



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGION IX
CALIFORNIA

50 UNITED NATIONS PLAZA
MAIL BOX 1200; ROOM 1545
SAN FRANCISCO, CA 94102

April 27, 2017

Ms. Erlinda J. Martinez, Ed. D.
President
Santa Ana College
1530 W. 17th Street
Santa Ana, California 92706-3398

(In reply, please refer to OCR Docket Number 09-16-2130.)

Dear President Martinez:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against Santa Ana College (College). The Complainant alleged that the College discriminated against her on the basis of race, national origin and age.¹ Specifically, OCR investigated the following issue:

Whether the College failed to respond adequately to the internal complaints that the Complainant made on December XX, 2015 and January XX, 2016 stating that she had been harassed/discriminated against based on race, national origin, and age.

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. OCR also investigated the complaint under the Age Discrimination Act of 1975 (AgeDA) and its implementing regulation. The AgeDA prohibits discrimination on the basis of age by recipients of Federal financial assistance. The College receives funds from the Department and is subject to Title VI and the AgeDA and their regulations.

To investigate this complaint, OCR conducted interviews and reviewed documents and other information provided by the Complainant and the College. After careful review of the information gathered in the investigation, OCR concluded that the College did not violate Title VI, but did violate the AgeDA with regard to the issue OCR investigated. The legal standards, facts gathered, and the reasons for OCR's determinations are summarized below.

Issue: *Whether the College failed to respond adequately to the internal complaints that the Complainant made on December XX, 2015 and January XX, 2016 stating that she had been harassed/discriminated against based on race, national origin, and age.*

¹ OCR previously provided the College with the identity of the Complainant. We are withholding the Complainant's name from this letter to protect the Complainant's privacy.

Legal Standards

Title VI

The Title VI regulation, at 34 C.F.R. §100.3(a) and (b), prohibit discrimination based on race, color or national origin by Colleges of Federal financial assistance. Colleges are responsible under Title VI and the regulations for providing students with a nondiscriminatory educational environment. Harassment of a student based on race, color or national origin can constitute a form of discrimination because it 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 harassing conduct (physical, verbal, graphic, or written) 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.

In analyzing claims of harassment under Title VI, OCR first considers the totality of the circumstances to determine whether a hostile environment has been created, *i.e.*, whether the harassing conduct is sufficiently serious that it denies or limits a student's ability to participate in or benefit from the college's program. These circumstances include the type of harassment, context, nature, scope, frequency and severity, age, race, duration, and location of the harassment incidents, as well as the identity, number, and relationships of the persons involved. It also considers whether other incidents motivated by race, color or national origin have occurred at the college to this complainant or others.

The extent of a college's responsibilities when an employee harasses a student is determined by whether or not the harassment occurred in the context of the employee's provision of aids, benefits, or services to students. OCR will consider a variety of factors in determining whether or not the harassment has taken place in this context including the type and degree of responsibility given to the employee, both formal and informal authority, to provide aids, benefits or services to students, to direct and control students conduct, or to discipline students generally; the degree of influence the employee has over the particular student involved, including in the circumstances under which the harassment took place; where and when the harassment occurred; the involved student's age and educational level; and, as applicable, whether, in light of the student's age and educational level and the way the school is run, it would be reasonable for the student to believe that the employee was in a position of responsibility over the student, even if the employee was not.

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 promptly conduct an impartial inquiry designed to reliably determine what occurred. If a college's grievance procedures encompass race,

color, and national origin discrimination, it must apply such procedures consistently and in a manner that does not constitute Title VI discrimination.

The response must be tailored to stop the harassment from recurring, eliminate the hostile environment, and remedy the effects of the harassment on the student who was harassed. The steps taken should be reasonable, timely, age-appropriate, tailored to the specific situation, and effective. 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.

AgeDA

Under the AgeDA regulation at 34 C.F.R. §110.10(a), (b), and (c) a College may not treat individuals differently on the basis of age with regard to any aspect of services, benefits, or opportunities it provides either directly or through contractual or other arrangements. To determine whether a student has been discriminated against on the basis of age under the AgeDA, OCR looks at whether there is evidence that the student was treated differently than students of other ages under similar circumstances, and whether the treatment has resulted the denial or limitation of services, benefits, or opportunities. If there is such evidence, OCR examines whether the college provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination. For OCR to find a violation, the preponderance of the evidence must establish that the College's actions were based on the student's age.

In addition, colleges are responsible under the AgeDA for providing students with a nondiscriminatory educational environment. Harassment of a student based on age can result in the denial or limitation of the student's ability to participate in or receive education benefits, services, or opportunities. In determining whether a hostile environment based on age 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 evaluates the appropriateness of the responsive action to alleged discrimination on the basis of age by assessing whether it was prompt and equitable. What constitutes a reasonable response to discrimination will differ depending upon the circumstances. However, in all cases the college must promptly conduct an impartial inquiry designed to reliably determine what occurred. The response must be tailored to stop the discrimination, and remedy the effects of the discrimination on the student who was discriminated against. The college must also take steps reasonably calculated to prevent the discrimination from recurring.

Facts

The following facts are relevant to OCR's analysis.

The Complainant is African-American, Native American, Indian, Japanese and Caucasian, and was a student at the College during the 2015-2016 school year. In 2015, the Complainant was 40 years old.

Grievance Procedures

The College has an age non-discrimination policy, found on its website at <http://sac.edu/AboutSAC/Pages/nondiscrimination.aspx> and in the College catalog. The non-discrimination policy is not visible from the College's homepage, and is found most readily using the search bar function. The contact listed for more information and discrimination complainants is no longer employed by the District. The non-discrimination policy is also included in the College online catalog, with the identity of the current coordinator.

The College has Grievance Procedures for Students, found in the financial aid portion of its website at <http://sac.edu/StudentServices/FinancialAid/Complaints/Pages/default.aspx>. The webpage identifies two procedures which are handled at the College level: Non-Academic Grievance Procedures and Academic Grievance Procedures (grade appeals). The webpage also includes a section entitled "Discrimination Complaints," which states that the Rancho Santiago Community College District, of which the College is a member, does not discriminate on the basis of ethnic group identification, national origin, religion, age, sex, race, color, ancestry, sexual orientation, or physical or mental disability, and that "inquiries regarding compliance and/or grievance procedures may be directed to District's Title IX Officer and/or Section 504/ADA Coordinator," who is identified as the individual who no longer holds the position. The webpage refers to, but does not describe the discrimination complaint procedure or provide a link to the procedures themselves.

The College Catalog states in its non-discrimination statement that the Chancellor "shall establish" administrative procedures to ensure that individuals can present complaints, but does not identify where these procedures can be found or what they contain. However, the non-discrimination statement directs individuals with inquiries regarding compliance or grievance procedures to the College District's Title IX/504 Coordinator. Another section of the College Catalog, under the heading "Grievance Procedures for Students", provides a description of the College Non-Academic Grievance Procedures, but not the District discrimination complaint procedures.

The Non-Academic Grievance Procedures described on the webpage cited above and in the College catalog, require students to begin the grievance process by conferring with the person who took the action or made the ruling to which they object no later than (10) days following the event. If the difference is not resolved, the student must confer with the respondent's supervisor. If the difference remains unresolved, the student may file a written statement on the prescribed form no later than 10 days from conferring with the supervisor

The Vice President of Student Services is then required to select a Student Grievance Panel, which “shall have the power” to make an appropriate investigation. If the grievance is sustained, the panel will recommend appropriate action for relief and communicate this in writing to the individual against whom the grievance was directed. If the grievance is not sustained, it is to be communicated in writing to the individual who made the complaint. The procedures do not include timeframes for convening the Student Grievance Panel, or for reaching a decision.

The Rancho Santiago Community College District has adopted Discrimination Complaint procedures as an administrative regulation (AR 3435). AR 3435 may be the procedures referenced on the College web page described above, under the heading of “Discrimination Complaints” although the procedures are not identified on the web page by AR number. The AR can be found, with difficulty, at <http://www.rscsd.edu/Trustees/Pages/AR-3435.aspx>. Administrative Regulation 3435, which is different from the Non-Academic Grievance Procedures described above, provides for an optional informal resolution process, interim steps to protect the complainant, a prompt investigation and review of documents, a written report, a copy or summary of the written report to the complainant within 90 days of receipt of the complaint, and an appeal process. The procedures are available to any student, employee, or third party who believes he/she has been subjected to discrimination or harassed by a student, employee, or third party.

Student Complaint

On December X, 2015, the Complainant sent an email to a manager in the financial aid office (Employee 2) regarding poor treatment and an alleged racial slur by a College employee in the financial aid office (Employee 1). The email did not mention any treatment or slurs based on age. On December X, 2015, Employee 2 responded to the Complainant with an email in which he attached the “grievance procedures.” The procedures described in the December X, 2015, email were the Non-Academic Grievance Procedures described above, rather than the discrimination procedures described in AR 3435.

On December XX, 2015, the Complainant went to Employee 2’s office to attempt to resolve the issue. According to the College, Employee 2 informed the Complainant that she would not qualify for financial aid because she already attempted 90 units and would have to file an appeal.

On December XX, 2015, the Complainant filed a written “Letter of Grievance” with the College alleging that Employee 1 discriminated against her on the basis of her race and age. She stated that Employee 1 had whispered that she had forgotten to write her age and that the statement was made to humiliate her because she is an older student. The grievance also alleged that Employee 1 had told the Complainant that she needed to be “worried about” her color. The Complainant also alleged that Employee 1 threatened to call security. The Complainant told OCR that when she subsequently met with Employee 2 about this, Employee 2 showed disapproval of the Complainant’s skin color and urban attire by gritting his teeth and harshly scolding her to sit down.

In December XX, 2015, in an email to the Complainant, the College stated that the Complainant’s grievance was received and that the College would respond the week of January X, 2016 when the College re-opened after Winter Break.

On January XX, 2016, the Complainant received an email from the College concerning her financial aid application, but not mentioning her discrimination complaint. In an email on January XX, 2016, the College sent the Complainant a blank copy of a student grievance form, which provides space for general student grievances, and does not reference discrimination or discrimination complaint procedures. The form was not identified as related to AR 3435, the Non-Academic Grievance Procedures, or some other College complaint process.

On January XX, 2016, the Complainant sent an email to the College President stating that she believed she was denied financial aid based on race and age discrimination.² On February X, 2016, in a letter from the College President, the College acknowledged receipt of the Complainant's January XX, 2016, email communication. The letter explained that the financial aid appeal committee decision was final, and provided contact information for the Office of Federal Student Aid. The letter also stated that all of the Complainant's discrimination allegations had been forwarded to the District Title IX Officer and Section 504/ADA Coordinator. The College informed OCR that the Complainant refused receipt of this letter, and provided a copy of the certified mail return receipt with the word "refused" written on it. OCR found no evidence that the Coordinator, who is no longer at the District, took any further action on the complaint. The Complainant informed OCR that the College had not responded to her complaints.

Analysis

Discrimination based on race, color and national origin

As part of their obligation to provide students with a nondiscriminatory educational environment, colleges are required to respond promptly and effectively when they learn that a student has been subjected to harassment based on race. In this case, the Complainant alleged to the College that an employee in the College's financial aid office told her that she should be worried about her color. The Complainant also informed OCR that the director of the financial aid office had looked disapprovingly at her urban attire and had shown, through his demeanor, a disapproval of the color of her skin. OCR determined that this information, without more, was insufficient to raise an inference that the Complainant had been subjected to a hostile environment on the basis of her race, or that the College's subsequent disapproval of her financial aid appeal was based on race. OCR concluded that the preponderance of the evidence did not establish that the Complainant had been subjected to racial harassment or discrimination. For this reason, there was insufficient evidence to establish that the College's failure to conduct an investigation violated Title VI or its implementing regulation.

² The Complainant's application for financial aid was denied because she had attempted too many community college units to remain eligible for aid under ED guidelines. She appealed this determination and, pursuant to the instructions of the Office of Financial Aid, presented a letter explaining her goals and the challenges she had faced due to poverty, discrimination at other colleges, and homelessness. Her appeal was considered by an appeals committee and denied, based on her low GPA and the number of units she had already attempted. The Complainant alleged that the denial was based on race and age, but provided no facts to support this allegation beyond the alleged comments by the financial aid office employee and the Complainant's belief, based on demeanor, that the office director acted in a discriminatory manner. Although the office director provided information for the appeals committee, neither he nor the employee who had allegedly made the comments participated in the committee's review.

Discrimination based on Age

The regulation implementing the Age Discrimination Act (AgeDA) requires colleges to provide students with an educational environment that is free from discrimination, including harassment on the basis of age. In addition, the AgeDA requires schools and colleges to give notice of the college employee designated to coordinate its AgeDA efforts, and adopt and publish grievance procedures providing for the prompt and equitable resolution of complaints of age-based discrimination.

The Complainant in this case alleged that an employee in the financial aid office attempted to humiliate her on the basis of her age by whispering to her that she forgot to write her age on a financial aid form. OCR concluded that this single comment of this nature was insufficient, without more, to establish discrimination on the basis of age. OCR concluded that the Complainant was not subjected to harassment on the basis of age by a College employee.

Because the Complainant filed a grievance with the College alleging age discrimination, and because the AgeDA requires grievance procedures providing a prompt and equitable response to discrimination, OCR also considered whether the College provided notice of the individual coordinating its AgeDA efforts, whether it adopted and published procedures to resolve such allegations promptly and equitably, and whether it used those procedures in resolving this case.

OCR found that neither the College's website nor its Catalog specifically identified the individual responsible for coordinating its AgeDA efforts. Both sites include a nondiscrimination statement that addresses age discrimination, and that directs readers to direct inquiries regarding compliance with the notice and/or complaints to the Title IX Officer and Section 504/ADA coordinator. As of April XX, 2017, the website identified an individual who was no longer employed by the College as the coordinator; the 2016-2017 College Catalog contains updated information.

The Rancho Santiago Community College District, which includes the College, has adopted an Administrative Regulation, AR 3435, which sets forth procedures for "Discrimination and Harassment Investigations." OCR analyzed these procedures to determine whether they were prompt and equitable. The regulation is not included in the catalog and is difficult to find online; the nondiscrimination statements in the catalog and on the College website do not describe the policies, but instead direct students with inquiries or complaints to the Title IX Officer and Section 504/Title II Coordinator. OCR concluded that the College has not provided potential complainants with adequate notice of the specific provisions of these procedures or of how to access them.

Administrative Regulation 3435 does provide for an optional informal resolution process, interim steps to protect the complainant, a prompt investigation and review of documents, a written report, and a copy or summary of the written report to the complainant within 90 days of receipt of the complaint. However, a review of the procedures reflects that they are available only to persons who have, themselves, been subjected to discrimination and therefore do not meet the requirement in the AgeDA regulation that a procedure be available to resolve complaints alleging "any action" that would be prohibited under the Act or its implementing regulation. Because the AR 3435 procedures are not available to persons who have observed but not been subjected to discrimination, and because the

College has not provided adequate notice of their provisions, OCR concluded that they do not meet the requirements for the provision of a prompt and equitable resolution of complaints of age discrimination.

The College has adopted two additional campus grievance procedures that may be used by students “when they believe they have been deprived of a right granted to students by the Board of Trustees”: an academic grievance procedure for challenges to grades and a non-academic grievance procedure for other complaints. A search for “discrimination” on the College website leads to a webpage that describes these policies. The non-academic procedures are also included in the College Catalog in an entry entitled “Grievance Procedures for Students,” prefaced by a statement that the College does not discriminate on several bases, including age, and that students who believe they have been subjected to discrimination may file a grievance. The Complainant was provided a copy of these procedures when she alleged that she had been subjected to discrimination.

OCR determined that the non-academic grievance procedures (the “Grievance Procedures for Students” included in the catalog) are not adequate to provide a prompt and equitable resolution of complaints of discrimination. For example, they do not include reasonable timeframes for investigating and resolving grievances; they must be filed within ten days after the event that prompted the grievance; they appear to apply only to actions by employees, not students or third parties; they do not provide for notice to the complainant if the grievance is sustained. Accordingly, OCR concluded that the procedures did not meet OCR’s standards for prompt and equitable procedures.

In this case, the Complainant filed an age discrimination complaint on December XX, 2015, stating, in part, that an employee in the financial aid office commented that the Complainant forgot to write down her age in an attempt to humiliate her, and that she believed she had been subjected to discrimination on the basis of age. The Director of Financial Aid, to whom her complaint was initially addressed, referred her to the Non-Academic Grievance Procedures described in the College catalog, rather than the District Discrimination Investigation procedures described in AR 3435, and sent her a copy of a generic complaint form, rather than the discrimination complaint form referenced in the District AR procedures.

The Complainant engaged in email correspondence with College administrators over the course of six weeks concerning both her complaint and her application for financial aid. The Complainant received numerous responsive emails from the College regarding her financial aid application. She also met with the employee who had allegedly discriminated against her, and her supervisor, in an unsuccessful attempt to resolve her discrimination allegations. This step was required by the College’s Non-Academic Grievance Procedures. The College has an affirmative duty to address discrimination for which it has notice, and in some circumstances, requiring a complainant to meet with the individual alleged to have discriminated against them may be either inappropriate or unsafe. See AgeDA 34 C.F.R. §110.25(c) (requiring the equitable resolution of complaints). Additionally, the Complainant was never informed about the College’s determination as to whether or not discrimination had occurred. The Complainant’s discrimination allegations were referred to the coordinator responsible for investigating complaints of discrimination under AR 3435, on February X, 2016 (50 days after she filed her complaint), and there is no evidence that the coordinator took any further action. Accordingly, OCR concluded that the College

did not provide the Complainant with a prompt and equitable resolution to her complaint of age discrimination.

Overall, OCR found that the two grievance procedures reviewed during the course of this case were inconsistent with one another, and difficult to locate online. While the District has adopted discrimination grievance procedures that provide, for the most part, for prompt and equitable resolution of complaints of discrimination, the procedures are not available to all persons, such as third parties, who wish to allege age discrimination, and the College has not provided students with adequate notice of the existence and requirements of the procedures. In this regard, the College catalog suggests that complaints of discrimination should be resolved through the Non-Academic Grievance Procedures, which do not provide for a resolution that is either prompt or equitable. In this case, the Complainant was given no information about the District's adopted procedures, and instead informed only about the Non-Academic Grievance Procedures. OCR concluded that the College had not adopted and published prompt and equitable procedures for resolving complaints of age discrimination, or provided the Complainant access to such a process, in violation of the AgeDA. OCR also concluded that the College had not complied with the requirement that it provide adequate notice regarding the identity of the individual responsible for coordinating its AgeDA efforts.³

Conclusion

On April 10, 2017, OCR entered into a resolution agreement (Agreement) with the College. In the Agreement, the College agreed to: 1. Revise AR 3435 to clarify that the procedures apply to complaints by students, employees or third parties who have not themselves been subjected to alleged age discrimination, but who are aware of such discrimination; 2. Provide notice of AR 3435, including where to file complaints, in a manner that is easily understood, easily located, and widely distributed; 3. Revise the Non-Academic Grievance procedures to include timeframes for investigating and resolving grievances, a reasonable date by which complaints must be made (eliminating ten day requirement), a statement that they apply to students and third parties in addition to employees; and notice to the complainant if the grievance is sustained, and 4. Provide training to those involved in the resolution of age discrimination complaints regarding the revised procedures. Individual remedies are not sought in this case as OCR did not find any violations regarding the individual harassment allegations.

³ The Complainant has the right, pursuant to the regulation at 34 C.F.R. § 110.39 implementing the Age Act, to file a civil action for injunctive relief in federal court following the exhaustion of administrative remedies. Administrative remedies are exhausted if: (1) 180 days have elapsed since the complainant filed the complaint with OCR, and OCR has made no finding, or (2) OCR issues any finding in favor of the recipient. A civil action can be brought only in a United States district court for the district in which the recipient is found or transacts business. A complainant prevailing in a civil action has the right to be awarded the costs of the action, including reasonable attorney's fees, but these costs must be demanded in the complaint filed with the court. Before commencing the action, the complainant shall give 30-days notice by registered mail to the Secretary of the Department of Education, the Secretary of the Department of Health and Human Services, the Attorney General of the United States, and the recipient. The notice shall state the violation of the Age Act, the relief requested, the court in which the action will be brought, and whether or not attorney's fees are demanded in the event the complainant prevails. The complainant may not bring an action if the same alleged violation of the Age Act by the same recipient is the subject of a pending action in any court of the United States. The Complainant was notified of these rights on November 4, 2016.

Based on the commitments made in the enclosed resolution agreement, OCR is closing the investigation of this complaint as of the date of this letter, and notifying the Complainant concurrently. When fully implemented, the resolution agreement is intended to address all of OCR's compliance concerns in this investigation. OCR will monitor the implementation of agreement until the College is in compliance with the statute(s) and regulations at issue in the case.

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. 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 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 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 Rhonda Ngom, Civil Rights Attorney at (415) 486-5540.

Sincerely,

/s/

Brian Lambert
Acting Team Leader

Cc: Judy Chitlik, Vice Chancellor of Human Resources
Ryan L. Church, Counsel