



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION IX
CALIFORNIA

April 29, 2015

Dr. Deborah Budd
President
Berkeley City College
2050 Center Street
Berkeley, CA 94704

(In reply, please refer to case no. 09-14-2260.)

Dear Dr. Budd:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed against the Berkeley City College (College). OCR investigated: 1) Whether the College failed to respond adequately to an internal fall 2013 complaint stating that the Program Coordinator (Coordinator) of the College's Service Community Program (Program) discriminated based on race when the Coordinator dismissed the Complainant¹ from the Program, and 2) Whether a Political Science Instructor (Instructor) created a hostile environment based on race when he used a racial slur in class in March 2014 while discussing a historical conflict.

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

OCR gathered evidence through interviews with College staff and administrators, the Complainant, and other students. We also reviewed documents and records submitted by the College and Complainant. Based on the evidence, OCR determined that the College was out of compliance with Title VI with respect to Allegation One, and in compliance with Title VI with respect to Allegation Two. The reasons for our determination are summarized below.

¹ OCR notified the College of the identity of the Complainant in its April 28, 2014 notification letter. It is withheld here to protect privacy.

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

Colleges are responsible under Title VI and its regulation for providing students with a nondiscriminatory educational environment. Harassment of a student based on race, color, or national origin can result in the denial or limitation of the student's ability to participate in or receive education benefits, services, or opportunities. Colleges provide program benefits, services, and opportunities to students through the responsibilities given to employees. If an employee who is acting, or reasonably appears to be acting, in the context of carrying out these responsibilities engages in harassment on the basis of race, color or national origin that is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a the college, the college is responsible for the discriminatory conduct whether or not it has notice.

Under Title VI and the regulations, if a student is harassed by an employee on the basis of race, color or national origin, the college is responsible for determining what occurred and responding appropriately. OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt, thorough, and effective. What constitutes a reasonable response to harassment will differ depending upon the circumstances. However, in all cases the college must conduct a prompt, thorough and impartial inquiry designed to reliably determine what occurred. If harassment is found, it should take reasonable, timely, age-appropriate, and effective corrective action, including steps tailored to the specific situation. The response must be designed to stop the harassment, eliminate the hostile environment if one has been created, and remedy the effects of the harassment on the student who was harassed. The college must also take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate. The effectiveness of the school's response is measured based on a reasonableness standard. Schools do not have to know beforehand that their response will be effective. However, if their initial steps are ineffective in stopping the harassment, reasonableness may require a series of escalating steps.

Other actions may be necessary to repair the educational environment. These may include special training or other interventions, the dissemination of information, new policies, and/or other steps that are designed to clearly communicate the message that the college does not tolerate harassment and will be responsive to any student reports of harassment. The college also should take steps to prevent any retaliation against the student who made the complaint or those who provided information.

In determining whether a hostile environment based on race, color or national origin has been created, OCR examines all the circumstances, including: the type of harassment (e.g. whether it was verbal or physical); the frequency and severity of the conduct; the age, race and relationship of the parties; the setting and context in which the harassment occurred; whether other incidents have occurred at the college; and other relevant factors.

Background

- The College is one of four campuses that comprise the Peralta Community College District (District) which serves northern Alameda County.² The College is required by state law to comply with District policies and procedures. All District policies and procedures supersede College-specific policies and procedures. According to the College, policies and procedures developed by the College are implemented to expedite College business.
- The College participates in the Transfer Service Community Program (Program). The Program is the parent organization for the College's Service Community program. The Program brings University of California, Berkeley, and College students together to assist College students in transferring into the UC System, getting involved in public service, and connecting to resources. The Program's mission is to increase support for prospective transfer students and provide them with enhanced leadership and service opportunities. (<http://publicservice.berkeley.edu/about>).
- At the time this complaint was filed with OCR, an Instructor was the faculty supervisor of the Program. Currently, the College's Director of Campus Life and Student Activities oversees the Program. A University of California Berkeley student serves as the Program's Coordinator. The Coordinator serves in a supervisory role (signs student-participant forms and conducts their evaluations) and is compensated through a grant the College receives from the University of California, Berkeley.

A. *Whether the College failed to respond adequately to an internal fall 2013 complaint stating that the Program Coordinator (Coordinator) of the College's Service Community Program (Program) discriminated based on race when she dismissed the Complainant from the Program.*

OCR's investigation found the following:

- The College has a policy related to race discrimination, Board Policy (BP) 3410 which is published in the College's 2013-2015 Catalog and on the College's website. The policy states that the District prohibits unlawful discrimination towards students on the basis of race.
- The College's Discrimination Complaint Procedures are published in the Catalog. The Discrimination Complaint Procedures are separate and distinct from the College's Grievance Procedures, which apply to incidents of harassment. The discrimination procedures provide that student complaints may be filed with the Office of Student Services at each college and forwarded to the District Equal Opportunity Officer, or with the Equal Opportunity Office. The procedures provide

² The four District campuses include: Berkeley City College, Merritt College, Laney College, and College of Alameda.

for timeframes (an investigation will commence within 14 days of the complaint, the complainant will be notified of the resolution in writing within 90 days and may appeal within 10 days). Appeal time frames in the Catalog and a document entitled *Unlawful Discrimination and Sexual Harassment: Complaint and Investigation Procedures for Employees and Students* collectively include 10, 15 and 30 day limitations, which creates ambiguity. The District's most prescriptive document describing the discrimination complaint procedures, *Unlawful Discrimination and Sexual Harassment: Complaint and Investigation Procedures for Employees and Students*, is not easily accessible from the College's website.

- During the Fall 2013, the Complainant participated in the Program (described in the Background section above).
- On September 9, 2013, the Complainant sent an email to a College Dean stating that she was feeling hopeless and helpless . . . and that she "would like to file a complaint against [the College] for discrimination . . . and dismissal from the Program without just cause."
- A meeting with the Coordinator³ and Dean was held in September 2013 to address the Complainant's concerns. The Dean stated to OCR that the Coordinator apologized for making the Complainant feel excluded. Despite the Coordinator's concerns regarding the Complainant's participation and performance in the program, alternate arrangements were offered for the Complainant to complete the Program, but the Complainant did not find the alternate arrangements to be acceptable.
- On October 29, 2013, the Complainant sent an email, entitled, "Discrimination@BCCSC," to the College President stating that she had been excluded from the Program due to discriminatory practices, and requesting that the issue be resolved.
- On October 30, 2013, the Complainant sent an email to the College President, entitled, "Awaiting Phone Call re: Discrimination," stating that the Complainant would like to discuss the issue further.
- On October 30, 2013, the Complainant and College President spoke via telephone.
- On November 1, 2013, the Complainant sent an email to the College President, entitled, "Discrimination," stating that her grievances included, in pertinent part,

³ OCR notes that the Coordinator, initially a student at the College and later at the University of California, Berkeley, had supervisory responsibilities and was considered to be a College employee for purposes of this analysis.

discrimination against people of color and ejection from the Program without just cause.

- On November 2, 2013, the College President emailed the Complainant that she would contact her within the next three days.
- Over the course of the next several days (November 4, 5 and 6, 2013) the Complainant was contacted by the College Dean and the Instructor, who oversaw the Program, in an effort to set up a time to meet with the Complainant. The meeting took place on November 6, 2013. The Complainant sent an email to the Instructor that same day stating that she was unsure about her academic future, but that she was satisfied with the results of the meeting, even though there was “very little that can be done at this juncture.”
- On November 16, 2013 the Complainant emailed the Instructor and Dean, stating that she was requesting another meeting to discuss other options to completely resolve the issue of discrimination.
- The College stated to OCR that it did not understand the Complainant’s emails or statements in meetings to be discrimination complaints. The College stated that the Complainant was dismissed from the Program because the Complainant was not fulfilling her course obligations regarding required volunteer hours, contributing to class dialogue and sharing resources with classmates. The College stated that the Coordinator felt verbally attacked by the Complainant who, during meetings, took her anger out on the Coordinator.
- Because none of the Complainant’s communications were understood by the College as discrimination complaints, the College did not follow its discrimination complaint procedures. The Complainant stated to OCR that she was not instructed on how to file a discrimination complaint, was not provided notification of the College’s resolution, and was not provided with appeal rights.
- The Dean stated that, as a result of the Complainant’s concerns, she spoke to the College’s Interim Vice President of Instruction to learn more about the Program and to clarify the Coordinator’s role. Subsequently, improvements to the Program were made, including additional faculty oversight.
- The Instructor who oversaw the Program stated to OCR that the College has not provided training regarding how to respond to and resolve race discrimination complaints. The College recently hired an ombudsperson whose responsibilities include guiding students through the appropriate resolution procedure.

- The College informed OCR that it has hired a new leadership team who would benefit from training on issues related to this complaint.

OCR found the College failed to provide the Complainant with an appropriate and effective response to her internal complaint. While the Title VI regulations do not have specific requirements for a grievance procedures, where a college provides a process for resolution of race discrimination complaints, in order to be effective, the process must be clear and understandable to students and staff. In this case, the College's discrimination complaint procedures overlap with its general Student Grievance Procedures. There is no clear guidance to students which procedure should be utilized for race discrimination complaints and it is unclear how the College determines which procedure it would follow. The multiple appeal timeframes noted in the Catalog and *Unlawful Discrimination and Sexual Harassment: Complaint and Investigation Procedures for Employees and Students* are confusing. The most prescriptive District document describing the discrimination complaint procedures, entitled, *Unlawful Discrimination and Sexual Harassment: Complaint and Investigation Procedures for Employees and Students*, is not easily accessible from the College's website.

Despite various emails from the Complainant to College administrators, including the Dean and the President, with subject lines reading: "Discrimination@BCCSC," "Awaiting Phone Call re: Discrimination," and simply, "Discrimination," the College failed to recognize the Complainant's concerns as a discrimination complaint. Consequently, the Complainant never received a letter to acknowledge receipt of her written complaint or notification of the College's response and determination. Further, there was no documented investigation and the Complainant was not notified of her appeal rights. Therefore, the preponderance of the evidence is sufficient to conclude that the College failed to provide the Complainant with an appropriate and effective response to notice of race discrimination in violation of Title VI.

B. *Whether a Political Science Instructor (Instructor) created a hostile environment based on race when he used a racial slur in class in March of 2014 while discussing a historical conflict.*

OCR's investigation found the following:

- The Complainant alleged that during a lecture in early March 2014, the Instructor used the N-word and advocated for the reinstatement of slavery. The Complainant stated to OCR that all students in the class would have heard these comments.
- The Instructor denied using the N-word and stated that he did not, nor would he ever, state that slavery should be reinstated. He stated that embedded in the Political Science course in which the Complainant was enrolled were discussions about race and gender discrimination, the etymology of 'we the people' as it relates to white males, the views of Thomas Jefferson on slavery, and the abomination of slavery. The Instructor stated that the course was designed to explore inherently difficult topics. The Instructor

has taught the course for the last 10 years and stated to OCR that he works hard to create an environment where students can navigate difficult topics while feeling respected and empowered.

- OCR interviewed students⁴, including one student of color, who were enrolled in the course with the Complainant. The students did not recall the Instructor ever making racially derogatory comments or advocating for slavery. They did recall a discussion about slavery in relation to Thomas Jefferson. They stated that the Instructor was an excellent teacher, and that they regularly recommended his classes to their friends.
- The students interviewed specifically remembered the Complainant. The students recalled that she became extremely upset during a class discussion about the Declaration of Independence. The students stated that it was their impression that the subject matter (the fact that slavery had happened) upset the Complainant, rather than a particular statement by the Instructor.
- The students interviewed stated that they believed the Instructor had a good relationship with, and was supportive of, the Complainant. They described him as respectful and gentle with the Complainant.
- Both the College Dean and the Instructor stated in writing and during interviews with OCR, that prior to the OCR complaint, they had not received any notice of an alleged use of a racial slur by the Instructor. There is no documentation showing that the Complainant notified the College prior to the OCR complaint of this incident. However, the Complainant stated to OCR that she verbally informed a College counselor who is no longer employed by the College.
- The Complainant stated to OCR that she has not witnessed or otherwise heard of any other racially offensive comments by the Instructor.
- The Instructor has not had any racial discrimination complaints filed against him prior to, or since the OCR complaint.
- Of the three courses the Complainant enrolled in during the Spring 2014, she withdrew from two, including the Instructor's course, and received an incomplete in the third. The Complainant's transcript indicates 12 additional withdrawals from College courses over a period of several years.

OCR attempted to interview a random sample of eight (8) to ten (10) students in the Spring 2014 Political Science class in which the Complainant was enrolled. Despite a good faith effort from the College and OCR, only two (2) students attended the OCR interview.

With respect to Allegation Two, the preponderance of evidence does not support a conclusion that the College violated Title VI as alleged. Although the College stated that it had no notice of the allegation prior to the OCR complaint, because the Instructor is a College employee who allegedly made the statements in question, in the context of his responsibilities, the College would be responsible if a hostile environment based on race was created, whether or not it had notice.

With regard to the Instructor's alleged comments, OCR notes that, in cases of alleged discrimination, the protections of the First Amendment to the United States Constitution must be considered if issues of speech or expression are involved. OCR has made it clear that the laws and regulations it enforces protect students from prohibited discrimination, and are not intended to restrict the exercise of any constitutionally protected expressive activities or speech. As explained in OCR guidance documents⁵, the regulations enforced by OCR are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution.

The preponderance of evidence did not establish that the Instructor used the N-word, or advocated for the reinstatement of slavery in a manner inconsistent with Title VI. The lecture in question involved the topic of slavery in historical context which inherently involves the subject of race. While the Complainant may have found some of the discussion offensive, the offensiveness of a particular point of view or expression, standing alone, is not a legally sufficient basis to establish a hostile environment. Under OCR's standards, in order to establish a hostile environment, conduct must be sufficiently severe, persistent or pervasive as to interfere with or deny the student's ability to participate in or benefit from the services, activities, or opportunities offered by the College. This requires that conduct be evaluated, not only from the subjective perspective of the Complainant but from the objective perspective of a reasonable person in the alleged victim's position.

While OCR was only able to interview a small number of students, those interviewed believed that the Instructor's lectures and conduct were appropriate to the classroom setting and the subject matter, and that they never heard him use a racial slur, or advocate for the reinstatement of slavery. Their perception was that the Instructor is highly regarded and went out of his way to make the Complainant feel comfortable. The Instructor had never had a complaint of racial harassment made about him previously and denied making the alleged comments. OCR found the Instructor and students interviewed to be credible.

After carefully examining the information provided by the Complainant and the other individuals interviewed, OCR concluded that the preponderance of the evidence does not

⁵ See "Dear Colleague Letter" issued July 28, 2003, clarifying OCR's enforcement standards in light of First Amendment protections, <http://www2.ed.gov/about/offices/list/ocr/firstamend.html>.

support a conclusion that the Instructor created a hostile environment based on race with regard to the comments alleged by the Complainant in violation of Title VI.⁶

On March 20, 2015 the College signed the enclosed resolution agreement which requires actions to address the systemic issues raised by Allegation One. Specifically, in order to provide students, employees and third parties an adequate response to discrimination allegations, the College will revise its policies and procedures, clarify the roles of individuals responsible for resolving discrimination complaints, update online and hard copy information related to discrimination policies and procedures, provide links to the College's discrimination policy and procedures on the College's website, and provide training annually for all staff who deal with discrimination complaints, including the President, Vice-Presidents, Deans and Instructors.

This concludes OCR's investigation of the complaint and 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. We are closing the complaint as the date of this letter, and notifying the Complainant simultaneously. 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 an individual OCR case. This letter is not a formal statement of OCR policy and they should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

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

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

⁶ OCR's determination on this issue does not affect the College's obligation to conduct prompt, thorough and impartial inquiries designed to reliably determine whether discrimination occurred when race discrimination against students is alleged. These issues are addressed through the remedies related to Allegation One.

Thank you for your cooperation in resolving this case. In particular, we appreciate the assistance of President Dr. Debbie Budd, Dean of Student Support Services, Brenda Johnson, and Dean of Academic Pathways, Workforce Development and Student Success, Dr. Carlos Cortez. If you have any questions regarding this letter, please contact Rhonda Ngom, the attorney assigned to this case, at (415) 486-5540.

Sincerely,

/s/

James M. Wood
Team Leader

Enclosure