



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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

JUN 30 2005

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Richard Metz, Vice President  
California State University, East Bay  
25800 Carlos Bee Boulevard  
Hayward, CA 94542

(In reply, please refer to case number 09-05-2028.)

Dear Vice President Metz:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against California State University, East Bay. The issue OCR investigated was whether the University responded adequately and appropriately to the complainants' allegations of sexual harassment against a faculty member in the University's College of Education.<sup>1</sup>

OCR investigated this issue under the authority of Title IX of the Education Amendments of 1972 and its implementing regulations. Title IX prohibits discrimination on the basis of sex in education programs and activities operated by recipients of Federal financial assistance. The University receives funds from the Department and is subject to Title IX and the regulations. OCR gathered evidence through interviews with the complainants, personnel at the school where the complainants were student teachers, and relevant University personnel. OCR also reviewed documents submitted by the complainants and the University.

OCR concluded that although the University responded to the complaint of sexual harassment and reached a reasonable outcome, its process was not in complete compliance with Title IX and its implementing regulations. On June 23, 2005, the District entered into a Resolution Agreement which, when fully implemented, will establish compliance as to the issues raised in this complaint.

The applicable legal standards, the relevant facts gathered during the investigation, and the reasons for OCR's determination are summarized below.

The Title IX regulation at 34 C.F.R. § 106.31(a) provides that no person shall, on the basis of sex, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any education program or activity operated by a

<sup>1</sup> OCR disclosed the names of the complainants in its December 15, 2004 letter to the University, and will refer to them as Students 1, 2 and 3 here in order to protect their privacy.

recipient of federal financial assistance. Sexual harassment is a form of sex discrimination that may violate Title IX and the regulations.

Under 34 C.F.R. § 106.31, a college or university is responsible for sexually harassing conduct by an employee when the employee engages in the conduct in the context of carrying out responsibilities for providing benefits or services of the school's program, and when the harassment denies or limits a student's ability to participate in or benefit from the program. This situation may occur where the employee: (1) explicitly or implicitly conditions a student's participation in an education program or activity, or bases an educational decision on a student's submission to unwelcome conduct of a sexual nature; or (2) engages in unwelcome conduct of a sexual nature that is sufficiently severe, pervasive, or persistent so as to deny or limit the student's ability to participate in or benefit from the school's program.

While sexual harassment is unwelcome verbal or physical conduct of a sexual nature, acts of verbal, nonverbal, or physical intimidation or hostility based on gender, although not of a sexual nature, can also violate Title IX if they are sufficiently serious to deny or limit a student's ability to participate in or benefit from a school's program.

To determine whether conduct has created a hostile environment, the following factors should be considered: the degree to which the conduct affected one or more students' education; the type, frequency and duration of the conduct; the relationship between the alleged harasser and the subjects of the harassment; the number of individuals involved; and the context of the incidents.

Once a school receives notice of harassment, it must take immediate and appropriate steps to stop it and prevent it from happening again. In evaluating a school's response, OCR will examine the recipient's nondiscrimination policies, complaint procedures and other applicable policies, and whether they were followed. Pursuant to 34 C.F.R. § 106.9, recipients must adopt and publish a policy against sex discrimination. In addition, 34 C.F.R. § 106.8(b) requires recipients to adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging sex discrimination, including sexual harassment.

Further, under 34 C.F.R. § 106.8(a), a recipient must designate an employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX, including the investigation of any complaint alleging noncompliance with Title IX. The recipient must notify all its students and employees of the name, office address and telephone number of the appointed employee.

OCR's investigation showed the following:

The University has published and distributed a "Non-Discrimination and Affirmative Action Policy" prohibiting discrimination based on sex in any of its programs or activities.

Faculty and staff participate in discrimination/harassment training during orientation, and were requested to complete a tutorial in November 2004. The University also has "Sexual Harassment Policy and Procedures for Students and Employees." This policy designates the Director of Equal Employment Opportunity (EEO) to oversee its implementation; the Director of EEO and the Executive Director for Student Judicial Services (SJS) are responsible for conducting sexual harassment investigations.

The procedures indicate that University staff or faculty who learn of alleged sexual harassment from a student should immediately inform the Director of EEO or the Executive Director for SJS of the allegations, and inform the complainant of the University's legal obligation to examine claims of sexual harassment. The time period for the investigation from the filing of the complaint to the submission of the fact finding report cannot exceed 60 days, but may be extended "for good cause." The procedures also provide a right to appeal to the President.

Additionally, the University's general "Complaint Procedures for Discrimination and Harassment Complaints" indicate that a complaint lodged by a student against a staff or faculty member should be reported to the Executive Director for SJS, and that other complaints are to be handled by the Director of EEO. These procedures require the investigator to make a good faith effort to issue findings within 45 days of a complaint.

The EEO Director stated that the University has not designated an individual as the Title IX Coordinator for the campus. She stated that generally, SJS handles complaints of student-on-student harassment, and she handles complaints against faculty. She further stated that she deals with the more serious complaints, including those alleging discrimination, but that this policy is not official. She keeps records of her investigations and outcomes, but does not have a tracking system for complaints that would enable her to monitor multiple complaints against the same individual.

The complainants, three female students in the University's teacher education program, initially brought their complaint to a female professor on October 13, 2004, telling her that their student-teaching supervisor (a male University professor) had made them feel uncomfortable. For example, the students stated that the supervisor had lengthy phone conversations with them late in the evening during which he asked a lot of personal questions. One stated that the supervisor met with her for an inappropriately long amount of time after he observed her student teaching, asked her numerous personal questions, sat close to her, and inappropriately complimented her. She reported that, while walking her out to her car, he suggestively asked her if she had a boyfriend. Another student reported that he forced her to meet with him alone, and repeatedly demanded that she "perform" her student teaching or he would fail her, in a suggestive and coercive manner.

The female professor responded by telling the students that the supervisor's conduct had been going on for many years, but that since he had tenure, she did not know what

could be done. She told them it would be extremely difficult to change supervisors, and instead advised them to keep the door open when meeting with him, to avoid being in a room alone with him, to schedule supervisor conferences with staff from their school site, and to avoid wearing revealing clothing when meeting with the supervisor. The professor also instructed at least one of the complainants to contact the department chair with the allegations, and she copied a sexual harassment policy flyer that she had seen posted nearby and gave it to two of the complainants. She did not notify the EEO or SJS Director, nor did she inform the students that the University had a legal obligation to respond to their allegations, as required by the University's policy.

After the complainants' discussion with the professor, Student 1 called the department chair, who instructed her to contact the College of Education's Dean. She called the Dean and requested a meeting. At about the same time, Student 3 reported to the principal of the school where she was student teaching that the supervisor was making advances towards her and was making her uncomfortable. The principal told OCR that she had met the supervisor shortly before, and was likewise disturbed by his conduct, which she found inappropriate.

While speaking with Student 3, the principal called the University's Chancellor, who referred her to the EEO Director and the Dean. The principal and Student 3 told the Dean their concerns. The principal informed the Dean that she did not want the supervisor on her campus, and the Dean agreed to change his assignment. The Dean contacted the supervisor to inform him that he was being removed from his supervisory (but not his teaching) duties.

The Dean scheduled a meeting for the following Monday, October 18, to discuss the students' allegations with them. She also contacted the EEO Director, who indicated that she would attend the October 18 meeting. Before the meeting, the EEO Director spoke with the principal of the school site who told the Director that the supervisor had asked a teacher at the school if she was the kind of dancer that "danced on the table." The EEO Director asked the teacher to come to the October 18 meeting.

When introduced to the complainants on October 18, the EEO Director told them that she was an attorney, but was not representing the University. She interviewed each separately, asking how the supervisor had made them uncomfortable, and how the female professor had responded to their complaints. The students told OCR they felt they were being "interrogated." One stated to OCR that the EEO Director was accusatory and intimidating, and that she felt that the EEO Director did not take her seriously. The students stated that, when they described the supervisor's inappropriate and offensive behavior, the EEO Director attempted to re-characterize the conduct in order to make it seem appropriate and suggested that the students were misinterpreting the supervisor's behavior. Similarly, the teacher felt that the EEO Director was serving as the University's attorney rather than a neutral investigator and was dismissive. The

students also felt that she focused primarily on the female professor's conversation with them, instead of on the supervisor's alleged harassment.

After the October 18 interviews, but before other witnesses were interviewed and the investigation was completed, the EEO called the principal and asked her if she would accept the supervisor back at the school. The principal responded by stating that she never wanted him on her campus again.

The EEO Director also interviewed the supervisor, the female professor, the Dean, other teachers at the student-teaching site, the current and former department chairs, and approximately eleven other students supervised or taught by the supervisor. She interviewed some of these students at the supervisor's and complainants' request, and others she selected herself.

The notes from her October 27 interview with the supervisor reflect that she told him that the "worst case scenario if [the] allegations [were] true" was that it did "not rise to level of sexual harassment" but that his conduct was not appropriate and that he would be on notice not to do it in the future. This occurred before the EEO Director had interviewed other staff, teachers, students and faculty.

The EEO Director told OCR that many students described the supervisor as obnoxious but did not report any sexually explicit statements. She said that one student reported that he asked her some "weird questions" like "are you Daddy's little girl?" Other students told the EEO Director that the supervisor asked them inappropriate personal questions (for example, he asked one if she was "intending on having children soon"), and that "everyone knew" not to be in a room alone with him. The Director indicated in her interview with OCR that, while these kinds of statements were of some concern, they were not particularly relevant to her analysis of the students' complaint.

By mid-December, about two months after they were interviewed, the student complainants had not heard from the EEO Director. One of the complainants called the EEO Director in the middle of December to ask about the status of the investigation. The EEO Director told her that she would get back to her in a week or two, but the complainants heard nothing until mid-February, after they had filed their OCR complaint.

The EEO Director issued a Report of Findings to the Dean on January 28, 2005 and to the file on February 11, noting that her investigation was delayed due to problems reaching witnesses, especially during vacation periods. Her reports indicate that she found many of the students' allegations to be true. She concluded that the supervisor "has a pattern of asking some of his female students inappropriate personal questions and that such questions have made the students very uncomfortable." However, she found that the evidence "does not support that [the supervisor] has engaged in any *quid pro quo* harassment, i.e., that he has either directly or impliedly required female students to engage in any sexual conversation or conduct in order to pass his class or

supervision.” The reports do not address whether, even if the supervisor did not condition education benefits on submission to sexual conduct, he engaged in sexual or gender based harassment that created a hostile education environment for the students.

The supervisor received a report of findings on February 9. He was informed that his conduct did not rise to the level of sexual harassment, but that it was inappropriate and unprofessional. He was warned that, if he repeated the conduct in the future, it could be considered sexual harassment under a hostile environment theory. The supervisor received a written reprimand from University administrators on February 11, 2005, and was warned that future misconduct could result in discipline, including termination. The complainants were notified of the findings by letters dated February 10, in which they were advised that the supervisor’s conduct “does not rise to the level of sexual harassment under CSUEB policy or under federal or state law (under either a quid pro quo or hostile environment theory).” The letters did not address the female professor’s response when the students initially reported the problem, which the complainants perceived as part of their complaint.

The EEO Director acknowledged that a hostile environment theory was not addressed in the findings. She stated, however, that she did a hostile environment analysis, considering whether there was “egregious conduct” and whether there was a pattern and practice of conduct that made it “so impossible for a reasonable woman to be a student in the environment.” She found there was no such conduct. She stated that she and the administration decided that the faculty member would no longer supervise student teaching, but that he would still teach courses because there were no issues regarding his classroom behavior.

The EEO Director also concluded in separate findings that the female professor’s response to the complainants’ allegations violated University policies. She concluded, however, that the professor ultimately acted appropriately by instructing the students to go to the department chair and by giving them a copy of the sexual harassment flyer. The professor received an oral reprimand from the Dean.

### **Analysis**

The University’s sexual harassment complaint procedures provide for prompt and equitable resolution of sex discrimination allegations, including sexual harassment. On their face, therefore, the procedures comply with Title IX’s requirements. OCR further examined whether the University’s response to the complainants’ allegations in this case was appropriate and sufficient, including whether the implementation of the complaint procedure provided a prompt and equitable resolution of the students’ allegations.

OCR concluded that, to a substantial degree, the response complied with Title IX regulatory requirements. An institution's response to a complaint of sex discrimination must be prompt and thorough. The Title IX regulations do not prescribe a specific timeframe that constitutes a prompt response to a discrimination complaint. OCR determines whether the amount of time taken to complete an internal complaint proceeding is reasonable under the circumstances. The Director of EEO initiated the investigation promptly by meeting with and interviewing the complainants, the supervisor, and several other witnesses by the end of October -- within two weeks of learning of the allegations. The findings were not issued, however, until February 2005. The Director stated that the investigation was prolonged because of difficulties contacting a number of witnesses during University breaks. Considering all of the circumstances, OCR concluded that the length of time for the University's response was not unreasonable. OCR also concluded that the investigation was thorough. In addition to the complainants and the supervisor, the Director of EEO interviewed numerous students and a variety of administrators. There was no evidence that the Director failed to interview necessary witnesses. Additionally, the evidence showed that the University took appropriate action to end the harassment by removing the alleged harasser from supervisory responsibilities and by addressing the female professor's incorrect and inappropriate response to the students' initial complaint.

However, there were several aspects of the response that were not consistent with Title IX requirements. First, an institution's complaint procedures and its response to allegations of harassment must be equitable. One element of an equitable process is ensuring that the individuals who file a complaint are kept apprised of the status of the investigation. When the students were interviewed on October 18, they were given little information about how the investigation would proceed. Having had no contact from the EEO Director, the students had the impression that the investigation was finished, until one of them called her in mid-December. The Director then said she would contact the students in a week or two, but did not contact them until the findings were issued in February. The complainants were completely uninformed as to the status of their complaint, and believed that several of the questions they had raised (such as the female professor's initial response to them and the supervisor's alleged prior history of harassment) were not investigated, when that was not the case.

Another element necessary for an equitable process is impartiality. OCR found indications that the EEO Director did not approach the investigation in a completely impartial manner. The complainants and the teacher were consistent in describing the questioning they experienced as accusatory, and as seeming to discount or reinterpret the significance of what they were saying about the supervisor's conduct. The school principal expressed similar concerns. Also, after the Director's interviews with the complainants, and before the rest of the investigation was initiated, she took steps to have the supervisor restored to his assignment at the school site. Further, she told the supervisor that his conduct did not rise to the level of sexual harassment long before the investigation was completed.

Additionally, an institution must apply appropriate legal standards in determining whether unlawful discrimination has occurred. The Director told OCR that she did consider the evidence under a hostile environment standard. However, there are indications that she did not consider all of the relevant factors to determine whether the supervisor's conduct was sufficiently severe, persistent or pervasive to result in the limitation or denial of education benefits and services. For example, it is unclear how much significance was given to the effects that the environment had on the students, or whether she factored into her analysis harassing conduct that was not explicitly sexual but that was otherwise inappropriate and based on gender. The EED Director's findings stated only that the Director had not found "quid pro quo" harassment because he had not required female students to engage in sexual conduct to pass his class.<sup>2</sup>

Further, although the University's sexual harassment complaint procedures comply with Title IX on their face, the fact that there are several different discrimination complaint procedures, and investigators are not always assigned in a manner consistent with the sexual harassment procedure, raised concerns about whether the system is confusing for individuals wishing to file complaints. Complainants may not understand which procedure to use, with whom their complaint should be filed, and who will investigate their complaint.

Finally, the University has not appointed and published notice of the identity of a Title IX Coordinator. It is therefore not in compliance with 34 C.F.R. § 104.7(x).

During OCR's investigation, Student 3 also alleged retaliation by the female professor with whom the complainants first lodged their complaint at the University. Title IX's implementing regulations prohibit recipients from retaliating against individuals who have engaged in protected activity, such as filing discrimination complaints. OCR investigated this issue and determined that the evidence did not establish retaliation.

For the reasons explained above, OCR concluded that the University did not fully comply with Title IX and its regulations. To resolve this, the University signed a resolution agreement on June 23, 2005. In this agreement, the University has agreed to 1) identify a Title IX Coordinator and disseminate his or her contact information campus-wide, 2) modify its policies and procedures for investigation assignment consistent with its practices, 3) develop a system for tracking all reports and complaints of sexual harassment, and 4) provide training to relevant administrations administrators on their specific responsibilities under Title IX. A copy of the agreement is attached to this letter.

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<sup>2</sup> In applying the Title IX regulations, rather than using specific labels (such as "quid pro quo") OCR determines whether the harassment rises to a level that denies or limits a student's ability to participate in or benefit from the school or college's program based on sex. As stated above, this can occur either when an employee conditions an educational benefit or service on a student's submission to unwelcome sexual conduct or, even if not, whether the conduct was sufficiently severe, pervasive or persistent to create a hostile education environment for the student.

Page 9 -- (09-05-2028)

OCR has concluded that the actions agreed to by the University will, if appropriately and timely implemented, resolve the University's non-compliance with respect to the issues in this case. OCR will monitor the implementation of this agreement, and is closing the investigative phase of this case as of the date of this letter. The complainants are being notified concurrently. Upon successful completion of the requirements of this agreement, OCR will issue a final compliance letter to the University pertaining to the issues resolved in this complaint under Title IX.

OCR thanks the University for its assistance in resolving this complaint. If you have any questions about this letter, please contact Julio Sivula Roiter at (415) 556 4150.

Sincerely,

  
Stella Klugman  
Team Leader

RECEIVED  
U.S. Dept of Education

California State University East Bay  
Resolution Agreement  
OCR No. 09-05-2028

JUN 27 2005  
Office for Civil Rights  
San Francisco Office

In order to resolve the issues raised in the above-referenced complaint filed with the U.S. Department of Education, Office for Civil Rights (OCR), California State University East Bay (University) agrees to take the actions outlined in this Resolution Agreement.

1. By Oct. 31, 2005 the University will designate one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX, and will notify all its students and employees of the name, office address and telephone number of the appointed employee. This notice will include a statement that the University prohibits sex-based discrimination, including sexual harassment, and that it is committed to resolving, in a prompt, equitable and impartial manner, all reports and complaints of sex-based discrimination and sexual harassment it receives. The notice will also explain how to file a sex discrimination complaint. Within 30 days of the signing of this agreement, the University will provide a draft of the notice to OCR for its review and approval. Within 14 days of OCR's approval, the notice will be disseminated to students and posted on the University's website.
2. The University will review and revise its policies and procedures to ensure that they (a) explicitly identify the administrator(s) responsible for investigating sexual harassment and sex discrimination complaints in a manner that is consistent with the University's practice, (b) address the appropriate actions to be taken if it is determined that an investigation cannot be completed within the timelines provided in the procedures, and (c) ensure that complainants receive periodic notice of the status of their complaints. By Nov. 30, 2005, the University will provide OCR with a draft of the revised procedures, and will adopt, publish and implement the revised procedures within 15 days of OCR review and approval.
3. By Dec. 31, 2005, the University will develop and implement a confidential campus-wide system for tracking all reports and complaints of sexual harassment, to enable it to address and prevent repetitive harassing behavior. The University will provide OCR with documentation confirming the University has taken this action, with a narrative description of the system as well as a description of how the University will monitor the information in the system.
4. By Nov. 30, 2005, the University will provide in-service training by a qualified professional to University administrators responsible for responding to and investigating sexual harassment complaints. The training will address: methods for objectively and impartially conducting investigations, how issues of confidentiality should be handled, communications that are appropriately made to complainants during the course of an investigation, and the standards for determining when conduct of a sexual nature or conduct based on sex is sufficiently serious to deny or limit educational benefits or services. By Dec. 15, 2005, the University will provide documentation to OCR that this training has been completed.

California State University East Bay  
OCR Docket No. 09-05-2028  
Resolution Agreement  
Page 2 of 2

Dated: 6/23/05

  
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Vice President Richard Metz