



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

400 MARYLAND AVENUE, SW
WASHINGTON, DC 20202-1475

REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

XXXX DATE REDACTED XXXX

Dr. Jake Schrum
President
Emory and Henry College
One Garnand Drive
Emory, VA 24327-0947

Re: OCR Complaint No. 11-16-2175
Resolution Letter

Dear President Schrum:

This letter is to advise you of the outcome of the complaint that the Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) received on XXXX against Emory and Henry College (the College). The Complainant alleged that the College discriminated against the Complainant and other African American students on the basis of race and retaliated against her. Specifically, the complaint alleged the following:

- (1) Beginning in the XXXX academic year, African American students were subjected to a racially hostile environment at the College and the College failed to investigate and respond appropriately.
- (2) On or about XXXX, the College retaliated against the Complainant for race discrimination-based advocacy when:
 - a. XXXX;
 - b. XXXX
 - c. XXXX.

In addition to this complaint (Complaint No. 11-16-2175), OCR received complaints from other individuals alleging the same as Allegation 1 above, and interviewed those complainants. OCR closed those complaints consistent with OCR's Case Processing Manual, and consolidated the investigation under this case number.

OCR enforces Title VI of the Civil Rights Act of 1964 (Title VI) and its implementing regulation at 34 C.F.R. Part 100, which prohibit discrimination on the basis of race, color, or national origin in any program or activity receiving Federal financial assistance from the Department. In addition, the laws enforced by OCR prohibit retaliation against any individual who asserts rights

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

or privileges under these laws or who files a complaint, testifies, or participates in an OCR proceeding. Because the College receives Federal financial assistance from the Department, OCR has jurisdiction over it pursuant to Title VI.

Before OCR completed its investigation, the College expressed a willingness to resolve the complaint by taking the steps set out in the enclosed Resolution Agreement. The following contains a discussion of the relevant legal standards and information obtained by OCR during the investigation that informed the development of the Resolution Agreement. During the course of OCR's initial investigation of the complaint, OCR reviewed documents provided by the Complainant and the College, interviewed the Complainant, other College students, and College staff, and conducted an on-site.

OCR's findings and conclusions are discussed below.

Background

For the XXXX academic year, the College had an enrollment of approximately XXXX students (81% white, 11% African American, 4% Hispanic, 1% Asian). Its campus is located in rural southwest Virginia.

During the XXXX academic year, the College had complaint, non-discrimination, and harassment policies in its student and faculty handbooks and in its employee information manual. These policies enabled students to submit complaints of discrimination or harassment based on race, among other bases, to the Dean of Students or Director of Human Resources, and obligated the College to address such complaints in a timely and appropriate manner. The policies discuss options for mediation and restorative justice, but do not reference an investigation process or specify time periods for resolving complaints.

Allegation 1

Legal Standard

A College's failure to respond promptly and effectively to racial harassment that it knew or should have known about, and that is sufficiently serious that it creates a hostile environment, is a form of discrimination prohibited by Title VI. A College may also violate Title VI if an employee engages in racial harassment of students in the context of the employee carrying out his/her responsibility to provide benefits and services, regardless of whether the College had notice of the employee's behavior. Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; physical conduct; or other conduct that may be physically threatening, harmful, or humiliating. Harassment creates a hostile environment when the conduct is sufficiently severe or pervasive as to interfere with or limit a student's ability to participate in or benefit from the College's programs, activities, or services. When such harassment is based on race, color, or national origin, it violates Title VI.

To determine whether a hostile environment exists, OCR considers the totality of the circumstances from both an objective and subjective perspective and examines the context, nature, scope, frequency, duration, and location of incidents, as well as the identity, number, and relationships of the persons involved. Harassment must consist of more than casual, isolated incidents to constitute a hostile environment.

When responding to harassment, a College must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. In all cases, however, the inquiry should be prompt, thorough, and impartial. If an investigation reveals that discriminatory harassment has occurred, a College must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring.¹

Analysis

The Complainant alleged that in the beginning of the XXXX academic year, African American students were subjected to a racially hostile environment at the College and the College failed to investigate and respond appropriately. Specifically, the Complainant alleged that in XXXX, a professor (Professor 1) and a Supplemental Instructor, an undergraduate student, led discussions about whether the “N-word” is an acceptable term, XXXX. The Complainant alleged that the initial discussion of the “N-word” was led by an untrained peer, unmonitored by the professor, in which the Supplemental Instructor supported white students’ perspectives (e.g. discomfort with anyone using the “N-word”) and disrespected views shared by students of color.

XXXX PARAGRAPH REDACTED XXXX

The Complainant also alleged that she experienced racial harassment in the days after she participated in a XXXX raising concerns about diversity and inclusion at the College. According to her, students posted prejudiced remarks on XXXX, an online forum, that targeted her by name, called members of the group (self-identified as “XXXX”) derogatory terms, and, on XXXX.

On XXXX, the Complainant filed a complaint with the College raising the above allegations. XXXX other students filed complaints with the College on XXXX as well, raising alleged incidents of racial discrimination and harassment, dating back to XXXX, including allegations that a student used the XXXX.

¹ Some conduct alleged to be harassment may implicate the First Amendment rights to free speech or expression. For more information on the First Amendment’s application to harassment, see the discussions in OCR’s Dear Colleague Letter: First Amendment (July 28, 2003), available at <http://www.ed.gov/about/offices/list/ocr/firstamend.html>, and OCR’s *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (Jan. 19, 2001), available at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.html>.

In its response to OCR’s investigation, the College provided a written narrative describing how it handled the incidents raised by the Complainant as well as the other students who filed internal complaints. It explained that the Dean facilitated informal mediations with Professor 1 and the students who felt marginalized by discussions about the “N-word” in his class, asked Professor 1 to address the incident in a sensitive manner, and gave the students a week of excused absences to make up work they felt they had missed due to the incident.² The College acknowledged that administrators were notified about the derogatory XXXX posts targeting students who participated in the XXXX, but stated that it was unable to respond, beyond the President condemning the posts in a campus-wide email, as it was incapable of determining the sources of the anonymous posts. Finally, the College indicated that it did not investigate the XXXX incident because it was not reported by the Complainant until her XXXX complaint, XXXX days after the incident occurred.

The College asserted that it timely responded to the demands made by students at the XXXX. XXXX had demanded that the College assemble a diversity and inclusion (D&I) task force, hire a D&I director, prioritize D&I, and investigate discrimination by the dean of students and campus security offices. The College created a D&I Task Force the following day, XXXX, and soon after announced its faculty, staff, alumni, and student representatives, including several members of XXXX who had XXXX. The College provided OCR with documentation that the D&I Task Force solicited campus-wide input, met XXXX times, and provided a report with recommendations to the College President on XXXX.

OCR also reviewed the President’s campus-wide emails addressing D&I efforts. On XXXX, the President announced plans for a multi-cultural graduation ceremony, a D&I meeting space, and a summer D&I staff training. On XXXX, he highlighted additional planned D&I actions, and on XXXX announced that the College had hired a Dean of Inclusion, opened an Inclusion & Dialogue center, held a multicultural graduation ceremony, held its first staff D&I institute, expanded D&I outreach in hiring, and was continuing its D&I work with affinity groups, alumni mentors, student training, and a climate survey.

The College also reported to OCR how it handled the XXXX complaints the College received on XXXX, noting that it had previously investigated many of the alleged incidents. The College reported retaining a law firm that conducted a six-week independent investigation into the complaints by interviewing two dozen witnesses, including College personnel and all XXXX complainants, reviewing the College’s non-discrimination and harassment policies, and examining documentation of how the College responded to the incidents referenced in the complaints.

The law firm’s investigation ended in late XXXX, concluding that (1) none of the incidents in the complaints was sufficiently severe, pervasive, or persistent to create a hostile environment; and (2) College personnel did not treat the students differently based on race, color, or national origin in a way that interfered with or limited their ability to participate in or benefit from a program or activity at the College. The firm did note that the College’s non-discrimination and harassment policies were difficult to understand. Specifically, the firm determined that the

² OCR staff sought to interview Professor 1, but he declined to participate and as of XXXX is no longer employed by the College.

College’s relevant policies did not clearly describe which policies applied and in what circumstances. OCR reviewed the presentation of the firm’s findings, dated XXXX. On XXXX, the College notified the XXXX students that an investigation by its outside counsel of the incidents raised in the students’ complaints found no Title VI violations.

The College also reported to OCR other race-related incidents that occurred on campus during the XXXX academic year. Most notably:

- XXXX
- XXXX,
- XXXX

The College provided documentation of its response to these incidents. XXXX 2 SENTENCES REDACTED XXXX.

In conversations with some of the other students who filed complaints with OCR regarding Allegation 1, OCR learned that after the XXXX incident, some African American students at the College did not go to class the day the XXXX was discovered, and in some cases, for the remainder of the week. The students told OCR that no College administrators reached out to them directly regarding the impact of the XXXX or to offer assistance.

Finally, OCR arranged for focus groups at the College in XXXX to gather student feedback. Despite College-initiated publicity of OCR’s focus groups, only one student attended.

Regarding the allegation that African American students were subjected to a racially hostile environment at the College during the XXXX academic year, OCR considered the totality of the circumstances from both an objective and subjective perspective and examined the context, nature, scope, frequency, duration, and location of the incidents, as well as the identity, number, and relationships of the persons involved. OCR notes that harassment must consist of more than casual, isolated incidents to constitute a hostile environment. OCR considered that the College is a relatively small college with a majority white population; the alleged class discussions of the “N-word”; the XXXX and XXXX incidents; the XXXX posts and other incidents that had occurred in College housing in prior years; and the XXXX. OCR acknowledged that the “N-word” discussions were held as part of an academic XXXX, and were related to discussion of a XXXX the students had read.³ OCR also reviewed Professor 1’s management of the classroom discussion. In addition, OCR considered the XXXX incidents, which occurred over the course of about XXXX months. Before OCR completed its investigation regarding whether African American students were subjected to a racially hostile environment at the College, and therefore before OCR reached a conclusion regarding this allegation, the College expressed a willingness to resolve the complaint.

³ As discussed in further detail below, OCR also considered the First Amendment implications of this discussion, including the fact that it occurred at a postsecondary institution during a discussion of race and society.

Based on all the information provided, OCR identified possible compliance concerns with respect to whether the College appropriately investigated and addressed the incidents raised by the Complainant, and whether African American students were subjected to a racially hostile environment. For example, while the College proactively responded to many of the internal complaints that were lodged, and took steps such as hiring a Dean of Inclusion, opening an Inclusion & Dialogue center, and expanding D&I outreach, the College may not have directly engaged with the African American students on campus after the XXXX campus XXXX incident or investigated the XXXX incident. Further, neither outside counsel nor the College appears to have considered the incidents' cumulative effects or the XXXX campus XXXX in reaching its conclusion of whether there was a racially hostile campus environment. As mentioned above, before OCR completed its investigation, the College expressed a willingness to resolve this complaint by taking the additional steps set out in the enclosed Resolution Agreement.

Allegation 2

The Complainant, who is African American, attended the College XXXX during the XXXX academic year.

Legal Standard

The Title VI regulation, at 34 C.F.R. § 100.7(e), prohibits retaliation against any individual who asserts rights or privileges under Title VI or who files a complaint, testifies, assists, or participates in a proceeding under Title VI. When analyzing a claim of retaliation, OCR will look at: 1) whether the Complainant engaged in a protected activity (e.g., filed a complaint or asserted a right under a law OCR enforces); 2) whether the College took an adverse action against the Complainant;⁴ and 3) whether there is a causal connection between the protected activity and the adverse action. If all these elements are present, this establishes an initial, or prima facie, case of retaliation. OCR then determines whether the College has a legitimate, non-retaliatory reason for its action. Finally, OCR examines whether the College's reason for its action is a pretext, or excuse, for unlawful retaliation.

Analysis

Allegation 2(a): On or about XXXX, the College retaliated against the Complainant for race discrimination-based advocacy when a professor XXXX.

OCR first examined whether the Complainant engaged in a protected activity. The Complainant alleged that on XXXX, she reported to College administrators that Professor 1 treated her and XXXX other African American students in a discriminatory manner. The Complainant told OCR that that she met with members of the administration, looking for an apology, because she felt mistreated in the class because of her race.

⁴ An adverse action is something that could deter a reasonable person from engaging in further protected activity. Petty slights, minor annoyances, and lack of good manners do not normally constitute adverse actions.

Next, OCR examined whether the College took an adverse action against the Complainant. The Complainant alleged that Professor 1 XXXX. The Complainant described to OCR that shortly after she reported Professor 1 to the administration due to his handling of the “N-word” discussions, he assigned the class to write a paper arguing the opposite viewpoint of XXXX. XXXX SENTENCE REDACTED XXXX. She said that she and another student (who had not engaged in the protected activity) raised their hands to express discomfort with the assignment. The Complainant reported that when she raised her hand to voice her concern, Professor 1 XXXX. She told OCR that he kept talking about the assignment and XXXX. When OCR asked whether other students raised their hands with questions or comments about the assignment, the Complainant did not recall any other students raising their hands. When OCR asked whether there were any other instances when Professor 1 XXXX, she said that was the only incident she could recall.

Prior to completing OCR’s investigation, including conducting interviews of Professor 1 and the Supplemental Instructor, the College expressed a willingness to resolve the complaint by taking the steps set forth in the enclosed Resolution Agreement.

Allegation 2(b): On or about XXXX, the College retaliated against the Complainant for race discrimination-based advocacy when XXXX.

As with Allegation 2(a), OCR finds that the Complainant engaged in a protected activity when she reported to College administrators that Professor 1 treated her and XXXX other students in a discriminatory manner.

Next, OCR examined whether the College took an adverse action against the Complainant. The Complainant alleged that after reporting to administrators, a meeting was scheduled with Professor 1, the Dean and Professor 1’s Department Head (the Department Head). The Complainant alleged that she had been told that the meeting would be confidential. XXXX 5 SENTENCES REDACTED XXXX. The Complainant told OCR that while she did not witness this firsthand, she learned about it from a classmate.

OCR considered whether College staff XXXX, as alleged, was an adverse action.⁵ However, prior to conducting interviews with the Department Head or the Supplemental Instructor XXXX, and if so, to analyze any purported legitimate, non-retaliatory reason for doing so, the College expressed a willingness to resolve the complaint by taking the steps set forth in the enclosed Resolution Agreement.

Allegation 2(c): The College retaliated against the Complainant for race discrimination-based advocacy when a XXXX.

⁵ OCR did speak with the Dean, who reported that as a result of the internal complaint, he spoke with the Complainant, XXXX other students, Professor 1, Professor 2, and the Department Head. He reported that he questioned the Department Head as to whether he had spoken to anyone about the meetings, and was assured that he had not broken confidentiality. OCR also reviewed Faculty Advisory Committee Meeting minutes from XXXX, which reflect that there was an informal discussion of student complaints of racist language used by the SI.

As with Allegations 2(a) and 2(b), OCR finds the Complainant to have engaged in a protected activity.

Next, OCR turned to whether the College took an adverse action against the Complainant. The Complainant alleged that XXXX⁶. She alleged that she attended as many classes as the syllabus required to pass the class, XXXX.⁷ OCR finds a professor XXXX to be an adverse action, and as it occurred during the same academic year as the Complainant’s protected activities, that there was sufficient evidence that the adverse action was causally connected to her advocacy. Therefore, OCR finds there to be a prima facie case of retaliation.

OCR next examined whether the College articulated a legitimate, non-retaliatory reason for failing the Complainant. The College asserted that the XXXX course required students to attend XXXX throughout the semester, and students were required to XXXX. XXXX 3 SENTENCES REDACTED XXXX.

As the College articulated a legitimate, non-retaliatory reason for XXXX the Complainant, OCR examined whether the College’s reason is a pretext for unlawful retaliation. OCR reviewed the XXXX course syllabus, which describes the two main components of the course. The first is mandatory attendance at XXXX specific XXXX. The second is attendance at XXXX specific class sessions in addition to XXXX additional “XXXX” of the student’s choosing. The syllabus describes that failure to miss any of the XXXX or the XXXX required XXXX would result in XXXX.

The College additionally provided OCR with XXXX to some of the XXXX and XXXX. Some of the XXXX the College provided failed to list the name of the XXXX or XXXX or to include a date, making it impossible for OCR to identify which XXXX or XXX the XXXX corresponded to, or whether the XXXX was for the XXXX semester at all. However, the College did provide a XXXX sheet for one of the required XXXX, and the Complainant’s name does not appear on XXXX, along with other students from the Complainant’s class.⁸ The College also provided OCR with a list of students in the course and their corresponding final grades. While some of the students who did not XXXX the mandatory XXXX received failing grades, other students who did not XXXX passed the course. The College asserted that XXXX students who did not XXXX passed the course because they received exemptions from the requirement due to special circumstances, and the College provided documentation of that correspondence. However, the College does not reconcile why the other students who failed to XXXX passed the class.⁹

OCR also reviewed XXXX correspondence between the Complainant and Professor 3 regarding her final grade in the class. XXXX 3 SENTENCES REDACTED XXXX.

⁶ The College notified OCR that the Complainant had not XXXX.

⁷ The professor of record for this course was Professor 3. However, the Complainant alleges that Professor 1, who taught the Complainant’s XXXX course, had oversight responsibility. OCR notes that Professor 1 gave her a passing grade for the XXXX course.

⁸ The College only provided OCR with the first names of students in the XXXX course. In addition, a number of students whose names appear on the XXXX do not appear on the list of students in the XXXX course.

⁹ OCR notes that of the XXXX other students who complained to the Dean regarding Professor 1’s XXXX course, along with the Complainant, one of those students passed the XXXX course while XXXX. The student who passed had XXXX, while the student XXXX had not.

Based on the information provided, OCR identified a possible compliance concern regarding this allegation. In particular, the documentary evidence (in essence comparator data) is inconclusive to support the College's non-retaliatory reason. In other words, OCR cannot conclude based on the evidence submitted to OCR that the Complainant XXXX because she did not XXXX the required XXXX. However, prior to completing OCR's investigation, including interviewing Professor 3, the College expressed a willingness to resolve the complaint by taking the steps set forth in the enclosed Resolution Agreement.

Conclusion

Pursuant to Section 302 of OCR's *Case Processing Manual*, the College signed the enclosed Resolution Agreement on November 8, 2017 which, when fully implemented, will resolve the allegations raised in this complaint. The provisions of the Agreement are aligned with the allegations and issues raised by the Complainant and the information discussed above that was obtained during OCR's investigation, and are consistent with applicable law and regulation. OCR will monitor the College's implementation of the Agreement until the College is in compliance with the statute and regulations at issue in the case. Failure to implement the Agreement could result in OCR reopening the complaint.

This concludes OCR's investigation of the complaint. This letter 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. 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. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the College must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

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

We appreciate the College's cooperation in the resolution of this complaint. If you have any questions, please contact Shana Heller (202-453-6599 or Shana.Heller@ed.gov) or Josie Evola (202-453-5908 or Josie.Evola@ed.gov), the OCR attorneys assigned to this complaint.

Sincerely,

/s/

Kristi R. Harris

Team Leader, Team IV
District of Columbia Office
Office for Civil Rights

Enclosure

cc: Doreen Martin, Outside Counsel