



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS - REGION IX

May 13, 2011

(b)(6),(b)(7)(C)

(In reply, please refer to case no. 09-11-2027.)

Dear

(b)(6),(b)(7)(C)

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced discrimination complaint concerning BioHealth College. You alleged that the College discriminated against you on the basis of sex. OCR investigated whether the College failed to respond appropriately and effectively to your allegations that (b)(6),(b)(7)(C) sexually harassed you (hereafter the complainant) by sexually assaulting you in fall 2010.

OCR investigated the complaint under the authority of Title IX of the Education Amendments of 1972 and its implementing regulation. Title IX prohibits discrimination on the basis of sex in education programs and activities operated by recipients of Federal financial assistance. The College receives funds from the Department and is subject to Title IX and the regulation.

OCR gathered evidence through interviews with the complainant, a female friend of the complainant's, the College President, and (b)(6),(b)(7)(C). OCR also reviewed documents submitted by the complainant and the College, including documentation of the College's internal investigation, documentation of the complainant's criminal complaint, and documentation of the complainant's request for a restraining order. OCR did not reinvestigate the allegation of sexual harassment because it had already been investigated by the College and the resolution met OCR standards. However, OCR identified several areas of noncompliance regarding the College's written non-discrimination policies and procedures. On May 11, 2011, the College agreed to resolve these areas of noncompliance through a Resolution Agreement.

The applicable legal standards, the facts gathered during the investigation, and the reasons for our determination are summarized below.

Legal Standards

The regulations implementing Title IX, at 34 C.F.R. §106.31, prohibit discrimination based on sex by recipients of Federal financial assistance. Colleges are responsible under Title IX and the regulation for providing students with a nondiscriminatory

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educational environment. Sexual harassment is unwelcome conduct of a sexual nature, which can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual harassment of a student can result in the denial or limitation, on the basis of sex, of the student's ability to participate in or receive education benefits, services, or opportunities.

On April 4, 2011, the Department's Assistant Secretary for Civil Rights issued a Dear Colleague Letter¹ clarifying that sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX. The letter explains colleges' obligations to respond to sexual harassment and sexual violence.

A college is not directly responsible for sexual harassment of a student by an employee if the conduct occurred outside the context of the employee's job responsibilities. However, under Title IX and the regulations, if a college knew or reasonably should have known about this type of harassment, it is responsible for promptly determining what occurred and taking appropriate steps to resolve the situation.

OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt, thorough, impartial, and effective. What constitutes a reasonable response to harassment will differ depending upon circumstances. However, in all cases the response must be tailored to stop the harassment, eliminate the hostile environment if one has been created, and address the problems experienced by the student who was harassed. The college must also take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate.

In addition, the Title IX regulations establish procedural requirements that are important for the prevention and correction of sex discrimination, including sexual harassment. These requirements include issuance and wide distribution of a policy against sex discrimination (34 C.F.R. § 106.9), and adoption and publication of grievance procedures providing for the prompt and equitable resolution of complaints of sex discrimination (34 C.F.R. § 106.8(b)). OCR examines a number of factors in evaluating whether a college's grievance procedures are prompt and equitable, including whether the procedures provide for the following: notice of the procedure to students and employees, including where to file complaints; application of the procedure to complaints alleging harassment by employees, other students, or third parties; adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; designated and reasonably prompt timeframes for major stages of the complaint process; notice to the parties of the outcome of the complaint; and an assurance that steps will be taken to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

The regulations also require that recipients designate at least one employee to coordinate compliance with the regulations, including coordination of investigations of

¹ A copy of the Dear Colleague Letter may be found at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

complaints alleging noncompliance, and to publish the name or title and contact information of the designated employee (34 C.F.R. § 106.8(a)).

Pursuant to Section 110(a) of its Case Processing Manual, OCR will not reinvestigate a complaint allegation if the same allegation has been filed and resolved through a recipient's internal grievance procedures, and the resolution meets OCR regulatory standards; *i.e.*, all allegations were investigated, appropriate legal standards were applied, and any remedies secured meet OCR's standards. Since the College had already conducted an internal investigation of the complainant's allegations when she filed her OCR complaint, the focus of our investigation centered on assessing whether the College's response met OCR's regulatory standards. This included a review of the College's written policies and procedures as well as the steps that it took to investigate and resolve the complainant's internal complaint of sexual harassment.

Factual Summary

The College is a private postsecondary institution that offers focused career oriented training in BioTechnology, Pharmacy Technology, Medical Assisting, and Business Administration. It currently enrolls 167 students.

College Policies and Procedures

At the time of the OCR investigation, the College had two publications that were used to notify students of its policies and procedures---the College Catalog and a document that was distributed at student orientation entitled Rules and Regulations. The College Catalog included a nondiscrimination provision, which prohibited discrimination on the basis of sex.² The Rules and Regulations document stated under Student Conduct that sexual harassment by students was prohibited. Neither this document nor the Catalog notified students that sexual harassment of students by employees and administrators was prohibited. The nondiscrimination provision was not posted on the College's website.

The College reported to OCR that the President was the individual designated to ensure compliance with Title IX, and to investigate complaints of sex discrimination, including sexual harassment. However, neither the Catalog, the website, nor the Rules and Regulations document identified the President as the College's Title IX coordinator, or provided his contact information in that regard.

The College had a general Student Complaint Procedure (Complaint Procedure) which was posted in each classroom and was included in the Catalog but not on the website. It did not specify that it applied to discrimination complaints, including sex

² OCR noted that the nondiscrimination clause stated that "no special services are provided for handicapped students." OCR provided the College with technical assistance regarding its obligation under the regulations implementing Section 504 of the Rehabilitation Act of 1973 to provide necessary academic adjustments and auxiliary aids to students with disabilities.

discrimination/harassment. The Complaint Procedure stated that if a student had a problem or a complaint, s/he should notify the instructor. If the issue was not resolved by the instructor, or if the student did not feel comfortable discussing it with the instructor, the student could either submit a student complaint form to a school official, or go to the VPE to discuss the issue. If the issue was not resolved by the Vice President of Education (VPE), the student could go to the President. If the issue was not resolved by the President, the student was advised to contact the California Bureau for Private Postsecondary and Vocational Education, or the Accrediting Council for Continuing Education and Training (ACCET). The Complaint Procedure included no timelines; did not describe an adequate, reliable, and impartial investigation; did not provide for notice to the complainant of the outcome of an investigation; and did not provide an assurance that steps would be taken to prevent recurrence of any harassment found and to correct its discriminatory effects.

The Student Complaint Form was available in the administration office. This form was very general, and did not reference that it applied to discrimination/harassment complaints.

The College also submitted a copy of its Employee Handbook (Handbook), stating that it was distributed to each employee when hired. The Handbook contained Standards of Conduct for employees, and had a list of examples of actions that were considered to be unacceptable and grounds for disciplinary action, including termination. This list included sexual harassment, and "close personal relationship or fraternization with students." This document was not distributed to students. The Handbook included a Policy against Harassment, which specifically prohibited sexual harassment and focused on harassment in the workplace between employees.

College employees were required to undergo a Sexual Harassment Prevention Training Workshop on a regular basis. (b)(6),(b)(7)(C)

(b)(6),(b)(7)(C) The materials describing the training noted that it focused on sexual harassment in the workplace. It did not cover sexual harassment against students by employees.

Background

The complainant enrolled in an eight-month (b)(6),(b)(7)(C) program at the College in April 2010. (b)(6),(b)(7)(C)

(b)(6),(b)(7)(C)

Previous to her enrollment at the College, the complainant knew (b)(6),(b)(7)(C) through (b)(6),(b)(7)(C). They also had common acquaintances. During the time period relevant to the complaint, she was (b)(6),(b)(7)(C) years old and he was (b)(6),(b)(7)(C).

Documents generated by the College's internal investigation and/or the complainant's subsequent criminal and civil complaints and reviewed by OCR indicated the following. Beginning in September 2010, the complainant and (b)(6),(b)(7)(C) began having frequent contact. In September, their contacts included visits in (b)(6),(b)(7)(C) office over coffee, (b)(6),(b)(7)(C) providing the complainant with rides home, and several dinners out together. The complainant stated that these contacts were initiated by (b)(6),(b)(7)(C) maintained that they were initiated by the complainant.

The documents reviewed by OCR further showed that in October 2010, the office visits continued, and the complainant and (b)(6),(b)(7)(C) had several meals together off-campus, including lunches out and dinners at (b)(6),(b)(7)(C) home. They also drove together from (b)(6),(b)(7)(C) on two occasions, including one overnight at the house of a (b)(6),(b)(7)(C). Again, the complainant maintained that each of these contacts was initiated by (b)(6),(b)(7)(C) and (b)(6),(b)(7)(C) stated that they were all initiated by the complainant. According to the complainant, (b)(6),(b)(7)(C) had sexual relations with her without her consent four times during this period. She described these incidents as sexual assault. (b)(6),(b)(7)(C) confirmed that they had sexual relations on two occasions, but stated that the sex was consensual. On October (b)(6),(b)(7)(C) the complainant invited (b)(6),(b)(7)(C) to dinner. The complainant stated that she accused him of forcing himself on her and told him that she no longer wished to see him. In contrast, (b)(6),(b)(7)(C) stated that during dinner the complainant began talking of marriage and a future together; when he suggested that they should have a cooling-off period, particularly because of their age difference, she became upset and left. On October (b)(6),(b)(7)(C) 2010, two days after the dinner, the campus security camera recorded the complainant bringing two cups of coffee into (b)(6),(b)(7)(C) office and staying several minutes.

The complainant reported to OCR that on October (b)(6),(b)(7)(C) 2010, she told a female friend what had been going on between her and (b)(6),(b)(7)(C). This was the first time the complainant spoke to anyone about her allegations of sexual harassment. They discussed reporting the situation to the police, and filing a sexual harassment complaint with the College. Both indicated to OCR that they did not know how to proceed with filing an internal complaint with the College. They could not find information about sexual harassment in the College Catalog, so the female friend consulted with her counselor who told her that such issues should be addressed to the President.

Internal Complaint and Investigation

On November (b)(6),(b)(7)(C) 2010 the complainant and her female friend met with the President, and told him that the complainant wanted to file a complaint against (b)(6),(b)(7)(C). The participants in this meeting had different recollections as to the amount of detail the complainant provided regarding her interactions with (b)(6),(b)(7)(C). However, all three agreed that the complainant said (b)(6),(b)(7)(C) had sexual relations with her against her will when she went to dinner (b)(6),(b)(7)(C) on October (b)(6),(b)(7)(C). The participants also agreed that the President reacted with shock and anger; he stated that there was a strict policy against staff and student fraternization and that, if what the complainant had reported

was true, (b)(6),(b)(7)(C) would be fired. He asked why the complainant had not reported the incidents earlier, and why she had not contacted the police. She responded that she did not know that she was supposed to. The President informed the complainant that he would conduct an investigation, and would meet with her after its conclusion. He advised the complainant that in the meantime he would handle all of her school matters, and that she would not have to go to (b)(6),(b)(7)(C) for anything.

The President told OCR that he began his investigation by interviewing (b)(6),(b)(7)(C) who confirmed that he had been seeing the complainant off-campus in a mutual relationship that included sexual relations, but denied that he had ever acted without the complainant's consent. He indicated that the complainant had initiated their contacts. (b)(6),(b)(7)(C) told the President that he believed that the complainant had filed the complaint against him because she perceived that he had rejected her when they went to dinner on October (b)(6) 2010. The President told (b)(6),(b)(7)(C) that he would be suspended during the investigation, and he took (b)(6),(b)(7)(C) College keys.

By letter dated November (b)(6) 2010, the day after the complaint was made, the President issued a Formal Notice of Suspension to (b)(6),(b)(7)(C). It stated that on November (b)(6) the complainant filed a complaint against (b)(6),(b)(7)(C) for sexual harassment, and that this was a serious allegation and required a detailed investigation. It noted that (b)(6),(b)(7)(C) was suspended from his duties effective immediately, pending the outcome of the investigation. This document remains in (b)(6),(b)(7)(C) complaint file.

The President reported to OCR that he continued his investigation by reviewing postings from the complainant's Facebook page, traveling to (b)(6),(b)(7)(C) and interviewing (b)(6),(b)(7)(C) interviewing an instructor at the College who had approached him regarding the complainant's frequent contact with (b)(6),(b)(7) speaking with (b)(6),(b)(7)(C) whose office was next door to (b)(6),(b)(7)(C) about what she had witnessed and reviewing available security camera tapes at the College. He also visited (b)(6),(b)(7)(C) from which the complainant (b)(6),(b)(7)(C) and the restaurant where the complainant and (b)(6),(b)(7)(C) had dinner on October (b)(6) 2010, to inquire what the proprietors had observed about the parties' conduct. The information from these investigative activities was documented by the President; the information did not support the complainant's allegation of non-consensual relations or sexual assault.

The President met with the complainant and her female friend on November (b)(6) 2010. He outlined the steps that he had taken to investigate the matter, and stated that he had concluded that it was a mutual relationship. The complainant and the female friend told OCR that the President suggested the complainant call (b)(6),(b)(7)(C) to straighten things out. The President denied making such a statement. In addition, both the complainant and the friend confirmed that the President again told the complainant that she should not have to deal with (b)(6),(b)(7)(C) for anything, and that if she needed anything at the College she should come to only him personally or to the Placement Director. The complainant and her female friend confirmed to OCR that during the meeting the President indicated

that he was angry that the whole situation had happened, and stated that (b)(6),(b)(7)(C) had broken school policy regarding fraternizing with students. He told the complainant that he would put the results of his investigation in writing.

By letters dated November (b)(6),(b)(7)(C) 2010, the President informed the complainant and (b)(6),(b)(7)(C) of his response to the complainant's internal complaint. The letter to the complainant stated that, although the alleged conduct took place off of College premises, the College took the accusation seriously. The letter noted that the College had a policy against a close personal relationship or fraternization with students. The President explained that he suspended (b)(6),(b)(7)(C) until his investigation was complete. The President stated that his investigation led him to conclude that the relationship between the complainant and (b)(6),(b)(7)(C) was consensual, and that the complainant was the motivating force in the relationship. The President stated that he interviewed witnesses and he described the other information he reviewed. He concluded that (b)(6),(b)(7)(C) violated the College's standard of conduct, but that the circumstances did not justify termination. He stated that (b)(6),(b)(7)(C) would be disciplined appropriately. He noted that the complainant should consult appropriate law enforcement authorities for questions of a criminal nature.

The letter to (b)(6),(b)(7)(C) noted that (b)(6),(b)(7)(C) had been on leave of absence since November (b)(6),(b)(7)(C) 2010, and was to report back to work on November (b)(6),(b)(7)(C). It stated that the investigation found that there was an intimate relationship between (b)(6),(b)(7)(C) and the complainant, but that she was the motivating force in the relationship. It further stated that the President found that the relationship took place off of College premises, and did not find any evidence that the relationship resulted from unwanted physical or mental force from (b)(6),(b)(7)(C). The letter stated that (b)(6),(b)(7)(C) had violated the College Standard of Conduct #22. It stated that the President did not find that the conduct rose to a level requiring that (b)(6),(b)(7)(C) be terminated, but warned him that any further violation of the rule against fraternization with students, on or off campus, would result in (b)(6),(b)(7)(C) immediate termination. This letter remains in (b)(6),(b)(7)(C) personnel file.

Criminal and Civil Charges

On November (b)(6),(b)(7)(C) 2010, the complainant filed an initial police report stating that she had been sexually assaulted by (b)(6),(b)(7)(C) off campus on a number of occasions. The Police Department interviewed the complainant's female friend on November (b)(6),(b)(7)(C) 2010, and interviewed the complainant on December (b)(6),(b)(7)(C). The District Attorney declined to press criminal charges against (b)(6),(b)(7)(C). In addition, the complainant filed for a permanent restraining order against (b)(6),(b)(7)(C) in civil court. The request for the restraining order was denied.

³ A copy of this letter was provided to OCR by the complainant, as well as by the College.

Complainant's Academic Program

As of November (b)(6) 2010, the day after she made her complaint to the President, the complainant successfully completed the course of study for (b)(6),(b)(7)(C). She earned an academic award and recognition for a grade point average of A+. The complainant's attendance record from September through the end of October 2010 indicated that she was absent on one day, September (b)(6),(b)(7)(C). This absence occurred prior to any alleged sexual behavior on the part of (b)(6),(b)(7)(C). Her grades for the three courses that spanned August (b)(6) through October (b)(6),(b)(7)(C) were A, A+, and Pass.

The complainant told OCR that she did not (b)(6),(b)(7)(C).
(b)(6),(b)(7)(C)

The College provides its graduates with placement services such as job search training and counseling, resume writing, mock interviews, distributing resumes to potential employers, and informing graduates of job openings in the field. Graduates are also allowed to take refresher courses at the College if there is room in the particular class. The complainant told OCR that she did not feel that she could take advantage of (b)(6),(b)(7)(C).

On December (b)(6),(b)(7)(C) 2010, the Placement Director called the complainant to get an update on her job-search efforts. Both she and the complainant reported to OCR that the complainant inquired about retaking a refresher course at the College, and the Placement Director told the complainant (b)(6),(b)(7)(C).
(b)(6),(b)(7)(C)

(b)(6),(b)(7)(C) The Placement Director told OCR that when she made this telephone call on December (b)(6),(b)(7)(C) 2010, she was unaware of the nature of the allegations that the complainant had made about (b)(6),(b)(7)(C). She stated that if she had known this at the time she would have never told the complainant (b)(6),(b)(7)(C) and that, in the future, she would refer any such request from the complainant directly to the President. She also indicated that she would meet with the complainant either offsite or in another area at the College if the complainant (b)(6),(b)(7)(C).

The President told OCR that the complainant requested to be allowed to participate in the graduation ceremony for her female friend's class that took place on (b)(6),(b)(7)(C) (b)(6),(b)(7)(C) and this request was granted. Each student was provided the opportunity to speak at the graduation (b)(6),(b)(7)(C).
(b)(6),(b)(7)(C)

Compliance Determination

With respect to the procedural requirements of the Title IX regulations, OCR found that the College did include a notice of nondiscrimination on the basis of sex in its Catalog and Handbook. However, this notice was not included on the College's website. In addition, neither the Catalog, the Rules and Regulations, the Handbook, nor the website specified that sexual harassment of students by College employees was prohibited. Accordingly, OCR found that the College has not fully complied with the requirements of 34 C.F.R. §106.9.

OCR further noted that while the College designated the President as its Title IX Coordinator it did not notify students and employees of this designation and related contact information through its Catalog, Rules and Regulations, Handbook, or website. OCR therefore determined that the College has not complied with the requirements of 34 C.F.R. §106.8(a).

In addition, OCR found that the College has not adopted a grievance procedure providing for the prompt and equitable resolution of student complaints of sex discrimination, including sexual harassment. The College's Complaint Procedure, while published through a notice in the Catalog and posting on campus, did not meet Title IX regulatory requirements for a number of reasons. The Complaint Procedure did not specify that it applied to discrimination complaints, including sex discrimination/harassment. The Complaint Procedure required students to attempt resolution with several College employees, and then referred students to outside agencies if the complaint was not resolved. It included no timelines; did not describe an adequate, reliable, and impartial investigation, including a determination of whether discrimination occurred; did not provide for notice to the complainant of the outcome of any investigation; and did not provide an assurance that steps would be taken to prevent recurrence of any harassment found and to correct its discriminatory effects. OCR therefore determined that the College has not complied with the requirements of 34 C.F.R. §106.8(b).

As noted above, OCR will not reinvestigate a complaint allegation if the same allegation has been filed and resolved through a recipient's internal grievance procedures, and the resolution meets OCR regulatory standards. OCR found that the College's response to the sexual harassment allegations reported by the complainant met these standards. The College responded appropriately by investigating the complaint even though all of the alleged harassment occurred off campus. The College's response was prompt; the results were reported to the complainant within two weeks after she complained to the President. The College took strong interim action by suspending [REDACTED] during its investigation, and advised the complainant that she could direct any school-related business to other individuals on campus. It provided the complainant with the opportunity to present evidence, and to be accompanied by her friend for support during meetings discussing the complaint. The College conducted a thorough investigation, including documented interviews with a number of individuals, visits to three different

off-site locations that were related to the allegations, and review of security tapes. In reaching his decision, the President weighed the credibility of all the witnesses and took into account the totality of the circumstances. He reviewed the College's findings and decision with the complainant verbally, issued a written decision to the complainant, and placed a copy of the decision and warning against further fraternization with students in (b)(6),(b)(7)(C) personnel file. In reaching its decision, the College took into consideration the effects of the situation on the complainant's educational opportunities and benefits, and determined that the complainant was academically successful during the time period at issue, had perfect attendance, and graduated with awards. Taking all this information into account, OCR determined that it would not reinvestigate the underlying allegation of sexual harassment and assault, or reexamine the College's conclusion de novo, and finds that the College is in compliance with Title IX requirements with respect to its response to the complainant's allegations.

Resolution

On May 9, 2011, OCR discussed its findings with the President. On May 11, 2011, the President signed the attached Resolution Agreement. OCR determined that the actions outlined in the Resolution Agreement, when fully implemented, will address the areas of noncompliance identified during the investigation. OCR will monitor the College's implementation of the Resolution Agreement.

This concludes the investigation phase of OCR's resolution process. OCR is informing the College of these findings by concurrent letter.

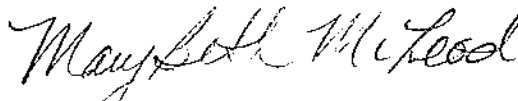
This letter is a letter of findings issued by OCR to address an individual OCR case. Letters of findings contain fact-specific investigative findings and dispositions of individual cases. Letters of findings are not formal statements of OCR policy and they should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR office and made available to the public.

If you wish to appeal this decision, you may send an appeal to the Deputy Assistant Secretary for Enforcement within 60 days of the date of OCR's letter of finding. You must explain why you believe the factual information was incomplete, the analysis of the facts was incorrect, and/or the appropriate legal standard was not applied, *and* how this would change OCR's determination in the case. Failure to do so may result in the denial of the appeal. Your appeal should be sent to the following address:

U.S. Department of Education
Office for Civil Rights
Attention: Deputy Assistant Secretary for Enforcement
400 Maryland Avenue, SW
Washington, D.C. 20202-1100

OCR appreciates the courtesy and cooperation extended by you during the investigation. If you have any questions, please contact Julie Baenziger, the OCR staff-person assigned to the case, at (415) 486-5502 or me, at (415) 486-5555.

Sincerely,

A handwritten signature in cursive script that reads "Mary Beth McLeod".

Mary Beth McLeod
Team Leader

Enclosure