



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

REGION IX  
Old Federal Building  
50 United Nations Plaza, Room 239  
San Francisco, California 94102

February 28, 2005

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Other:	

Dr. Salvatore Rotella  
Chancellor  
Riverside Community College District  
4800 Magnolia Avenue  
Riverside, CA 92506-1299

(In reply, please refer to Case No. 09-03-2139.)

Dear Dr Rotella:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint that was filed against the Riverside Community College District. The complainant<sup>1</sup> alleged that the District discriminated against students, based upon sex, race and national origin by failing to appropriately investigate and resolve complaints of discrimination filed by students. The issue that OCR investigated was:

Whether, as required by Titles VI and IX, the Riverside Community College District took, timely, reasonable, and effective steps in response to student complaints alleging sex and race/national origin discrimination and retaliation. Further, whether students who sought a response by the College District to alleged discrimination became the object of unlawful retaliation.

OCR investigated the complaint under the authority of Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, and their implementing regulations. Title VI prohibits discrimination on the basis of race, color or national origin in programs and activities operated by recipients of Federal financial assistance. Title IX prohibits discrimination on the basis of sex in education programs and activities operated by recipients of Federal financial assistance. The College District receives funds from the Department and is subject to Title VI, Title IX, and the corresponding regulations. OCR's enforcement of these laws is also informed by its published guidance.

<sup>1</sup> OCR did not give the College District notice of the identities of the complainant and the students when the investigation was begun. However, OCR's data requests to the College District did name the three students whose treatment was investigated by OCR during the course of the investigation. We are withholding the names of students, faculty, and the complainant from this letter to protect their privacy.

The regulation implementing Title VI found at 34 C.F.R. section 100.3(b), provides that, a recipient may not treat individuals differently on the basis of race, color, or national origin with regard to any aspect of the services, benefits, activities or opportunities it provides. Published OCR guidance further provides that, " the existence of a hostile environment based upon race or national origin that is encouraged, accepted, or tolerated by a school, college, or university may constitute different treatment of students on the basis of race/national origin." This guidance, entitled; Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, may be found at 59 Fed. Reg. 47 (March 10, 1994). (Additional guidance from this document is quoted in the Legal Standards section below.)

The regulation implementing Title IX found at 34 C.F.R section 106.31(a) provides, in pertinent part, that, "...no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, .....or other education program or activity..." Published OCR guidance further provides that, "...sexual harassment discriminates against students because it denies the aids, benefits, or services they are entitled to receive." This guidance entitled; Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, may be found at 62 Fed. Reg. 12034 (Mar. 13,1997). (Additional guidance from this document is quoted in the Legal Standards section below.)

The Title VI regulation found at 34 C.F.R. section 100.7 (e) prohibits a "recipient," such as Riverside Community College, or "other person" from retaliating against individuals or from intimidating, threatening, coercing, or harassing complainants or anyone else because they filed a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing, or because they asserted rights protected by Title VI. 34 C.F.R. section 106.71 incorporates the non-retaliation provisions of Title VI into the regulation supporting Title IX.

The Title IX regulation at 34 C.F.R. section 106.8 (b) requires that the College District adopt and publish grievance procedures providing for prompt and equitable resolution of student complaints alleging sex discrimination, including claims of disparate treatment and sexual harassment.

The definitions of sexual harassment, racial harassment, and a description of the College's duty to respond to allegations of harassment are set forth below in greater detail following the discussion of the facts established through OCR's investigation. The analytical steps followed by OCR in investigating alleged retaliation are also explained.

OCR reviewed documents provided by the complainant and the District, including files concerning specific prior complaints of discrimination made to the College District. OCR also interviewed the complainant, students, and College District staff including, the District Director of the Office of Affirmative Action, Diversity & Equity, the President/Chancellor of the College District, faculty members and several Deans of the Riverside Campus. In addition, OCR reviewed correspondence and policy statements provided by the State Chancellor's Office of the California Community Colleges.

OCR neither investigated nor determined whether any faculty at the College District had engaged in conduct that constituted a hostile environment of the basis or race, national origin or sex. However, based on its investigation, focusing on three examples, OCR determined that the College's responses to such allegations of discrimination, made against faculty by students, did not measure up to its responsibilities under Titles VI and IX.

Further, OCR determined that an individual faculty member had engaged in retaliation against a student who raised such a claim. Prior to the OCR investigation, the College had reached this same conclusion. Because the College is responsible for the conduct of its faculty, OCR examined the extent to which the College provided a complete remedy to the student for his adverse treatment. OCR determined that the College's response was insufficient to ensure that retaliation would not reoccur or that the student who was the victim of retaliation was "made whole." Finally, OCR determined that the deficiencies in the College's response to alleged discrimination contributed to the retaliation that took place.

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

### Facts

OCR's investigation showed the following:

- The College District has established written policies and procedures for filing and processing complaints of unlawful discrimination called "Regulation Procedures for Complaints of Unlawful Discrimination (including Sexual Harassment). The Director of the Office of Diversity, Equity & Compliance (Director) is the employee designated to receive and respond to such complaints. On its face, the College District's procedures provide for a prompt and timely resolution of complaints of discrimination, including sexual and racial harassment. Indeed, several procedures published by the College District were the result of prior negotiations between OCR and the College District to improve the operation of its discrimination complaint procedures.<sup>2</sup>
- The College District complaint procedure has an option for "informal" resolution. Within the informal procedures it is stated, "Efforts at informal resolution may not include any investigation... Efforts at informal resolution may continue after the filing of a formal written complaint...any efforts at informal resolution after the filing of a formal written complaint shall not exceed the ninety (90) calendar day period for rendering the administrative determination."

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<sup>2</sup> In a prior case, 09-95-6005, the College District entered in a resolution agreement that was under monitoring at the time OCR began its investigation of the instant case. That matter has been closed as OCR merged resolution of both matters under OCR case number 09-03-2139.

- Student 1 is a Hispanic male student enrolled in the Professor's class in Fall 2001. Student 1 alleged that the Professor subjected him to adverse treatment based on his national origin when the Professor allegedly made derogatory comments to students in class in Spanish and when the Professor allegedly routinely used vulgar sexual terms and graphics. Such terms and graphics appeared to Student 1 to be gratuitous rather than tied to the instruction topics at hand in the classroom.
- When interviewed by OCR, the Professor did not deny using Spanish street slang in his classes. He identified the use of Spanish street slang as a way of connecting with his students. The Professor could not however tell OCR how many Spanish-speaking students he had in his class or their level of fluency in English or Spanish. Though the identified Professor stated he is fluent in a wide range of languages, Spanish is not one of them.
- Student 1 sought advice of the Co-Chair of the Department who suggested that Student 1 raise these concerns with the Professor. When Student 1 rejected this idea, the Co-Chair suggested that Student 1 poll other students in the class to see if they were also offended by the Professor's actions. Student 1 was not advised or directed to any of the College District procedures for addressing claims of discrimination nor did the Co-Chair volunteer to address Student 1's concerns directly with the Professor.
- Based on the advice of the Co-Chair, on November 1, 2001, Student 1 polled fellow students before class and during breaks as to whether they had complaints about the Professor and collected contact information. Student interviews conducted by the Director confirmed that, the Professor found out what was happening, became angry and ordered Student 1 out of the class.
- The next day, Student 1 talked with the Co-Chair about what happened in class. The Co-Chair advised Student 1 to not return to class. When Student 1 protested that he had done nothing wrong, the Co-Chair told Student 1 to ask permission from the Professor to return to class. During this period there was also communication between the Professor, the Co-Chair and the Dean of Students in which the Professor alleged that Student 1 had disrupted the class. According to the Professor, the Dean indicated that he could call security to escort Student 1 off campus if he disrupted class.
- On November 8, Student 1 arrived at the Professor's class. The Professor told Student 1 that there would be a problem if he stayed and that the campus police were looking for him. Campus police arrived and escorted Student 1 off campus. The incident was documented in the records of the campus police.
- On November 13, Student 1 met with the Dean of Students who told him that he could return to class, gave him a handwritten note on her business card and also told him that he could file a discrimination complaint with the Director. On the

same day, Student 1 met with the Director, received discrimination complaint forms, completed and submitted them to the Director.

- On November 15, Student 1 again met with the Dean to discuss how he could complete the course. He was allowed to attend the same class taught by the Professor on a different day. Arrangements were made so that Student 1 would receive class notes and that the Co-Chair would proctor, but not grade, his examinations. Grading responsibility was left to the Professor. Student 1 received no notes and took a test on November 15 and the final on December 12. The Professor gave Student 1 a final grade for the course of "F".
- On one earlier exam in the course Student 1 had received a low grade. By the time he took the second examination, the Professor had ejected him from class and knew his name. Despite the fact that Student 1 was forced to miss all or part of two classes, he did better on the second examination. However, from a strictly mathematical point of view, Student 1 needed an even higher score on the final to pass the course.
- Student 1 told OCR that he had a "B" average in his courses and had never received a "D" or an "F" except in this Professor's class. The syllabus for the Professor's class in the fall of 2001 states that students will earn up to 100 points each on the three tests, but students could earn "extra credit" for visiting the Museum of Tolerance, writing a research paper or attending a "Health Fest" organized by the Professor at which he appeared with his band. Points could also be deducted; "walk in late minus 10 points" and "missed class minus 20 points". Student 1 told OCR that students were expected to pay \$10 to attend the Health Fest and were given additional points if they danced or played an instrument. Student 2 reported to the Director that female students could get additional credit if they appear at the band performances wearing "Betty Flintstone" skirts or grass skirts. (The Professor received a letter from the College President in May of 2000 asking him to stop collecting fees from students for this activity.)
- It is not unusual for a student to receive a lower grade in the Professor's class than they generally receive in other classes. In her report dated 14, 2002, the Director reported that, in the Fall of 2001, of all graded awarded District-wide, "F"s accounted for 13.9% of the grades, of the all the grades awarded in the same type of classes as Professor's class, without including the Professor's classes, "F"s comprised 16% of the grades awarded, and in Professor's classes in Fall 2001, "F"s comprised over 50% of the grades assigned.
- Professor informed OCR that he had received several awards for his teaching skills. Professor's resume shows that he received an award for the 1992-1993 academic year when he was teaching at the Moreno Valley Campus.
- In response to Student 1's formal complaint, the Director sent him a letter on December 17 "acknowledging" receipt of the complaint. On December 19, the Director asked him to resubmit some of the documents he filed with her the

previous month and to state what remedy he sought. Student 1 promptly complied with this request.

- By letter dated January 9, 2002, Student 1 wrote to the Director stating "nothing had happened with his complaint . . . except to receive an "F" from [the Professor], which is an obvious retaliation by [the Professor]". Copies of this letter were sent to the Co-Chair, the Dean, the College President/Chancellor and the Board of Trustees.
- On February 9, 2002, still having had no response to his formal complaints, Student 1 attended a meeting of the Board of Trustees and complained about his treatment by the Professor. According to best accounts, the College President/Chancellor preempted the Board of Trustees from responding to this complaint by assuring Student 1 that he could retake the course in the spring and would be reimbursed for the tuition and costs.
- By letter dated October 8, 2002, the Director notified Student 1 that a "prompt, impartial and objective" investigation was conducted. The letter stated that although the investigation found that inappropriate remarks were made in the Professor's class, "they were not severe and pervasive to rise to the level of hostile environment sexual harassment". The letter also stated that the Professor had been counseled to cease making inappropriate comments in Spanish during instruction. The letter did not state whether a hostile environment or the race/national origin was found nor did the letter address Student 1's allegations of retaliation for removing him from class or for giving him a final course grade of "F".
- When this complaint was filed with OCR in June 2003, Student 1 had still not received a response to his January 9, 2002 complaint. Student 1 did retake the course in summer 2002, earned a grade of "B", and was reimbursed for the cost of tuition. The original "F" grade remained on his transcript, but was not used to calculate his grade point average. His contact records also remained in the files of the campus police.
- Although California state law provides for a hearing in cases where there is a written claim that a student record is inaccurate, the College President/Chancellor did not initiate such a hearing for Student 1 and did not suggest it to him.
- The Professor did not provide to the College District or to OCR the underlying documentation to show how Student 1's test grades and course grade were computed. At the time that OCR conducted its investigation, the documents were no longer available, but they were available at the time the College District received Student 1's retaliation complaint concerning his grade.
- Documents submitted to OCR by the College District in response to requests for information on how Student 1's complaints were investigated included a

memorandum dated March 14, 2002 from the Director to the College President/Chancellor concerning "Issues related to [the Professor]". The memorandum summarizes Student 1's allegations and includes some testimony of other student that supports Student 1's claims, including the Professor's use of derogatory words in Spanish and use of sexually explicit slides and other material that appeared to some students as presented in an insensitive and demeaning manner. The Director states the Professor objects when students present opinions different from his and has asked students who arrive late to describe their first sexual experience to the whole class. The memorandum states, "This office has received at least 20 other complaints against [the Professor]. To my knowledge Academic Affairs has received other complaints." OCR could not determine the purpose of this memorandum in the context of the College District's discrimination complaint procedure.

- The College District also submitted a copy of an investigative report for Student 1's complaint dated September 23, 2002. [This report was not provided to Student 1 with the subsequent letter notifying him of the results of the investigation]. The report concludes that the Professor subjected Student 1 to retaliation when he was ejected from class. The report does not address the allegation of retaliation for the grade given to Student 1. The report includes the conclusion described in the October 8 letter to Student 1 that the investigation did not find that a hostile environment based on sexual harassment occurred. The report concludes, "...Progressive discipline should have followed because this is not the first incident." The report goes on to state that Professor was to have received a 90-day letter for improvement in May 2002. The report noted that the Associate Vice President for Human Relations and Special Assistant to the President/Chancellor asked that this letter not be placed immediately in the Professor's file because the Professor was providing beneficial information relevant to another matter. There is no evidence that this 90-day letter for improvement was subsequently placed in the Professor's personnel file.
- In a letter dated October 8, 2002, Student 1 was notified of the results of his formal complaint. The letter stated that, "though inappropriate remarks were made in class, ...they were not severe and pervasive to rise to the level of hostile environment sexual harassment." It also stated, "...the district takes this matter seriously and has counseled the [Professor] to cease and desist from making inappropriate comments in Spanish slang during instruction in the future". The letter did not respond to Student 1's allegation in his letter of January 9, 2002 that his failing grade was retaliatory. It also did not address the Professor's action of excluding of him from class; including removal by the campus police or his campus police contact records. The letter stated that the Professor was notified that no retaliatory action could be taken against Student 1 for having filed a complaint. The letter also notified Student 1 that he could file a request for a hearing with the District President "...within "ten days from the date of the written report". The letter did not include information that Student 1 had the right to appeal to the Board of Trustees or to further appeal to the State Chancellor of the California Community Colleges.

- Student 1 made a timely appeal and met with the College President/Chancellor on October 28, 2002 to discuss his dissatisfaction with the investigation and remaining unresolved issues.
- A Notice of Reprimand dated November 25, 2003 was placed in the Professor's personnel file as a result of Student 1's complaint documenting his inappropriate behavior and notifying him that further conduct could lead to further disciplinary action. Subsequent to commencing resolution negotiations with OCR, this Notice of Reprimand was removed from the Professor's file because of an agreement reached between the College District administration and the Professor in which the Professor agreed to let the College District change Student 1's "F" grade to a "W" for withdrawal.
- Student 2, a female, enrolled in the Professor's class in Spring 2003. Student 2 alleged that on April 9, 2003, she spoke to the Professor outside of class to ask him some information about a test. Student 2 stated that the Professor responded to her by asking personal questions about her marital status and whether she had children. Student 2 further alleged that the Professor suggested that he had much to discuss with her, that he could not talk to her at school. Student 2 stated to OCR that, based on the Professor's close physical proximity, eye contact and manner, that she believed that he was proposing that he and Student 2 should initiate a social, possibly sexual, relationship, outside of class.
- Immediately after this happened, Student 2 told a close girlfriend and her mother about what happened. The next day, Student 2 told another professor (P2) in the department about the incident. She said that she wasn't sure if she had been sexually harassed, but she did want to transfer out of the class. P2 told OCR that Student 2 was "visibly shaken" by the incident and he was willing to help her in getting a transfer. At the P2's suggestion, Student 2 wrote a detailed account of what happened.
- P2 and Student 2 spoke to the Co-Chair about the incident. Student 2 described what had happened. At this point, the Co-Chair told Student 2 that he would speak with the Professor and suggested that Student 2 also speak with him. Student 2 said that she did not want to talk to the Professor and only wanted to transfer out of the class.
- There is some evidence that the Director was contacted by one of the faculty members subsequent to this but there is no evidence that Student 2 was given any information or guidance as to her right to file a complaint of sexual harassment with the Director.
- Faculty members took it upon themselves to speak with the Professor about the incident and to discuss a transfer for Student 2. The Professor told his colleagues that nothing had happened and refused to grant a transfer. The Dean of

Instruction was brought into the matter and made a decision to authorize Student 2's transfer.

- Finally, on May 2, 2003, Student 2 filed a sexual harassment complaint with the Director, attached the document that she wrote on April 9 about the incident and informed the Director about the faculty members and others that she has told about the incident when it happened. The Director sent Student 2 a letter on May 27<sup>th</sup> acknowledging receipt of the complaint. The letter stated that she would be notified of the findings by July 30, 2003.
- On July 7, 2003, OCR notified the College District that it had accepted this complaint, #09-03-2139, for investigation.
- Student 2 received the investigative findings of the College District in letter dated July 21. The cover letter stated that the accused had been advised of her complaint and was provided an opportunity to, "present his side of the matter." The "Written Report" stated that the complainant and another (unnamed) student approached [the Professor] after class to discuss the content of a test. The other student left. The report then summarized the respective contentions of each party. The report does not identify any witnesses who could or did corroborate the statements of Student 2 such as her friend, mother or any of the professors with whom she had spoken. The report concluded that, "the situation, as described by the complainant, does not meet either the standard of 'quid pro quo' or 'hostile environment' sexual harassment. Also, the alleged offender did not act in a persistent pervasive or repetitious behavior towards the complainant." The document did state that the "perceived unwelcome sexual advance had the effect of having a negative impact upon an individual's academic performance by creating an uncomfortable environment." The report concluded, "Sexual Harassment Discrimination: The investigation did not find sufficient evidence to support or substantiate the allegation of sexual harassment". It was noted that Student 2 was moved to another course section and [the Professor] was, "...counseled on this matter." Student 2 was informed that she could appeal the results of the investigation to the College District President using a written form. The appeal form and a two-page document entitled "Written Report" were enclosed with the letter. Student 2 did not appeal the findings of the investigation. She successfully completed the class.
- Student 3, a female, was enrolled in the Professor's class in Fall 2003. In class on October 28, 2003, She expressed disagreement with the Professor's presentation of his opinions of the affect of alcohol use by women and subsequent sexual assaults against them. Student 3 found in the Professor's statements an implication that young women were, in some sense, asking for an assault. The Professor told Student 3 that he wanted her out of the class. Student 3 told OCR that the Professor did not allow her to return to class until November 3.

- Student 3 spoke to the Co-Chair. Subsequently a meeting was held with Student 3 and her husband, the Riverside campus Dean of Instruction, and the Dean of Student Services. At this meeting, Student 3 stated that the Professor had made personal comments of a sexual and racial nature to her outside the classroom several weeks prior. Student 3 further stated that the Professor used profanity and vulgar language in the classroom and displayed slides of human genitalia for excessively long periods of time without relating the slides to his instruction. The evidence collected by OCR is conflicting as to whether the Student was provided guidance on filing a complaint of discrimination with the Director at this time.
- Student 3 did meet with another administrator, the College District Dean of Instruction on the same day. The Dean documented Student 3's allegations on a form entitled "Inquiry Information Sheet" dated November 3, 2003. The Dean referred Student 3 to the Director. Student 3 met with the Director on November 6 and told the Director about what had happened between her and the Professor. The Director took some notes of this meeting and gave Student 3 complaint forms to fill out and submit.
- By November 3, 2003, Student 3 had dropped the class and did not subsequently submit the complaint forms. The Director subsequently sent Student 3 a report of an investigation in a letter dated December 3, 2003. The document states that three students registered in the class were "randomly selected" to verify Student 3's account of what happened, but "did not substantiate the allegations made by this claimant." The report did not respond to the allegations of sexual and racial comments allegedly made by the Professor outside of class, but included a statement that defined race discrimination as "...treating or favoring a person differently based upon their race or color". The conclusion of the report was that there was "not sufficient evidence to support or substantiate" the allegations of sexual harassment discrimination or race discrimination. The report noted that the complainant was given, but failed to return a formal complaint form. Information about appeal rights was included. Student 3 did not file an appeal.
- A log of complaints from 1994 to 2003 shows that the College District received a number of complaints of discrimination during this period including six other documented complaints of alleged sexual harassment by students against the Professor. All but one of the six complaints was characterized as an "informal" complaint.
- As noted previously, the internal memorandum by the Director dated March 14, 2002, stated that 20 other complaints had been filed against the Professor. The Director and later characterized these complaints as "general<sup>3</sup>."

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<sup>3</sup> OCR did not find an effective administrative system for cross-referencing multiple complaints within the College District or made to OCR against the same College District faculty member. The laws and regulation enforced by OCR does not require such a system, but the 1997 Sexual Harassment Guidance points out the benefits of maintaining such a log, "...Coordination of recordkeeping (for instance, in a confidential log maintained by the Title IX coordinator) will also ensure that the school

- A review of the Professor's personnel files submitted to OCR by the College District in March 2004 shows that his use of vulgar language in the classroom was noted in his performance reviews. In March 1997, the Professor was verbally placed on notice of the College District's policy of anti-harassment; and in August 1997, the President verbally reprimanded the Professor for using foul language in the classroom and a "humiliating teaching style". In October 1999 and December 1999, there were additional complaints against the Professor that resulted in written apologies.

### Legal Standards

#### Definition of hostile environment discrimination

A hostile environment on the basis of race/national origin or sex is a form of discrimination prohibited respectively by Titles VI and IX. In the context of this case, a racially hostile environment would exist if a faculty member acting within the scope of his or her authority (such as classroom teaching) engaged in race-based harassing conduct toward a student or students (physical, verbal, graphic, or written) that is sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of the student or students to participate in or benefit from the services, activities, or privileges provided by the college, including the program of instruction. Similarly, a hostile environment on the basis of sex, exists if a faculty member acting within the scope of his or her authority, engages in gender-based harassing conduct toward a student or students (which can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct) of a sexual nature so severe, pervasive or persistent as to interfere with or limit the ability of the student or students to participate in or benefit from the services, activities, or privileges provided by the college, including the program of instruction.

#### First Amendment

"In cases of alleged harassment, the protections of the First Amendment [to the United States Constitution] must be considered when issues of speech or expression are involved. Free speech rights apply to the classroom." Titles VI and IX are "intended to protect students from ... discrimination, not to regulate the content of speech." "[T]he offensiveness of particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a ... hostile environment" under Titles VI and IX, the harassment must be sufficiently severe, persistent, or pervasive to limit the student's ability to participate in or benefit from the educational program..."

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can and will resolve recurring problems and identify students or employees who have multiple complaints filed against them..."(Footnote omitted)

Factors in assessing whether an alleged incident, if true, is sufficiently severe, persistent or pervasive to be discriminatory

In determining whether harassing conduct on the basis of race/national origin or sex is sufficiently severe, persistent, or pervasive to be unlawful, OCR looks at a number of factors, including:

- The mission of educational institutions
- The nature of the incidents—whether the conduct was verbal or physical and the extent of the hostility characteristic of the incident (for example did the conduct threaten injury to a student)
- The context, scope, frequency, duration, and location of the incidents --- (for example a conversation between a male and female in a secluded location may cause the female to feel more physically at risk; a racial epithet in a classroom in front of many students may be more humiliating and hurtful than one used during a private conversation in at cafeteria table)
- Other incidents at the college ---“a series of incidents at a college, not necessarily involving the same student, could, taken together, create a hostile environment, even if each incident by itself would not be sufficient.”
- Whether the alleged hostile conduct is calculated to raise fear in students or otherwise to attain their acquiescence to a hostile environment
- The identity, number, and relationship of the persons involved, including recognition of the relative “power” of faculty members in comparison to students
- The age of the student involved—college students are presumed to be more resilient than elementary aged students, for example
- The perspective of a reasonable person of the same race/national origin or gender as the alleged victim (however the acts need not have been targeted at the complainant in order to create a hostile environment, the effect on other students who witnessed the alleged unlawful conduct is also important)
- All other relevant circumstances

In addition to the above factors in the case of an alleged hostile environment on the basis of sex, “welcomeness” is obviously an important factor. Here too, colleges “should be particularly concerned about the position and authority of the alleged harasser in comparison to a student.”

Response to alleged discrimination

Within the circumstances of this case, though a college may be held directly responsible for the conduct of its faculty acting within the scope of their authority, OCR also measures the culpability of a college for its response to alleged unlawful harassing conduct by faculty. “An educational institution has a duty to provide a nondiscriminatory environment that is conducive to learning. In addition to the curriculum students learn about many different aspects of human life and interaction [while attending college]. The type of environment that is tolerated or encouraged by or at a [college] can send a strong signal to, and serve as an influential lesson for its students.”

There are two elements common to Titles VI and IX with regard to a response:

- A duty to take immediate and appropriate steps to investigate or otherwise determine what occurred
- And, if discrimination is found, steps reasonably calculated to end the harassment, eliminate the hostile environment, and prevent the harassment from occurring again

With regard to the first element, OCR considers whether the investigation commenced in a timely manner, followed the college's own published or required procedures, was reasonably diligent, used reliable methods to obtain and weigh information and evidence, and applied the appropriate legal standards. Conducting a diligent and reliable investigation may not be easy. If there is a dispute between parties and/or witnesses, determinations should be made on the basis of the totality of the circumstances taking into account such sources as statements of all the witnesses, evidence of relative credibility such as other statements by a witness that have proven to be reliable or unreliable, the alleged harassed student's reaction and behavior, other steps taken by the student to address the alleged harassment, other contemporaneous evidence (for example did the student claiming harassment promptly write down notes about the incident).

As to the first element, under Title IX, recipients have a duty to adopt and publish a policy against sex discrimination as well as publish and adopt grievance procedures for the prompt and equitable resolution of complaints of sex discrimination. "A grievance procedure applicable to sexual harassment cannot be prompt and equitable unless students know it exists, how it works, and how to file a complaint." This provision places on colleges a responsibility to conduct adequate, reliable, and impartial investigations of complaints within designated and reasonably prompt published timeframes and with notice to the parties of the outcome of the complaint.

Colleges may offer and students may avail themselves of informal resolution processes but students must be notified of their right to end the informal processes at any time. Further a process that places on the student the responsibility for resolving his/her own discrimination claim against a faculty member places on the student a responsibility that by law belongs to the college. Further, such a process is neither reliable nor equitable and fundamentally misperceives the nature of hostile environment discrimination and the power relationship between students and teachers. For this reason, OCR has recommended that whenever a student files a claim of hostile environment discrimination, a college seriously consider taking interim steps to protect the student from the potential of further discrimination or retaliation. This may entail, for example, reassigning the student to another teacher in the same subject.

With regard to the second element, where hostile environment conduct has been identified it must be eliminated through actions that are well-calculated to ensure that the unlawful conduct will not reoccur. Such steps may include a series of escalating consequences against the offender including discipline that takes into account the nature of the incident and whether the offender has a record of prior discriminatory misconduct.

Steps must also be taken to undo any harm to the victim or victims. This may include reimbursement for counseling, reassignment to another teacher, repeating the course at no cost, tuition adjustments, private tutoring, assigning other qualified faculty to grade or re-grade the victims' work, correction of transcripts or other student records, etc.

#### Retaliation

Among the most important immediate responsibilities of a college is to ensure that students who allege harassment, bring it to the attention of the college and/or cooperate in an investigation are not subject to retaliation. This responsibility exists irrespective of whether the claim of hostile environment discrimination is borne out by the investigation or other method of resolution.

In determining whether unlawful retaliation has taken place, OCR looks at whether the individual (student) who is the alleged object of the retaliation engaged in an activity protected under the laws and regulations OCR enforces; whether he or she was subsequently subjected to an adverse action (in this case, alleged to have been taken by a professor); and, whether there is evidence of a connection between the protected activity and the adverse action. If there is evidence of a connection, the recipient (college) must state a legitimate, nonretaliatory reason for the adverse action. OCR will then determine whether the stated reason is a pretext for retaliation. In assessing pretext, OCR utilizes many of the techniques recommended for assessing witness credibility discussed above.

Because the objective of retaliation is to discourage the making of additional allegations of discrimination or to discourage individuals from acting as witnesses in an investigation, OCR considers alleged acts of retaliation that occur in public venues such as the classroom to be particularly serious.

### **Analysis and Conclusions**

Based on its investigation, focusing on three examples, OCR determined that the College District's responses to allegations of discrimination, made against faculty by students, did not measure up to its responsibilities under Titles VI and IX. These responses failed to adhere to the College's own published procedures and placed resolution responsibilities on students that belonged to the College. The response of the College neither commenced nor concluded on a timely basis. These investigations were not reasonably diligent. They identified but did not always apply appropriate legal standards. The response of the College failed to protect Student 1 from retaliation, and when retaliation was identified, failed to take steps well-calculated to ensure that the misconduct would not reoccur and that the injured student was fully remedied for the acts of retaliation. OCR's determination is further detailed below.

*The deficiencies in the response of the College to allegations of a hostile environment on the basis of race/national origin, or sex begin with the fact that some faculty, including individuals in positions of responsibility, are ill-informed about how to respond*

*to a complaint of discrimination and fail to immediately direct students to the existing College District procedures for addressing claims of discrimination including racial and sexual harassment.*

Both Students 1 and 2 were not promptly directed to the appropriate office to file their complaints. The Office of Affirmative Action, Diversity & Equity should have been, but was not, involved from the beginning of the College's responses to alleged discrimination. The published policies and procedures of the College were not followed. Persons with the training and authority to address these problems were cut out of the process.

*Evidence of a pattern of unreasonable, ineffective, and inequitable responses to claims of harassment is also reflected in the degree to which students were left to obtain their own resolutions after providing notice to the College of alleged discrimination. Students were left to fend for themselves in seeking cessation of the alleged unlawful conduct and in removing themselves from the alleged hostile environment.*

In the case of Student 1, relying on the advice he was provided by a Department Co-chair, he came into serious conflict with the Professor. When he sought additional help he was given a note on a business card to take back to the Professor that would allow him to return to the class. Under the circumstances, there was little likelihood that this would serve as an effective shield against further conflict and, it did not. According to the Professor, he went to the Dean of Academic Affairs to complain of Student 1's conduct. The Dean, without hearing the Student's perspective, authorized the use of campus security service to eject the Student should he cause further disturbance in the Professor's class. Student 2 was forced to seek the assistance of faculty members to help her transfer out of the Professor's class, before she filed a complaint of discrimination.

*Based on the examples and documents reviewed by OCR, in those instances when complaints of a hostile environment reached the individuals authorized to investigate the complaints, the investigation process was not timely, reasonably diligent or reliable as required by Titles VI and IX, nor were the processes prompt and equitable, as required by Title IX. The investigations were not sufficient to accord students the protections of Titles VI and IX.*

A timely or prompt response to an alleged hostile environment requires the immediate referral of students to the appropriate authority for investigation and resolution. In the case of Student 1, his complaint was in a process of resolution for almost 2 years. Though there may be times when informal steps are considered, reliance upon an "informal" process when a more formal one will quite predictably be necessary cannot be a legitimate source of delay.<sup>4</sup>

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<sup>4</sup> The published complaint procedures of the College District do not explain to students the important differences between these "informal" and "formal" complaint processes. The College accorded this distinction great weight in how it proceeded to resolve a complaint. OCR found no evidence that students were advised of their rights to terminate the informal process, at any time. Based on the examples

A reasonable, equitable, and reliable process requires an investigation that is logically thorough and applies the prevailing standards of law, not just in name, but also in substance. In the examples reviewed by OCR, key witnesses were not interviewed and allegations were not responded to in the course of the investigations. Student 1's race discrimination claim to this day has not been the subject of a finding by the College. Though Student 2's claims were dismissed as "he said, she said", the friends and family with whom she held contemporaneous conversations were not interviewed. A critical dispute in the claims of Student 3 was whether her husband did or did not meet with the Professor. The District did not put this question to the complainant's husband during either of his two interviews.

Though the College's investigatory reports set forth appropriate legal standards and terms in reaching conclusions of compliance or noncompliance, it is less clear that these standards were actually applied. For example, in a report that was created to support the conclusions relayed to Student 1, it is correctly noted that whether alleged harassing conduct is persistent or pervasive is pertinent. But the reports never addresses what consideration, if any was given to the Professor's alleged prior discriminatory conduct.

*In at least one instance, that of Student 1, the above described pattern of unreliable responses to alleged hostile environment discrimination resulted in retaliation and a denial of educational opportunities.*

That Student 1 was a victim of retaliation implemented by the Professor is documented in the College District's own investigatory reports dated March 14, 2002, September 23, 2002, and November 20 2002 and the written reprimand dated November 25, 2002, signed by the Riverside Campus Dean of Instruction

Student 1 engaged in a protected activity when he alleged to the College District that the Professor conducted his lectures in a manner that created an unlawful hostile environment on the basis of race/national origin and sex. Student 1 experienced significant adverse treatment when he was twice denied participation in the class, once in front of his classmates. He was the subject of two contact reports with the campus police. Student 1 had to transfer to a different class section and, ultimately, received a failing grade and had to retake the class to earn his degree. The connection between the protected activity and the adverse treatment is clear. Student 1 was ejected contemporaneous to the Professor learning of this protected activity. The Professor's own statements identify Student 1's "disruptive" polling activities as the basis for his ejection.

The Professor's non-retaliatory explanation is a pretext for retaliation. The allegation that the Student 1 was solely excluded or ejected for his disruptive behavior is not supported by the investigation of OCR or the College District. Student witnesses to the events, and the statements of Student 1 to OCR establish that his polling activities

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reviewed by OCR, the information that students were provided about complaint procedures was often incorrect or not helpful.

occurred before class and at breaks. Moreover, the steps he took were in reliance upon the faulty advice given him by the Department Co-Chair. The College District's own failure to adhere to its procedures placed Student 1 in an untenable position. Finally, OCR judged Student 1 to be more credible than the Professor and placed the Professor's allegations against Student 1 in context of similar allegations of other individuals who had alleged that the Professor had engaged in hostile environment conduct.

*Even where the College's own internal investigation uncovered discrimination or retaliation, steps reasonably calculated to ensure that the violation would not reoccur were not taken.*

The College traded away the disciplinary actions the College itself had deemed to be appropriate and necessary. For example, during the negotiation of the resolution agreement with OCR, a reprimand (issued to the Professor in regard to a determination in Student 1's case) was removed from the Professor's personnel file as a result of a negotiation between the Professor and the College to correct Student 1's transcript. The College had previously provided this reprimand as evidence to OCR that the College had the ability and will to take steps reasonably calculated to ensure that discrimination or retaliation, once uncovered, does not reoccur.

In the case of Student 1, the College certainly took a range of corrective steps. However, it avoided steps that posed potential conflict with the Professor. Sufficient steps were not taken to ensure that the retaliation Student 1 suffered would not reoccur and was fully remedied. Based on its investigation, OCR requested that the College District change Student 1's grade in Professor's class to a "W" (withdrawn). The College District declined this remedy on the grounds that the evidence did not warrant it. The College District's position was that, the student had received very low grades on earlier exams in the Professor's class, therefore a passing grade was nearly a mathematical impossibility.

From OCR's perspective, the position of the College on correcting Student 1's transcript was flawed both as a matter of law and fact. First, the College District and OCR found that Student 1 was a victim of retaliation. The retaliating party was the same individual who gave Student 1 his grade. Under these circumstances, as a matter of law, the burden was on the College District to disprove that the failing grade given to the victim of retaliation was also not retaliation. Second, the reason no one will know for sure whether the failing grade that Student 1 received in the class of the Professor was purposefully (i.e. fraudulently, inaccurately and/or discriminatorily) low or mathematically correct was that the College District failed to properly investigate the failing grade. Though on explicit notice that Student 1 feared retaliation in grading, the College District failed to maintain copies of the pertinent grading records. In addition, there has never been a careful accounting or timeline establishing when protected activities, short of filing a complaint with the College District, had taken place and whether they preceded one or both of the earlier low grades.

Further, the position of the College District was founded on the notion that all the grades accorded to students in the Professor's class were solely based on machine-graded

objective exams<sup>5</sup>. The Professor's syllabus undercuts the validity of this position. This syllabus makes explicitly clear that students may raise their grade based on attendance at health fairs that include the Professor's band and that all students are graded, in part, on their attendance. The statements of female students concerning points based on the cut of their clothing are even more disturbing. Unfortunately, the Professor kept no separate record of attendance or dress grades. These subjective points were unaccountably melded into the objective points in the Professor's grading system. For example, did the Professor deduct points for the absences of Student 1 on the days he was ejected from class or those days he was absent from class at the direction of the College District? The College District could not tell OCR.

Mindful of the significance of the principles of academic freedom, it has never been the position of OCR that Student 1 was entitled to a good grade in the class of the Professor or any specific grade; only that his transcript ought not bear the implication that on some objective basis he deserved a poor grade in Professor's class. For this reason, OCR never asked the College District to do more than expunge Student 1's transcript of any grade for that class. Placed in the context of the Professor's history, his documented other retaliatory acts against Student 1, Student 1's otherwise solid academic record, and the Professor's ill-defined grading system, OCR concluded that under an equitable and effective system of responding to alleged discrimination/retaliation, the College District's investigatory lapses should not have redounded to the detriment of the student and the affirmation of the Professor.

Unfortunately, the College District never did take direct responsibility for changing the grade of Student 1. Rather, it acquiesced to the identified Professor by permitting remediation of the transcript in return for removing the previously identified reprimand from his personnel record. These too, were not actions reasonable calculated to ensure that retaliation did not reoccur.

### Conclusion

Taken as a whole, the evidence shows that the responses of the College District to the race, national origin and sex discrimination and retaliation complaints of the three students noted above, as well as others reviewed by OCR, were not addressed in a manner consistent with the College's responsibilities under Title VI and IX. Far too much responsibility was placed on students with serious negative consequences to them. Investigations, when conducted, were untimely, less than thorough and legally insufficient. Further, even where the College found a violation, sanctions were traded

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<sup>5</sup> The College district originally took the position that it did not have the authority, under California law, to change the transcript of Student 1 to expunge the "F" grade or substitute a different notation. To resolve this issue, OCR consulted with the Assistant General Counsel for the Chancellor of the California Community Colleges. The Assistant General Counsel determined, based upon a prior opinion of the General Counsel's office to the Sonoma County Office of Education dated November 15, 1995, that the College District had both the authority and the obligation to expunge a negative grade from a student's record, if the facts demonstrated it was the product of illegal retaliation. This opinion was conveyed directly to the College District by the General Counsel's office.

away in order to implement a remedy that the College, on its own authority, should have undertaken.

Accordingly, in a meeting of September 9, 2004, OCR advised the College District in detail the bases for concluding that the College District was in violation of Title VI and IX.

In response to OCR's findings in this complaint, the College District, on November 16, 2004, without admitting to any violation of law, agreed to take steps well-calculated to correct the violations noted by OCR by entering into a Resolution Agreement the provisions which include; correcting the transcript of Student 1 for the Professor's class to reflect a "withdrawal", expunging records of Student 1's contacts with the campus police in this matter, counseling the Professor as to the College District's harassment and non-retaliation policy and behavior expectations, utilizing an independent and experienced outside investigator to investigate all future allegations against the Professor and other employees with multiple complaints of discrimination and/or retaliation, amendment of board policy and procedures to ensure that complaints of discrimination and retaliation will be promptly and equitably investigated, publication of clear and succinct guidance for students concerning how to file complaints of discrimination and explaining the distinctions between "formal" and "informal" complaint resolution and training for faculty and staff on the amended policies and procedures.

This concludes OCR's consideration of the complaint. We are closing the complaint as of the date of this letter. The complainant is being notified concurrently. OCR wishes to thank the firm of Best Best & Kreiger for their cooperation and courtesy in this matter.

If you have any questions about this letter, please contact Ms. Stella Klugman, Team Leader at (415) 556-4154.

Sincerely,



Charles R. Love  
Program Manager

Enclosure: Resolution Agreement

Cc: **(b)(7)(C)**

Riverside Community College District  
Agreement to Resolve  
Complaint Number 09-03-2139

In order to voluntarily resolve the above-referenced complaint filed with the Office for Civil Rights (OCR), the Riverside Community College District (College District), without admitting to any violation of law concerning the above complaint number, agrees to the following:

Section I: Remedy for identified male Student:

1. The College District will expunge from the transcript of the identified male student the "F" grade he received in the identified Professor's class and replace that grade with a "W."
2. College and Safety Police will seal any reference in the campus security records related to the identified male Student's actions in the identified Professor's class, specifically call number 013050059 on November 1, 2001 and call number 013120049 on November 8, 2001, and will not open the records without the concurrence of the Chief of College and Safety Police and the College District's legal counsel, or as required by applicable law
3. The College District will provide the identified male Student a letter informing him of the corrections to his transcript and the restricted access to his campus security record.

Section II: Actions involving the identified Professor:

1. The College District will meet with the identified Professor to discuss the College District's harassment and non-retaliation policy and to counsel the identified Professor regarding the College District's behavioral expectations. This meeting will be memorialized in an e-mail memorandum by the College District President to the identified Professor.
2. A copy of this e-mail memorandum and copy of the OCR letter of findings issued for this complaint will be provided to any government agency conducting an investigation, and any independent agency or individual contracted with by the College District to investigate a complaint, involving an allegation of discrimination or retaliation against the identified Professor.
3. If the College District receives notice from any student, faculty member, or administrator of a complaint of alleged discrimination and/or retaliation concerning the identified Professor in this OCR complaint, the College District will utilize an independent and experienced outside agency or individual to investigate any such

complaint(s). Such individual or agency will be charged with the responsibility of investigating the allegations, including contacting and interviewing pertinent witnesses, and reaching recommended conclusions of law consistent with existing Federal regulations and court precedents. The outside investigator(s) will be provided with a complete record of all prior allegations of discrimination and/or retaliation and determinations reached by the College District with regard to the identified Professor. The results of the outside investigation(s), and any proposed resolutions, will be presented in a written report to the President of the College District (who will forward it to the Board of Trustees) and sent to the Chancellor's Office of the California Community College system. This agreement provision shall apply to the identified Professor for as long as he is an employee of the College District.

Section III: Revision of Policies and Procedures and Training:

1. The College District will amend and implement its board policies and procedures prohibiting discrimination, including sexual harassment, and retaliation, in accordance with the standards provided by the Chancellor's Office of the California Community College system to ensure that complaints alleging discrimination and/or retaliation will be investigated promptly and equitably. The amended draft policies and procedures will be reviewed and approved by the Chancellor's Office prior to implementation and a copy of the approved policies and procedures will be sent to OCR. In the event that by June 1, 2005, the College has not provided policies and procedures that are fully satisfactory to the Chancellor's Office, the College will provide such policies and procedures to the Office for Civil Rights by June 15, 2005 for consideration under the standards of the legal authorities enforced by OCR. Within one month of receipt of comments by OCR, the College will make the revisions necessary to achieve compliance with these authorities and adopt and implement them.
2. The College District will prepare and publish clear and succinct guidance to students as to how to provide the College District with notice of alleged discrimination and/or retaliation. This document will include an explanation of the College District procedure for responding to such allegations and will explain the distinction between "informal" and "formal" complaint resolution. This guidance will also be distributed to any student who files or expresses interest in filing a formal or informal complaint at the first meeting at which any party raises the subject of unlawful discrimination and/or retaliation.
3. The College District will provide training to all Deans, administrators and Department Chairs as to its amended policies and procedures for responding to allegations of discrimination, including sexual harassment and/or retaliation, and their respective roles in

implementing those policies and procedures. The College District will adopt such amendments and conduct such training as is necessary to ensure that no college staff or administrator advises a student alleging discrimination or retaliation to bear the independent burden to resolve, investigate or remediate the alleged discrimination and/or retaliation.

4. For the next five years, the College District will utilize an independent and experienced outside agency or individual to investigate any College District employee not identified in this complaint that is the subject of two or more complaints of discrimination and/or retaliation within two consecutive academic years. (For purpose of implementing this provision, with regard to persons other than the identified Professor, multiple complaints concerning the same event, shall be counted as a single complaint.) Such individual or agency will be charged with the responsibility of investigating the allegations, including contacting and interviewing pertinent witnesses, and reaching recommended conclusions of law consistent with existing Federal regulations and court precedents. The outside investigator(s) will be provided with a complete record of all prior allegations of discrimination and/or retaliation and determinations reached by the College District with regard to the accused employee. The results of the outside investigation(s), and any proposed resolutions, will be presented in a written report to the President of the College District (who will forward it to the Board of Trustees) and sent to the Chancellor's Office of the California Community College system.

#### Section IV: Reporting

1. Section I: The College District will provide OCR with documentation of the completion of actions in Section I no later than December 1, 2004.
2. Section II:
  - a. The College District will provide OCR with documentation that Section II, Item 1 has been completed no later than December 1, 2004.
  - b. The College District will provide OCR with reports on December 1, 2004, June 1, 2005, December 1, 2005, June 1, 2006 and December 1, 2006 documenting any complaints of discrimination or retaliation, formal or informal, filed against the identified Professor subsequent to May 1, 2004 and how the College District investigated any such complaint in accordance with Section II, Items 2 and 3.
3. Section III:
  - a. The College District will provide OCR with documentation that

Section III, Item 1 has been completed and approved by the Chancellor's Office of the California Community College system by June 1, 2005. If the College District has not fully implemented the revisions requested by the Chancellor's Office by this date, the College District will prove OCR with a copy of its discrimination policies and procedures for OCR review by June 15, 2005.

- b. The College District will provide OCR with a draft of the guidance by December 1, 2005. Following OCR's approval, the document will be distributed and published in the College District's Student Handbook, the schedule of classes, the website, and the College catalogue. Additionally, the College District will post the guidance in prominent locations throughout the campus including the classroom of the identified Professor.
- c. The College District will provide OCR with a schedule for completing the training in Item 3 within 60 days after OCR receives notice that the amended policies and procedures referred to in Item 1 have been approved by the Chancellor's Office or, in the alternative provision, approved by OCR. The College District will provide OCR with course materials, a summary of the subjects covered, and a sign-in list of participants.
- d. The College District will provide OCR with documentation of all complaints of discrimination and/or retaliation, formal or informal, filed after December 1, 2004. This provision will apply to complaints of retaliation and harassment for having engaged in an activity protected under Federal civil rights law and/or sexual harassment alleged by students against faculty, staff member or employees of the College District. The documentation will include information as to how each complaint was resolved. This documentation will be collected annually and sent to OCR on December 1, 2005, and December 1, 2006. (The documentation period shall encompass matters arising between December 1, 2004 and December 1, 2005.) The College District will specifically identify and document its response to any complaints against College employees that meet the criteria set forth in Item 4.

Signed:

*Glen O'Reilly*  
*President*

Date:

*Nov. 16/04*

Title: