



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

50 BEALE ST., SUITE 7200
SAN FRANCISCO, CA 94105

REGION IX
CALIFORNIA

April 10, 2015

Dr. Mark Zacovic
President
Cuyamaca College
900 Rancho San Diego Parkway
El Cajon, California 92019

(In reply, please refer to case no. 09-15-2067.)

Dear Dr. Zacovic:

In a letter dated December 22, 2014, the U.S. Department of Education (Department), Office for Civil Rights (OCR), notified you it had accepted a complaint, filed on behalf of a Cuyamaca College student (Student), against Cuyamaca College (College). The complaint alleged discrimination on the basis of race. Specifically, the Student's legal counsel (Complainant) alleged that the Student was subjected to harassment by a College employee based on race when the employee made derogatory comments about African-Americans during an Oceanography class lecture; and that the College failed to respond appropriately to the Student's internal complaint filed with the College on May XX, 2014.

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

OCR gathered evidence through documentation submitted by the Complainant and the College. OCR concluded that there was sufficient evidence to support a conclusion of noncompliance with Title VI and its implementing regulation with regard to the failure to respond appropriately to the Student's May 21, 2014 complaint. The attached Resolution Agreement, when fully implemented, will resolve the areas of noncompliance found in this case. The applicable legal standards, the facts gathered during the investigation, and the reasons for our determinations are summarized below.

The regulations implementing Title VI, at 34 C.F.R. §100.3(a) and (b), prohibit discrimination based on race, color or national origin by recipients of Federal financial assistance. Colleges are responsible under Title VI and the 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 serious to deny or limit a student's ability to participate in or benefit from the program, 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. A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment.

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 evaluates whether or not the conduct was sufficiently serious to deny or limit the student's ability to participate in or benefit from the district's program. 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.

OCR's investigation found:

- The Student is a student at the College, is African American, and attended an Oceanography class during the Spring 2014. According to the Complainant, on May XX, 2014, as the Oceanography students attended class, and were awaiting their grades, the Oceanography professor practiced what she described as a "comedy routine," which included racially derogatory statements, and the use of negative language about African Americans. This fact is not disputed by the College.

- On May XX, 2014, the Student emailed the College President after the Oceanography class, describing the incident, but he did not identify the course or the Oceanography professor by name. In the email complaint, the Student stated that the professor used racial slurs, 'jokes', and comments that offended most of the class that was present and that made everyone uncomfortable. The Student wrote that several students tried to stop the professor. The Student wrote that, despite taking offense to the professor's racial commentary, everyone stayed in class to receive their grade.
- The College took some investigative steps, including on May XX, when the President asked the Vice President of Instruction to follow-up with the Complainant. On May XX the VP of Instruction asked the Dean of Math Science and Engineering (DMSE) to follow-up. This same day, the Complainant emailed the same complaint to the Associate Dean of Student Affairs (ADSA).
- On May XX, 2014, a second student in the same Oceanography class notified the College of the same incident and provided the professor's name. In an email to the Student, dated May XX, 2014, the DMSE asked the Student if the alleged incident occurred in the Oceanography course. The Student replied the same day to confirm that it was.
- Between May XX and June XX, 2014, the DMSE, ADSA, and the VP of Instruction followed up with the Student and at least one other witness to gather information. The Student was told by the ADSA that the DMSE would notify him of the results of the investigation. The College provided information to OCR that no College employee, including the DMSE, ever notified the Complainant of the investigative findings.
- In an email dated May XX, 2014 from the DMSE to the VP, the DMSE states that the professor in question was not being rehired for the coming semester for reasons unrelated to the incident, but that he still wanted to follow College processes and be able to inform the students that this behavior, if true, was unacceptable.
- The Complainant stated to OCR that the Student did not receive any notification from the College until after the Complainant's attorney filed a second complaint of discrimination by letter on October XX, 2014. College counsel responded on November X, 2014 by letter, denying the settlement demands made by the Complainant's attorney on October XX, 2014 because, he wrote, the incident was not sufficiently severe, persistent, or pervasive as to create a hostile environment for the Student.
- In College counsel's response to OCR, counsel acknowledged that the College's response to the complaint was problematic because it did not

advise the Student of the result of the investigation, and the fact that the professor would not be retained as a College instructor. Further, counsel stated that the College did not use the appropriate procedure to resolve the complaint and that the appropriate policy that should have been used was the College administrative policy AP 3435 *Discrimination and Harassment Complaints and Investigations*.

- OCR's review of AP 3435, issued by the College April 11, 2013 and updated November 18, 2014, showed that the policy met OCR's standards, except in one area, and thus the policy as written does not provide for an effective resolution of discrimination complaints. Specifically, AP 3435, mandates that when official complaints of discrimination/harassment are filed, it must be filed using a form prescribed by the California Community Colleges Chancellor's Office.

Factual Analysis:

The Student filed a complaint of racial discrimination/harassment by email on May XX, 2014 to the College President, and by email on May XX, 2014 to the ADOSA, about the professor's actions in the May XX, 2014 Oceanography class. The College did not provide an effective resolution to the complaint; because, while it responded promptly, the College's investigation did not include interviews of all relevant witnesses, such as the students in the class, and therefore the investigation lacked sufficient evidence to adequately determine whether the professor's so-called comedy routine, constituted harassment on the basis of race and whether it created a hostile environment on the basis of race for the Student and the other students in the class. The College's resolution of the race discrimination complaint was also not effective because it failed to provide the Complainant with the outcome of its investigation.

In reviewing the College's procedure, AP 3435, OCR noted that people who file official complaints of racial discrimination must use an official form to file the discrimination complaint. Because this requirement could result in a complaint that is filed using another means, such as an email or a letter, remaining unacknowledged or unresolved, this creates an ineffective flaw in the process.

The College agreed to address these areas of non-compliance through signing a Resolution Agreement, a copy of which is attached. The Resolution Agreement requires the College to conduct a thorough investigation of the racial discrimination issues raised by the Complainant. The College agreed to provide training to all administrators who are directly involved in the processing, investigating, or resolving of complaints of race discrimination. The College also agreed to revise its discrimination complaint resolution procedure to ensure that complaints filed will be processed, and not rejected solely because they are not submitted on a particular form.

This concludes OCR's investigation of this complaint. When fully implemented, the attached Resolution Agreement will remedy the compliance issues found during OCR's

investigation. OCR will monitor the implementation of the Resolution Agreement through to its completion. OCR is closing the investigative stage of this case as of the date of this letter. The Complainant is being notified in a separate letter.

OCR routinely advises recipients of Federal funds and public educational entities that Federal regulations prohibit intimidation, harassment or retaliation against those filing complaints with OCR and those participating in the complaint resolution process. Complainants and participants who feel that such actions have occurred may file a separate complaint with OCR.

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

If you have any questions about this complaint, please contact David Howard, Investigator, at (415) 486-5523, or via email at david.howard@ed.gov.

Sincerely,

/s/

Mary Beth McLeod
Team Leader

Attachment enclosed

Cc: Mr. Timothy K. Garfield, Esq. Schwartz, Hyde, and Sullivan, LLP