the evidence standard, the Title IX Coordinator did not describe a process of weighing the evidence to determine whether something was more likely than not to have occurred. Rather, he described the standard as "a good classic level of need" that involved considering the health and safety of students and the best interests of the institution. The Title IX Coordinator also described applying the preponderance of evidence standard as "something that comes by the seat of your pants." In describing the evidentiary standard as he applied it in the Complainant's case, he stated that he believed that something happened XX XXX XXXXXXXX but that it was not enough to discipline the Respondent.

OCR asked the Title IX Coordinator how he evaluated the credibility of the Respondent, Complainant and the witnesses interviewed. The Title IX Coordinator told OCR that based on the Respondent's demeanor in his interviews, the information provided by his witnesses and the lack of a prior criminal history, his

impression was that the Respondent did not have the capacity to rape the Complainant. OCR noted, however, that the Title IX Coordinator learned that the Respondent did not have a prior criminal history on November XX, 2012, 21 days after he had issued his determination. The Title IX Coordinator also told OCR that the Respondent did not have a reputation as a “player”, and that the Respondent’s “soft-spoken” way in the interviews had “swayed him.” The Title IX Coordinator stated that if a student presented as someone who scared him, then that would be sufficient evidence to remove the student from campus.

The Title IX Coordinator acknowledged to OCR that he sought and relied upon evidence of the Complainant’s alleged reputation XXX XXXXXX XXXXXXXX from Respondent’s XXXXXXXXX, and he stated that in contrast to his positive impression of the Respondent’s reputation, the Complainant had a “XXXXXXX reputation.” The Title IX Coordinator told OCR that he spoke with friends of the Respondent who said that the Complainant XXX XXXXXXX X XXX XX XXX XXXX XXX XXXXX XXX XXXXXXXXXXX XXX XXX XXX XXXX XXX XX X XXXXX XX XXXXX XXXXX XXXXXXXXXXX; he said that those things factored into his decision as a “relational” thing. However, none of the interview notes reviewed by OCR reflect that any witness reported observing the Complainant do what the Title IX Coordinator described to OCR. The Title IX Coordinator told OCR that he told XXXXXXXX XXXXXXX to continue to “report anything of interest” regarding the sexual activities of the Complainant.

The Title IX Coordinator confirmed that he did not check the veracity of the statements made about the Complainant by the Respondent’s friends with the Complainant or other witnesses. The Title IX Coordinator’s note reflects that neither student who made the allegations had first-hand knowledge of or had witnessed any alleged sexual activity by the Complainant. The Title IX Coordinator also did not assess the Respondent’s reputation, with respect to prior sexual activity, with the Complainant or with students other than the Respondent’s friends XX XXX XXXXXXXX XXXX.

The Title IX Coordinator also confirmed that he did not interview the hospital nurse or obtain documents from the hospital. He told OCR that he did not solicit this evidence because the Detective told him the evidence collection kit XXXXXXXX XXXX XXXXXXXX. However, the evidence shows that he was not apprised of any update on the status of the evidence collection kit from the Detective until November XX, 2012, 21 days after he had issued his determination. In addition, he did not inquire regarding XXX XXXXXXX XXXX XXX XXXXXXXXXXXXXXX XXXXXXX XXX XXXX XXX XX XXX XXXXXXXXXXXXXXXXXXXX XX XXX XXXX.

Appeal Procedure and Revisions

On November XX, 2012, the College issued an acknowledgment of the Complainant’s November XX, 2012 appeal, which referred to the BP/AP 5500. Pursuant to BP/AP 5500 in effect at the time, the College was required to convene a five member Judicial Council panel, which included two students, two faculty members, one administrator, and one member selected by the Title IX Coordinator to serve as the hearing officer. The hearing officer is a non-voting member who selects the committee chair, answers procedural questions, makes determinations about admissibility of evidence, and conducts the hearing. The hearing officer would select the Chair and provide training for the panel. During the hearing, the College’s representative and the respondent student could provide opening statements, call witnesses, introduce testimony, and the College had an opportunity for rebuttal. The burden was on the College to prove “by substantial evidence” that the alleged facts were true. The Judicial Council’s decision would be based on the hearing record, as well as the College’s investigatory file.

The Title IX Coordinator asked the College's Director of Admissions and Records to serve as the Hearing Officer (Hearing Officer) for the matter, and he agreed. The Hearing Officer told OCR he had not received any prior training on sexual assault or the Title IX legal standards but had attended training on addressing sexual misconduct; his training on conducting hearings came from discussions with the Title IX Coordinator and the former hearing officer. On November XX, 2012, the Hearing Officer issued notification letters with a hearing date of November XX, 2012. The letters informed the parties that they had the right to represent themselves or to be represented, except that they could not be represented by an attorney unless complex legal issues were involved. Both parties had the right to bring witnesses and to prior inspection of documents. The Hearing Officer stated to OCR that the College included BP/AP 5500 with the notification letter, even though the College knew the procedures "were insufficient" and had decided to modify the procedures in advance of the hearing.

In a November XX, 2012 letter, Complainant's Counsel requested that the College make several modifications to the hearing process, including permitting the Complainant to submit a written statement in lieu of attendance because it would be extremely difficult for her to personally present the details of her alleged rape to a panel of faculty, administrators and students.

On November XX, 2012, Complainant's sister received a text message from Student II's XXXXXXXX, in which Student II's XXXXXXXX stated "[Student II] just talked to the detective face to face, told him she thought it was rape. He said no matter what [Student II] says XXXXX XXXXXXXX XXXXX XXXXXXXX XXXXXXXX XX XX XX XXXXX." The text exchange was submitted as supplemental evidence to the panel.

On November XX, 2012, the Hearing Officer issued revised notification letters advising that the College would use existing BP/AP 5500 with modifications contained in a two-page appeal procedure to comply with Title IX requirements. The ad hoc procedure included the following provisions that were different from the original procedures. Each party would represent themselves at the hearing. The parties would not be allowed to confront each other or to cross examine each other's witnesses; the parties could request that the panel ask questions of witnesses or inquire into certain issues. A party could be accompanied by someone of their choice at the hearing, including an attorney, but the attorney or other representative could not present the party's evidence or call witnesses. The Judicial Council would decide by a preponderance of the evidence whether the Complainant was sexually assaulted or forcibly raped (not defined) by the Respondent and/or whether any specific sections of the Student Code of Conduct were violated.

On or about November XX, 2012, the Complainant withdrew from all her classes after communicating to the Coordinator that she continued to suffer from anxiety and nightmares and was having difficulty concentrating. The Complainant's sister told OCR that the College's investigation process, including that information about her reputation for past sexual activity was being solicited by a College administrator and that rumors were circulating on campus about her and the incident contributed to her inability to continue. In the days that followed, the College facilitated the withdrawal process and provided a tuition refund for the semester.

On November XX, 2012, Complainant's counsel requested a postponement until November XX, 2012 because some of the modifications in the ad hoc procedure would "deprive the Complainant of the rights afforded to her under BP 5500 and federal law." After the Respondent also requested postponement, the College delayed the hearing until December X, 2012. The College did not further amend the hearing procedure.

Judicial Council Formation, Training and Evidence Provided

OCR interviewed each member of the Judicial Council. Each member told OCR that prior to their participation in the Complainant's appeal hearing, they had no specific training or experience in reviewing sexual assault claims or with the applicable Title IX legal framework. Two of the six Judicial Council members had previously been on a hearing panel for a peer sexual harassment case.

The College provided each Judicial Council member with several hundred pages of information related to the appeal two to three days before the hearing. Several Judicial Council members told OCR that a few days was not sufficient time to review the evidence and, as a result, they did not review all of the evidence prior to the hearing.

The Judicial Council received a document entitled "[College] Title IX Appeal Hearing Training Guidelines" (Training Guidelines). The Training Guidelines provided definitions of sexual harassment, sexual violence/assault, consent, and mental presence/incapacity and a list of questions for the panel to consider (e.g., Did the accused know, or have reason to suspect, that the alleged victim was incapacitated?), and the burden of proof. Sexual violence/assault was defined as a "sexual act perpetrated against a person's will or where a person is incapable of giving consent; a single act of sexual assault is sufficiently severe to create a hostile environment...." Consent was defined, in part, as an individual being capable of controlling her/his physical actions and capable of making rational/reasonable decisions. Mental presence/incapacity was defined as lacking ability to make reasonable and rational judgments, which may occur as a result of use of alcohol, etc. The College's policies only included the California Penal Code definition of rape but did not include the definitions of consent, mental presence/incapacity, and sexual assault.

The Judicial Council members stated that they arrived one hour prior to the hearing to receive training. One Judicial Council member stated that when the hearing started, the Judicial Council was unsure about what they were supposed to be doing and whether their review was de novo. This member stated that the Judicial Council relied on the College's Counsel and the Hearing Officer to instruct them during the hearing and deliberations.

Appeal Hearing

OCR reviewed the transcript and recording of the appeal hearing. Complainant's Counsel provided an opening statement and indicated that the Complainant was not appearing personally because it was too difficult for her to do so, and that she had requested to be represented by him. Complainant's Counsel then provided an overview of the Complainant's concerns with the appeal procedures and requested that he be permitted to present the Complainant's case. The Hearing Officer denied the request.

Complainant's Counsel then requested that the panel hear testimony from the Coordinator, the Complainant's mother and sister, and the sister's XXXXXX. The Judicial Council determined that the witnesses would not be allowed to make statements or provide unsolicited information, but would be permitted to answer specific questions posed by the Judicial Council. After the Judicial Council members questioned the Complainant's witnesses, Complainant's Counsel provided a closing statement, which included that the Complainant was intoxicated, and that the Respondent had raped her XXXXX XXXXXXXX XXXXXXXX XXX XXXXXXX XXX XXXXXXXX.

The Judicial Council called in the Respondent who made an opening statement. He described his version of the events, including that XX XXXXXXXXXXXX XXX XXXXXXXXXXXX XXXXXXXXXXXX. He denied sexually assaulting or raping the Complainant. He stated that at the party he was not intoxicated and was fully in control of himself. The Judicial Council asked the Respondent questions, primarily focused on his physical contact with the Complainant and why he believed the Complainant had the capacity to consent.

The Respondent called Students III, IV, V, VI, and VII. Unlike the Complainant's witnesses, the Respondent's witnesses were allowed to provide general testimony and describe what they observed the night of the incident and respond to questions from the Respondent. The Judicial Council then asked each witness questions focused on their observations of the Complainant's interaction with the Respondent and the degree to which the Complainant and Respondent appeared intoxicated. The Judicial Council also asked two witnesses to confirm statements they had made about the Respondent initially informing them that he had had sexual intercourse with the Complainant. The Respondent made a closing statement. The hearing closed after Judicial Council members asked the Respondent questions about inconsistencies between his testimony and certain witnesses.

The Complainant submitted a statement, wherein she objected to the Title IX Coordinator inquiring into her sexual reputation in his interviews, denied the allegations pertaining to her reputation, and provided support for the denials. The Complainant wrote about her version of the incident and its impact on her, including that XXX XXX XXXX XXXXXX, XXX XXXXXX XXXXXXXXXXXXXXX XXX XXXXX XXXXXXXXXXXXXXX, did not feel safe on campus without an escort, and had dropped out of classes for the fall semester. In a declaration submitted to the panel as supplemental evidence, her sister stated that prior to the incident, the Complainant was independent, social, not easily upset, and goal oriented; after, she would not go alone to XXXXXXXX XX XXXXXX, had trouble doing things outside the home, had frequent breakdowns, and experienced flashbacks of the incident.

Judicial Council Deliberations

Following the hearing and with the Hearing Officer and College Counsel present, the Judicial Council deliberated for approximately two to three hours. Judicial Council members told OCR that most of their deliberation focused on the type of sexual contact, whether the Complainant had the capacity to consent, and how a reasonable person in the Respondent's position would have perceived the Complainant's capacity to consent.

With respect to consent, Judicial Council members told OCR that they agreed that the Complainant did not have the capacity to consent because of her level of intoxication. The Chair stated that the deliberation then focused on whether a reasonable person in the Respondent's position would have known that the Complainant was too intoxicated to provide consent. One Judicial Council member told OCR that the College's Counsel and the Hearing Officer were "overly directive" in guiding the deliberation on this question. She informed OCR that the College's Counsel told the Judicial Council that if they determined the Complainant was too drunk to consent and the Respondent was too drunk to know this, then they could not make a finding of sexual assault. This Judicial Council member said this instruction resulted in confusion regarding the appropriate reasonable person standard to apply.

The Judicial Council member stated that the Judicial Council held a vote on whether the Respondent was too intoxicated to know the Complainant could not consent, despite the Respondent's assertion that he was not drunk, was fully in control of himself, and recalled the night's events. The vote was 3:2 in favor

of the Respondent. The Judicial Council member stated that after that vote, the College's Counsel said that meant there was no sexual assault, which the Judicial Council relied on.

Some Judicial Council members told OCR that it would have been beneficial to ask witnesses follow-up questions and request additional evidence before reaching their decision. Another Judicial Council member stated specifically that she would have liked to question the Complainant's witnesses again. She stated that the College's Counsel told the members that they had to make a decision based solely on the information they had.

On December XX, 2012, the Judicial Council provided a recommendation letter to the President, wherein they made factual findings by a preponderance of the evidence, including: 1) The Complainant did not have the capacity to consent to XXX XXXXXXXX XXXXXXXXXXXX; 2) The Respondent reasonably believed that the Complainant did have the capacity to consent and did consent; 3) A reasonable, sober person in a similar situation would believe that the Complainant had the capacity to consent; 4) No harassment occurred; and 5) The incident caused the Complainant to feel that there was a hostile environment on campus.

The Judicial Council recommended that the Respondent attend sexual assault training and that the College examine its policies regarding dissemination of sexual harassment and assault information, provide sexual harassment and assault training to athletics teams, and continue current accommodations and consider additional requests for accommodations for the Complainant.

President's Review of the Judicial Council Determination

On December XX, 2012, the President issued letters of finding to the parties. The President affirmed the factual findings of the Judicial Council with the additional factual finding that "[t]he event traumatized [the Complainant]." The President revised the remedies recommended by the Judicial Council to require the Respondent Student to attend training and meet with the Title IX Coordinator before enrolling in classes or engaging in any College activities.

Analysis

OCR determined that prior to the appeal, the College violated Title IX by failing to provide a prompt and equitable response, including because the College: 1) failed to provide prompt and effective interim measures; 2) utilized a grievance process that did not meet Title IX requirements; 3) afforded the Complainant an inequitable opportunity to present witnesses and other evidence; 4) allowed and relied on the Respondent's witness statements about the Complainant's past sexual behavior, which may have had a prejudicial effect; and 5) misapplied the preponderance of evidence standard. In addition, two responsible employees failed to report the sexual assault allegations to the Title IX Coordinator.

Failure to Provide Prompt and Effective Interim Measures

OCR found that the Safe Place facilitated several immediate, interim measures, including a parking space at and a study space in the Safe Place office, and an escort to classes. X---paragraph redacted---X.

However, the Complainant informed the College that she had no way of knowing where the Respondent would be on campus at any given time. She informed the College that she avoided common areas on campus out of fear that she would come into contact with the Respondent; she ate lunch in the Safe

Place office. She stopped participating in a class to avoid contact with XXXXXXXX XXXXXXXX. She had requested that the College issue a mutual no contact order, and/or place some restrictions on the Respondent to create a space for her to access her classes and common areas on campus. The College did not respond to her request. She completed some of her studies and exams at the Safe Place office for the same reasons and ultimately dropped all classes in late November. OCR concluded that the Complainant was not provided with equitable access to the College's programs and activities during the investigation because the College placed the burden on the Complainant to avoid the Respondent, and the interim measures had the effect of isolating the Complainant and limiting her access to common areas of campus. In addition, the Title IX Coordinator did not reassess with the Complainant whether additional or alternate measures would have addressed her concerns related to access to program and activities. As discussed below, in its review of the College's investigative files for sexual harassment and sexual violence matters, OCR identified other students, including Complainant One and Four, for whom the College may not have provided adequate interim measures.

Failure to Provide an Adequate, Reliable, and Impartial Investigation

A responsible employee includes any employee who has a duty to report sexual harassment or other misconduct of students to appropriate school officials. The Title IX Coordinator acknowledged that the XXXX Coach and Athletic Director met this definition and had a duty to report the allegations to him once they learned of them on September XX, 2012. However, they did not do so. Based on the XXXX Coach and Athletic Director's positions of leadership and authority and the Title IX Coordinator's acknowledgement of the same, OCR found that these two employees had a duty to report and they failed to do so.

OCR interprets Title IX's requirement of an equitable process to require a recipient to, among other things, afford the parties an equal opportunity to present relevant witnesses and other evidence. OCR found that the Title IX Coordinator used the student misconduct policy and procedure, BP/AP 5500, to investigate the complaint, despite the fact that it describes a process that the College acknowledged did not meet Title IX requirements because it did not provide for an equitable opportunity for the complainant to present evidence and witnesses.

OCR also found that, in practice, the College provided the Complainant with an inequitable process. In this regard, the College interviewed all student witnesses identified by the Respondent and accepted all of the Respondent's evidence. The College sought information about the sexual reputation, character and credibility of both the Respondent and the Complainant from the Respondent's selected student witnesses. Rumors of the Complainant's past sexual behavior with third parties are not relevant to determining whether the Respondent sexually assaulted her, yet the Title IX Coordinator stated that he relied on this irrelevant and prejudicial information when making his determination.⁷

In contrast, the College did not interview the Complainant's witnesses about her sexual reputation, character and credibility nor were the Complainant's witnesses afforded the opportunity to express their opinions about the sexual reputation, character and credibility of the Respondent. While the College interviewed the Respondent's coach about his character and credibility, it did not interview the Complainant's coach about the Complainant's character and credibility, even though she requested that

⁷ Similarly, as described below, in Complainant Two's case, the investigators solicited information about the female student's past sexual history (did not do the same with respect to the male student) and relied on that information, in part, when reaching a credibility determination and making a no violation finding.

the College do so. The College sought the opinions of a mental health counselor about the Respondent's character and credibility, but it did not inquire into whether the Complainant's therapist or other medical professionals, including the nurse who had treated her in relation to the incident, were available to provide the same type of consultation. Although at least two students identified by the Complainant refused to be interviewed, the Title IX Coordinator and President were presented with information suggesting that they may have been pressured by other students not to participate in the investigation as evidenced by the October X, 2012 text message, but the College did not pursue an inquiry regarding potential retaliation or intimidation, which is prohibited by Title IX and College policy, and the Title IX Coordinator declined to consider the text message supporting the allegation.

Furthermore, the Title IX Coordinator did not seek to interview witnesses who were with the Complainant close in time to the incident and/or intimately familiar with her behavior and presentation prior to the incident, including the Complainant's family members and XXX XXXXXXXXXX Coach. The Title IX Coordinator's description of the Complainant's behavior to OCR as cool and fidgety during the October XX, 2012 meeting indicates that to the extent that the Complainant's physical presentation and behavior may have been considered, it was in a negative fashion. He told OCR that he reached a conclusion that she had XXXXXXXX XXXXXX issues. However, he did not speak with her therapist.

Because of the unequal treatment with respect to the Complainant's witnesses, testimony and documentary evidence, OCR determined that the College's investigation was inequitable. In addition, based on the Title IX Coordinator's explanation to OCR of how he considered evidence, OCR determined that the College misapplied the preponderance of the evidence standard.

Inequitable Appeal Process

Title IX does not require an appeal process, but where a recipient offers an appeal, Title IX requires that the process be prompt and equitable. OCR concluded that the College's handling of the Complainant's appeal failed to meet Title IX standard for equity in three ways: 1) Judicial Council members did not receive consistent instruction on applicable standards, the scope of review, and other elements necessary to issue a reliable determination; 2) Judicial Council members could not ensure an equitable process because they were limited in their examination of Complainant's witnesses; and 3) several Judicial Council members did not review all the evidence prior to the hearing.

Nine days before the hearing date, the College announced ad hoc modifications to BP/AP 5500 that put the burden on the Complainant and the Respondent to present her/his own case, when previously in student misconduct cases the College bore the burden of presentation and proof. When Complainant's counsel voiced concerns that the Complainant was not emotionally capable of presenting the details of the alleged rape and witnesses to a group of teachers, administrators and student peers, the College did not take sufficient steps to ensure that the Judicial Council understood its obligation to provide an equitable appeal process, regardless of whether either party could make such a presentation. As a result, as applied, the process was inequitable because the Judicial Council allowed the Respondent's witnesses to make open ended statements and answer any questions posed by the Respondent. In contrast, the Complainant's witnesses were only allowed to respond to Judicial Council members' questions, which were narrow. The Respondent was also permitted to testify a second time to explain discrepancies between his testimony and his witnesses' testimony. A similar opportunity was not afforded to Complainant's witnesses to return to explain any discrepancies, even though Judicial Council members expressed a desire to obtain further information. Finally, the Judicial Council reviewed prejudicial testimony about the Complainant's alleged sexual history with third parties. Accordingly,

OCR found that the College did not afford an equitable opportunity with respect to the presentation of evidence.

OCR determined that the College's one-hour training on its ad hoc hearing procedures resulted in Judicial Council members being unclear about the applicable legal standards for determining consent, and the standard and scope of the review. The Hearing Officer informed OCR that he had no specific training with respect to Title IX and sexual assault, yet he trained the Judicial Council members. All members of the Judicial Council expressed a lack of confidence in the training provided on consent or in his or her understanding of the consent standard, which was the focus of the deliberations. The Judicial Council reached a conclusion that the Complainant was so intoxicated that she could not have consented to sex. However, the College's legal counsel redirected the members to deciding whether the Respondent could have reasonably known that the Complainant lacked the capacity to consent. Based on the statements of the Judicial Council members, OCR concluded that they were uncertain what the standard was and how to evaluate and weigh the evidence when reaching this determination. Some members thought they were deciding whether a reasonable, sober person would have known that the Complainant lacked the capacity to consent, while others thought they were determining whether a "reasonable drunk person" would have known that the Complainant lacked such capacity.

OCR also found that members of the Judicial Council did not have sufficient time to review the hundreds of pages of evidence provided to them and have access to all relevant information before the hearing deliberations. Judicial Council members who wanted to call back certain witnesses to ask clarifying questions were told by the Hearing Officer and College's legal counsel that they could not do so. There was no review of the physical evidence – photographs of the Complainant's bruises XXX XXX XXXXXXXX XXXXXXXX XX XXX XXXXXXXX XXX -- by someone trained to understand their meaning, such as a forensic examiner. In addition, at least one Judicial Council member expressed uncertainty as to whether they were to provide a de novo review of the Title IX Coordinator's decision.

Accordingly, OCR found that although prompt, the appeal process was not reliable or equitable.

Hostile Environment for the Complainant

In addition to the areas of noncompliance discussed above, OCR found that the College failed to take effective action to stop rumors about the Complainant's sexual history with third parties once it had notice of them. Although neither of the two student witnesses who provided information regarding the Complainant's alleged sexual activity had personally witnessed the conduct, the Title IX Coordinator solicited and accepted the information as fact, reporting to OCR that on three separate occasions the Complainant had "done this", namely "XXXXXXXX X XXXX XXXXXXXX XXXX X XXXXXXXX XX XXXX XXXX XXXX XXX," a statement not supported by the interview notes reviewed by OCR and denied by the Complainant in her statement submitted to the Judicial Council. He also reported to OCR that he encouraged the Respondent's witnesses to continue to report "anything of interest" about the Complainant, even after the conclusion of the investigation. The College's solicitation of rumors about the Complainant's past sexual activities contributed to the hostile environment. The Complainant was aware of the sexual rumors from the written summary of the witness interviews that she reviewed in late October prior to the appeal hearing. That the Title IX Coordinator, a high level representative of the College, was asking for information about the Complainant's past sexual behavior from the Respondent's friends contributed to her inability to continue at the College.

In addition, the Title IX Coordinator was told by a student witness that the incident was the talk of the weight room but did not take any responsive action other than contacting the XXXX Coach by phone on October XX, 2012. The knowledge that the incident continued to be discussed on campus by XXXXXXXX XXXXXXXX who supported the Respondent contributed to the Complainant's feeling that she could not continue with her day-to-day activities, and was an additional reason why she chose to dis-enroll.

Furthermore, when a school knows or reasonably should know of harassment by other students against witnesses or potential witnesses, it must take immediate and appropriate steps to investigate or otherwise determine what occurred. OCR found that the Title IX Coordinator and President were on notice that one or more student witnesses felt pressured by College XXXXXXXX XXXX XXXXXXXX not to report what they had witnessed or participate in the investigation, yet the College failed to investigate or consider whether there may have been a threat of retaliation in its assessment of whether there was a hostile environment on campus.

OCR also determined that the failure to provide a prompt and equitable process denied or limited the Complainant's ability to participate in or benefit from the College's program. During the course of the College's resolution, family members, the XXXXXXXX Coach, and the Complainant stated that the Complainant, who had been independent, happy, and goal-oriented, became incapable of being unaccompanied on campus and had frequent emotional breakdowns. The Complainant reported difficulty participating in class, XXXXXXXX XX X XXXXXXXX XXXXXXXX, and even eating in the cafeteria due not only to her fear that she would encounter the Respondent but also because the College did not effectively address the gossip about the incident and rumors about her sexual history with third parties following her report. The Complainant, who had been a 3.56 GPA student XXXXXXXX, ultimately decided that she could not concentrate on her classwork and formally withdrew. While she did return to her studies and graduated XXXX XX XXXXXXXX XXXXXXX XXXX XXX XXXXXXXX XX XXXX, she ceased her participation XX XXX XXXXXXXX XXXX and never reenrolled XX XXX XXXXXXXX XXXXXXX.

Other Reports or Complaints: 2013-2014 to 2015-2016 School Years

The College provided OCR with 15 investigative files for oral reports and written complaints of sexual harassment and sexual violence that it received from the 2013-2014 through 2015-2016 school years. Through this review of files, OCR identified deficiencies because in more than one case the College did not identify the policy or procedure under which an investigation was being conducted, determine what occurred, assess whether the conduct at issue created a hostile environment for the complaining student, provide notice to one or both parties of the outcome of the investigation, or provide interim measures or remedies to address the discrimination to the complainant. In regards to two different respondents, the College issued a sanction at the conclusion of the grievance process without making a finding of a conduct violation. In one case the College solicited and considered information about a complainant's sexual history, which may have had a prejudicial effect on the process; the College also did not provide the Complainant with an opportunity to review the statements made and respond. In another case, a responsible employee did not promptly report to the Title IX Coordinator. The following summaries are examples of cases where OCR identified deficiencies in the College's response.

Complainant One: On March XX, 2014, the Director of the XXXXXX XXXXXXX XXXXXXXXXX XXX XXXXXXXX XXXXXXX (Program Director) notified the Title IX Coordinator that a female student informed an instructor that a male student XXXXXXX XXXXXXX XXXXXXX XX XXX XXXXXXX and had groped her breast with his open hand during a class exercise XX XXXXXXX XXXXXXX. Both students were enrolled in a course through

XXX XXXXXX XXXXXX XXXXXXXXXXXX XXX XXXXXXXXXXX XXXXXX and were employees of an outside agency (Agency). The Agency initiated an investigation.

The Title IX Coordinator inquired into the length of time to complete the investigation and whether it would be shared with the College. Later the same day, the Program Director informed the Title IX Coordinator that the Agency had determined that no “impropriety” occurred and that the female student was satisfied with the outcome. The Title IX Coordinator stated that he appreciated the report and took no further action.

Two days later, on March XX, 2014, an instructor at the College emailed the Safe Place Coordinator to inform her that the female student had reported the incident, and that classmates and Agency staff discouraged her from filing a formal complaint. The female student alleged that Agency staff required her to participate in a meeting with the male student, even though the female student wanted to file a complaint.

On March XX, 2014, the Safe Place Coordinator and female student met with the Title IX Coordinator. The Title IX Coordinator’s notes of the meeting state that the female student was “distracted” with the outcome of the Agency’s investigation and wished to file a formal complaint. The Safe Place Coordinator requested the female student receive an extension on her upcoming exam because she was not sleeping and struggling to focus. On March XX, 2014, the Title IX Coordinator’s office stated that the College did not have the authority to extend the midterm date XXX XX XXXXXX XXXXXXXXXXXXXXX.

On April X, 2014, the Safe Place Coordinator emailed the Title IX Coordinator that the female student was alleging retaliation by Agency staff, because she was being denied XXXXXXXXXXX XXXXXXXXXXX XXXXXXXXXXXXXXX XXXX. The Title IX Coordinator did not respond to the Safe Place Coordinator’s email.

On April X, 2014, the Program Director informed the Title IX Coordinator that the female student would be removed from X XXXXXXXXXXX XXX XXXX XX XXXXX because she was disrupting the class. Later that same day, the female student emailed the Title IX Coordinator and stated that she had a two hour meeting with Agency staff who pressured her XX XXXXXX. When she refused, staff told her that she XXXXX XX XXXXXXX. On April X, 2014, the Title IX Coordinator told the female student that he had been informed that the Agency XXXXX XXXXXXXXXXX XXXXXX (XXX) would initiate an investigation. He encouraged the student to submit a written complaint to his office. The Agency XXX opened the investigation on April XX, 2014.

On April XX, 2014, the female student XXXXXXXXXXX X XXXXXXX XXXXXXXXXXX XX XXX XXXXX XX XXXXXXXXXXX. XXX XXXXXX XXXXXXX XXXXX XXX XXXXXXXXXXX XXX XXXXXXXXXXXXXXX XXX XXXX XXX XXX XXX XXXXXXXXXXX XX XXXXX XX XXXX XXX.

The XXX Officer interviewed the male student on April XX, 2014 and the female student at the end of May 2014. During this time, the female student began therapy with the College’s Counselor, who emailed the Title IX Coordinator that the female student was “very distressed.”

On August XX, 2014, the Agency XXX issued a findings letter to the female student and sent a copy to the Title IX Coordinator’s office. The Agency XXX found that Agency staff “mishandled the response to her complaint” but did not find that the male student violated the sexual harassment policy or that the Agency retaliated against her. After reviewing the Agency XXX’s findings letter, the Title IX Coordinator informed the President that the College did not need to take any further steps.

The Agency XXX sent the Title IX Coordinator a letter dated January X, 2015, which stated that the Agency would update applicable manuals to include XXX reporting, disseminate the Agency Sexual Harassment Prevention Policy, and conduct training on sexual harassment investigations for administrators. The file does not reflect that the January X, 2015 letter was provided to the female student.

Based on the information provided, OCR identified deficiencies in the College's response because: the Title IX Coordinator did not consider the information before him to determine if interim measures beyond counseling were appropriate; the investigation was not prompt because it took 11 months to complete; the remedial actions taken by the Agency XXX may not have been shared with the female student; and the College did not assess whether the Agency XXX conducted its investigation in a manner consistent with Title IX requirements or if not, did not conduct its own investigation into the allegations under its grievance procedures, as required by Title IX.

Complainant Two: On June XX, 2014, a female student filed a sexual harassment complaint, alleging that on June XX, 2014 the male student subjected the female student to unwanted kissing, touching of her breasts under her shirt, and repeat attempts to put his hands down the front of her pants when she was XX XXX XXXX. The Title IX Coordinator interviewed the female student on June XX, 2014 with the Safe Place Coordinator present; the male student was interviewed on June XX, 2014. The July X, 2014 investigative report states that investigation addressed allegations of violations of BP 3540, sexual assault.

The investigators provided the female student with a notice of the Title IX investigation and interviewed her on July X, 2014. The investigators contacted the female student's witnesses on multiple occasions but they would not respond.

The investigators provided the male student with a notice of the Title IX investigation and the allegation, and interviewed him on July X, 2014. The male student stated he and the female student engaged in consensual kissing, and that he "tried to do more with his hands" but that the female student moved his hands away. On July X, 2014, the investigators interviewed the male student's witnesses, two supervisors of the male and female student.

The credibility assessment portion of the investigative report states the female student's witnesses failed to provide evidence to substantiate her allegation, that other witnesses "questioned [the female student's] integrity", that the female student's account of the incident to her supervisor and to the investigators was different, that the supervisors stated that the female student initiated contact with the male student XX XXXX after the incident, that "[the supervisors] state[d] that the female student ... XXX XXXXX XX XX XXXX XXXX XXXXXXXX XX XXX XXXX", and that the supervisors thought the male student was a good worker, non-aggressive, and got along well with others. The investigators concluded that it was "not more than likely that [the male student] violated [BP/AP 3540]."

On August X, 2015, the Title IX Coordinator issued a determination letter to the male student, with a copy to the female student, which included the no violation finding but stated that the Title IX Coordinator had determined that the College would take appropriate action to prevent recurrence of the behavior. Specifically, the Title IX Coordinator placed the male student on permanent probation and directed him to stay away from the female student.

Based on the information provided to OCR, the College properly notified the male student of the allegations, identified BP 3540 as the applicable policy, reached a prompt determination within 54 days, interviewed or attempted to interview all witnesses, and completed an investigative report with findings that was provided to both parties. However, OCR identified two deficiencies. First, the Title IX Coordinator issued a sanction – permanent probation -- to the male student in spite of a no violation finding. Second, the investigators based their determination in part on the College supervisors' comments about the female student's unrelated sexual interactions with third parties, and the female student was not given an opportunity to rebut statements made by staff supervisors, which may have resulted in an inequitable process.

Complainant Three: On October X, 2014, a female student reported to campus police that while on a College bus on September XX, 2014, a male student touched her bra strap, and repeatedly rubbed her breasts with his arm without her consent. The police officer's report stated that after taking the female student's report, he brought her to the Safe Place office. The Safe Place Coordinator assisted her in filing a complaint and provided support, including facilitating an excused absence in a class.

The police officer rode the bus in plain clothes with the female student on two occasions, until she identified the male student, who was previously unknown to her, on October X, 2014, at which time the officer took the male student into custody and questioned him. The Title IX Coordinator interviewed the male student on November XX, 2014. The Title IX Coordinator referred the male student to the College's mental health counseling department, but he did not go to the appointment. The Title IX Coordinator provided a written determination letter to both parties, dated January XX, 2015, which included the allegation, sanctioned the male student with permanent probation, and ordered him to have no contact with the female student but did not identify a conduct violation under the College's policies.

Based on the information provided to OCR, the complaint was resolved timely in approximately three and a half months, and the College took action to investigate the allegation and provided a written determination letter to both parties. However, OCR is concerned that the process was not equitable for the male student because the letter issued to the male student did not include a determination as to whether the harassing conduct occurred or the policy/procedure under which the determination was made. Nevertheless, the male student was placed on permanent probation. If the College determined that the conduct occurred, there is no documentation that would show that the College assessed whether the female student was subjected to a hostile environment based on the incident.

Complainant Four: On March X, 2016, a female student made an oral report and gave a voluntary written statement to campus police, stating that from about January XX, 2016 to March X, 2016, a male student in her class commented on and touched her legs, called her multiple times a day, sent her multiple texts a day, sat next to her during class, even when she tried to move away, tried to walk with her after every class and drive her home, and offered her medication to help her relax when she went out. The female student reported that she arranged to have another female student meet her after class because the male student's behavior was unwelcome and frightened her. In this regard, the female student reported that she had panic attacks before class and when the male student called her, and that she feared he would find out where she lived.

On March x, 2016, campus police interviewed the male student. The male student denied touching the female student, and said that he offered the female student his pain medication as a favor, and he offered her rides because he thought she lived near him. Campus police told the male student to refrain

from contacting or sitting near the female student, and that a copy of the police report would be forwarded to the Title IX Coordinator, who would contact the male student to schedule an interview.

Student Services received the police report on March X, 2016, and determined that the male student had no prior discipline as of March XX, 2016. On March XX, 2016, the Title IX Coordinator met with the male student and gave him a verbal warning.

Based on the information provided, the complaint was resolved within about fifteen days. However, OCR identified a deficiency because the documentation that the College provided to OCR does not show that the female student was ever contacted by the Title IX Coordinator, given information about her right to make a written complaint, or referred to Safe Place or offered interim remedies, nor did she receive any other follow-up from anyone at the College.

CONCLUSION

The College has entered into the enclosed Resolution Agreement (Agreement) to address the deficiencies and violations identified in this matter. The Agreement includes but is not limited to:

- Revisions to the College's policies and procedures so that they are compliant with Title IX requirements;
- OCR review of the College's investigations of sexual harassment and sexual violence allegations during the term of the Agreement;
- Development of a confidential system for reviewing and examining oral reports and written complaints of sexual harassment, which includes information about interim measures, remedies and notice of the outcome;
- Guidance and training for staff regarding the revised policy, procedure and complaint system;
- Student training on the prevention of sexual harassment and sexual violence and reporting and the prohibition on retaliation; and
- Individual remedies for the OCR Complainant.

Based on the commitments made in the enclosed Agreement, OCR is closing the investigation of this complaint as of the date of this letter. When fully implemented, the Agreement is intended to address the violation findings and compliance deficiencies identified in this investigation. OCR will monitor the implementation of the Agreement until the College is in compliance with the statute(s) and regulations at issue in the case. OCR's determination in this matter should not be interpreted to address the College's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

This letter sets forth OCR's determination in this 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, retaliate, 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 with OCR 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, it will seek to protect, to the extent provided by the law, personal information that, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

Thank you for your cooperation in resolving this case. If you have any questions regarding this letter, please contact Monique Raco-Fuentes and Julie Baenziger at the San Francisco OCR office at (415) 486-5555.

Sincerely,

/s/

Laura Faer
Regional Director

Enc.