



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS, REGION IX

DEC 29 2008

Dr. Benjamin Duran
Superintendent/President
Merced College
3600 M Street
Merced, California 95348

(In reply, please refer to case no. 09-07-2037.)

Dear Dr. Duran:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its resolution process for the above-referenced complaint against Merced College. The complainant¹ alleged that a College instructor discriminated against her on the basis of sex and retaliated against her while she was a student in a College Program. The issues OCR investigated are as follows.

- 1) Whether the College provided a prompt and equitable resolution to the complainant's internal complaints of sexual harassment and retaliation, including reaching the appropriate determination as to:
 - a. whether the instructor (I.) discriminated against the complainant on the basis of sex by creating a sexually hostile environment in the Program; and
 - b. whether I. retaliated against the complainant for complaining about his sexual harassment by initially delaying her make-up exam, and then refusing to grade it until she submitted documentation regarding her absence that was not required of other students.

During the course of the investigation the complainant further alleged that I. continued to retaliate against her for pursuing the internal complaints of sexual harassment and retaliation, and against student witnesses who testified on her behalf. Therefore, OCR also examined the following.

- 2) Whether the College provided a prompt and equitable resolution to additional allegations of retaliation by I., including reaching the appropriate determination as to whether he retaliated against the complainant and other student witnesses for pursuing an internal complaint or testifying during the internal complaint processes.

¹ We notified the College of the identity of the complainant when the investigation began. We are withholding her name from this letter to protect her privacy.

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

At the time the complainant filed her complaint with OCR she had previously filed internal complaints with the College, which were processed during OCR's investigation. OCR examined all records of these internal procedures, including interview notes, investigative reports, and hearing tapes. OCR also gathered evidence through interviews with the complainant and College personnel, and through review of additional documents submitted by the complainant and the College. OCR concluded that the evidence established that the College failed to comply with Title IX and the applicable regulations with respect to some aspects of its resolution of the complainant's internal complaints of sexual harassment and retaliation. The College took action over the course of the investigation that resolved a number of the identified areas of non-compliance. The remainder will be resolved through a Resolution Agreement with OCR. The applicable legal standards, the facts gathered during the investigation, and the reasons for our determination are summarized below.

Legal Standards

Title IX, at 20 U.S.C. 1681, and its implementing regulations, at 34 C.F.R. §106.31, prohibit discrimination based on sex by recipients of Federal financial assistance. Colleges are responsible under Title IX and the regulation for providing students with a nondiscriminatory educational environment. Sexual harassment of a student can result in the denial or limitation, on the basis of sex, of the student's ability to participate in or receive education benefits, services, or opportunities.

Colleges provide program benefits, services, and opportunities to students through the responsibilities given to employees. If an employee who is acting, or reasonably appears to be acting, in the context of carrying out these responsibilities either (1) conditions an educational decision or benefit on a student's submission to unwelcome sexual conduct, or (2) engages in sexual harassment that is sufficiently serious to deny or limit a student's ability to participate in or benefit from the program, the college is responsible for the discriminatory conduct whether or not it has notice. A college is not directly responsible for sexual harassment of a student by an employee if the conduct occurred outside the context of the employee's job responsibilities. However, under Title IX and the regulations, if a college knew or reasonably should have known about this type of harassment, it is responsible for determining what occurred and responding appropriately.

In determining whether a hostile environment based on sex has been created, OCR evaluates whether or not the conduct was sufficiently serious to deny or limit the student's ability to participate in or benefit from the college's program. OCR examines all the circumstances, including: the type of harassment (e.g. whether it was verbal or physical); the frequency and severity of the conduct; the age, sex and relationship of the parties; the setting and context in which the harassment occurred; whether other incidents have occurred at the college; and other relevant factors.

Under Title IX and the regulation, if a student is sexually harassed by an employee, the college is responsible for determining what occurred and responding appropriately. OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt, thorough, and effective. What constitutes a reasonable response to harassment will differ depending upon the circumstances. However, in all cases the college must conduct a prompt, thorough and impartial inquiry designed to reliably determine what occurred. If harassment is found, it should take reasonable, timely, age-appropriate, and effective corrective action, including steps tailored to the specific situation. The response must be designed to stop the harassment, eliminate the hostile environment if one has been created, and remedy the effects of the harassment on the student who was harassed. The college must also take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate. A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment.

Other actions may be necessary to repair the educational environment. These may include special training or other interventions, the dissemination of information, new policies, and/or other steps that are designed to clearly communicate the message that the college does not tolerate harassment and will be responsive to any student reports of harassment. The college also should take steps to prevent any retaliation against the student who made the complaint or those who provided information.

The Title IX regulations, at 34 C.F.R. §106.71, incorporate 34 C.F.R. §100.7(e) of the regulations implementing Title VI of the Civil Rights Act of 1964 and prohibit colleges from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Title IX. When OCR investigates an allegation of retaliation, it examines whether the alleged victim engaged in a protected activity and was subsequently subjected to adverse action by the college, under circumstances that suggest a connection between the protected activity and the adverse action. If a preliminary connection is found, OCR asks whether the college can provide a nondiscriminatory reason for the adverse action. OCR then determines whether the reason provided is merely a pretext and whether the preponderance of the evidence establishes that the adverse action was in fact retaliation. If student complaining of sexual harassment or others participating in the process are subjected to retaliation, the college is obligated to determine what occurred and respond appropriately in a manner consistent with the responsive process outlined above.

In addition, the Title IX regulations establish procedural requirements that are important for the prevention and correction of sex discrimination, including sexual harassment and retaliation for assertion of Title IX rights. These requirements include issuance of a policy against sex discrimination (34 C.F.R. §106.9) and adoption and publication of grievance procedures providing for the prompt and equitable resolution of complaints of sex discrimination, including retaliation (34 C.F.R. §106.8(b)). OCR examines a number of factors in evaluating whether a recipient's grievance procedures are prompt and equitable, including whether the procedures provide for the following: notice of the procedure to students, and employees, including where to file complaints; application of the procedure to complaints alleging harassment by employees, other students, or third parties; adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; designated and reasonably prompt timeframes for major stages of the complaint process; notice to the parties of the outcome of the complaint; and an assurance that steps will be taken to prevent recurrence of any harassment and to correct its discriminatory effects. The regulations also require that recipients designate at least one employee to coordinate compliance with the regulations, including coordination of investigations of complaints alleging noncompliance (34 C.F.R. §106.8(a)).

Factual Summary

The Program in which the complainant was enrolled is 29 consecutive months in length, comprised of five semesters and two 12-week summer sessions. Program requirements include lecture/theory and lab/practicum classes that take place on campus, as well as assignment to a minimum of three different clinical facilities over the course of the Program. At the time this complaint was filed, classes were primarily taught by the Program Director or I., who was the Clinical Coordinator as well as an instructor. Each group of students that go through the Program is called a "cohort," and all cohorts attend classes with both instructors.

OCR's investigation showed the following:

Existing Policies and Procedures

- The College has general policies prohibiting discrimination on various bases, including sex. It also has more specific policies prohibiting sexual harassment, and prohibiting retaliation for filing a sexual harassment complaint or participating in such an investigation. The policies direct students to contact the College Equal Opportunity Officer (EEO) to resolve alleged acts of discrimination or harassment.
- At the time this complaint was filed, students were notified of these policies through the College catalog, the Schedule of Classes, and postings around campus. Employees also received regular notice of the policy, and biennial sexual harassment training. These publications also named a Title IX Coordinator (apart from the EEO) for inquiries regarding Title IX compliance.

- At the time the complaint was filed, the College reported that its informal and formal process for resolving sexual harassment complaints is outlined in Title V of the California Code of Regulations, sections 59327-59328². The College had no written procedure documenting its complaint process apart from a one-page flowchart entitled Merced College Unlawful Discrimination Complaint Process. The flowchart outlines basic steps of informal resolution, fact-finding investigation and determination, and appeal rights. Some steps contain timeframes, some do not. The flowchart implies that informal resolution must be attempted before a formal complaint may be filed.
- The College noted that, in practice, a student would meet with the EOO to discuss allegations of discrimination. At that meeting, the EOO would explain the informal and formal process and provide a packet of information with the flowchart.
- The College has a separate complaint procedure entitled Merced College Student Grievance Procedures. At the time this complaint was filed, the Procedures applied when a student felt subjected to unfair action, or was denied rights stipulated in College policies or procedures. The Procedures contained contradictory language regarding whether acts of discrimination were covered.
- The Student Grievance Procedures required a complainant to attempt informal resolution before proceeding formally, and provided for a hearing once a formal "grievable act" is alleged. The Procedures placed the burden on a complainant to prove his or her case at hearing.
- Student publications such as the Catalog and Schedule of Classes did not contain notices describing the various complaint procedures available. Instead, the publications directed students to contact the EOO or the Title IX Coordinator to obtain copies of the proper procedure.

2006-2007 Academic Year

- The complainant entered the Program in fall 2005. On September 28, 2006, the complainant called the Program Director to report that she needed to be absent from a scheduled exam in I.'s class on September 29 because of family illness.
- On September 28, 2006, the complainant also notified the Program Director that I. had approached her in class in Spring 2006 and whispered a statement she interpreted as a sexual innuendo, and that in August 2006 he had touched her inappropriately during a demonstration in a lab class.
- The same day, the Program Director notified the Intern Dean of Instruction over the Program (Intern Dean), and took the complainant to meet with him. The Intern Dean encouraged the complainant to file a complaint, if she wished to.
- The complainant emailed the Intern Dean after her meeting with him, outlining a number of concerns about I. These concerns included her observation that I. was unprofessional and frequently absent, that he intimidated students, and that

² These sections outline a process for responding to discrimination complaints that has been prescribed by the Chancellor's Office of the California Community Colleges.

he made inappropriate comments about females. The complainant wanted her identity to remain confidential at that point.

- The Intern Dean replied that he would keep the email confidential, that the complainant should continue to document her concerns, and that other students should feel free to notify him if they were experiencing similar concerns.
- On September 29, 2006, the Program Director emailed a number of administrators, including the Intern Dean, the Vice President of Instruction (VP/I), the Vice President of Student Personnel Services (VP/SPS), the Vice President of Administration Services (VP/AS), and the Division Chair over the Program. The email did not specifically mention allegations of sexual harassment, but stated that some students and the Program Director were forced to tolerate a “hostile environment” when interacting with I., and asked that action be taken to address the situation.
- On or around the same date another female Program student, F1, also emailed the Intern Dean with a list of general concerns about I.’s professionalism, which did not include allegations of sexual harassment. However, F1 also forwarded an anonymous email from another female student (F2) in I.’s class who wrote that I. had touched her inappropriately during a lab, and had acted inappropriately toward her and other female classmates at a College party.
- The Intern Dean, who was new to his position, then met with various administrators about the procedures used to respond to such allegations. He was advised that the student(s) would need to file a written complaint, and that it would be more difficult to address the situation if they wished to remain anonymous. The VP/AS, who is also the College’s EOO, also told the Intern Dean that any student alleging sexual harassment must be provided a packet of written information regarding how to file a complaint.
- The Intern Dean emailed both the complainant and F1 on October 2, 2006, informing them that he wanted to provide them the packet of information on filing a sexual harassment complaint. The message for F1 asked that she forward the packet to F2.
- On the same date, the complainant’s mother emailed the Intern Dean and various administrators and stated that students had been afraid to come forward because of a perception that I.’s abusive and harassing behavior had been historically tolerated by the College administration. The VP/I replied, stating that College administration was taking the complaints very seriously.
- On October 3, 2006, the Intern Dean emailed and met with the complainant, and provided her with a packet of information, including the College’s Student Grievance Procedures and the flow-chart outlining the Unlawful Discrimination Complaint Process. The Intern Dean informed the complainant that two Vice Presidents would be meeting with I. regarding the concerns raised by her and other students, but that they said the College could only proceed to a certain point without written statements identifying those who complained.
- On October 4, 2006, the VP/I and the VP/A met with I. regarding the concerns raised by students about him. On the following day, the complainant and F1 reported to the Program Director that I. had come to class and said that he had

initiated the meeting with administrators for another reason. I. reportedly then stated that he had heard rumors that he provided an intimidating environment and had acted inappropriately, but told students that what had been said was immature on the students' part and that nothing would happen as a result. The students stated that I. told the class that if students had a problem with him they should come to him instead of "running to the Dean."

- On October 5, 2006, the Program Director reported the content of her meeting with the two students to the VP/I and the VP/A by email, with copies to the Division Chair and the Intern Dean. She noted that the students feared retaliation if they filed a complaint.
- Between October 12 and November 8, 2006, there were a series of emails between the Intern Dean and/or the Program Director and the complainant regarding whether she wished to file a formal complaint. Both administrators expressed their support of whatever the complainant chose to decide, and indicated their willingness to work with her in the process.
- On October 26 and 27, 2006, there was an email exchange between the Program Director, I., and the Intern Dean regarding I. scheduling a make-up for the exam the complainant had missed on September 29. Despite the Program Director's confirmation that the complainant had left a message about her absence prior to the exam, I. insisted that he be provided documentation of the call and the specific reason that the complainant had to be absent before he would schedule a make-up. The Intern Dean directed I. to schedule a make-up exam without such documentation and explanation of the absence.
- On November 9, 2006, the VP/SPS met with the complainant, her mother, and the Intern Dean. Her notes indicate that the complainant raised general concerns about I.'s professionalism, but also complained about inappropriate touching, delay in scheduling the making-up examination, offensive/intimidating behavior, and fear that I. would sabotage her upcoming exams. The VP/SPS reviewed the Student Grievance Procedures process and told the complainant that it would be very difficult to address her issues without something in writing. The VP/SPS shared the complainant's concerns with the College President, the VP/I, the VP/A, and the Intern Dean by memorandum.
- On November 16, 2006, the VP/A responded to the November 9 memorandum, asking that any documentation of inappropriate touching be provided to him as soon as possible, and stating that such an allegation demands a thorough response.
- On the same date, the complainant was allowed to take her make-up exam.
- On November 16, 2006, the complainant filed the same petition for a grievance hearing (Petition) with three College offices--the Office of Student Personnel Services, the Office of Instruction, and the Office of Human Resources. She noted that some of her allegations would be better resolved by different offices, but that it compromised the total picture to divide them up into different complaints.
- The Petition included a number of issues that relate to I.'s professionalism and instruction, but also raised allegations of sexual harassment experienced by the

complainant and other female students. The Petition also alleged that I. retaliated against the complainant for raising verbal concerns about him by delaying the make-up exam, and that in general students felt vulnerable to retaliation by I. because the College had historically tolerated his behavior.

- The Petition specifically named several current and former students of I.'s, as well as some employees of clinics that he worked with, whom the complainant said described to her incidents of sexual harassment or other inappropriate behavior or comments toward female students.
- As described further below, the College decided to process the sexual harassment allegations raised in the Petition separately through investigation by an outside investigator (Investigator) with experience in investigating this type of complaint. The College processed the remainder of the allegations, including the allegation of retaliation regarding the make-up exam, under the Student Grievance Procedures.
- Even though the complainant had taken her make-up exam on November 16, 2006, I. had not yet notified her of a grade by November 30. When she asked him about it, I. told her that she would not receive a grade until she provided him with cell phone records verifying that she had in fact called the Program Director about her absence prior to the initial exam. I. had been informed of the formal written complaints against him by this time.
- The complainant notified the Intern Dean, the Division Chair, and the Program Director about I.'s refusal to provide her exam grade, and they referred the matter to the VP/SPS who was in charge of the Student Grievance Procedure. The VP/SPS assured the complainant that she would obtain the exam results from I.
- The complainant provided her cell phone records to the VP/SPS and told the VP/SPS that she was only doing so to prove her truthfulness in the matter, and that the records should not be shared with I. Nevertheless, the VP/SPS informed I. of the phone records, and only then did he provide the complainant with her grade. The complainant filed an amendment to her original complaint on January 12, 2007, which included this additional allegation of retaliation. The College added this to the allegations being processed under the Student Grievance Procedures.
- On December 16, 2006, the complainant filed her OCR complaint.
- On January 17, 2007, the complainant requested that I. no longer evaluate her during clinical placement because of her pending complaints against him. The College informed I. that he could continue to make clinical site visits to evaluate other students, but should not evaluate the complainant at least until the Student Grievance Procedure hearing was complete.
- On January 26, 2007, I. emailed the Program Director and other administrators regarding what he characterized as the complainant's "clinic deficiencies." The Program Director responded after looking into the matter, stating that I.'s facts were not corroborated by administrators at the complainant's clinical placement, and that those administrators requested that I. no longer be assigned to evaluate students at that site.

Student Grievance Procedure Hearing

- The Student Grievance Procedure hearing was held on February 7, 2007. Both the complainant and I. were represented by counsel.
- As a part of the Student Grievance Procedure, a copy of the complainant's full November 2006 Petition and all documents she intended to rely on at the hearing were provided to I. approximately three months before the hearing date. These documents included information related to the retaliation allegations, as well as the sexual harassment allegations. As noted above, the documents included personally identifying information about other students and clinical site employees. The College did not provide the complainant with copies of the information I. was to present at the hearing until less than one week before the hearing.
- At the outset of the hearing, complainant's counsel raised a number of concerns, including the following: separating the sexual harassment and retaliation allegations would not yield a complete picture of the hostile educational environment caused by I.; the Student Grievance Procedure had conflicting language regarding its coverage of harassment or discrimination complaints; I. received copies of the complainant's hearing information much sooner than she received copies of his; and it was unfair to place the burden of proof on the complainant.
- Each party presented their case to the hearing committee outside the presence of the other party. The complainant presented first, then left the hearing and I. came in. The committee summarized the complainant's evidence for I., and I. then presented his case. When I. left the room the committee then summarized his evidence for the complainant, and she was allowed time for rebuttal. Each party had opening and closing statements, and presented witnesses and documentary evidence.
- The hearing committee heard testimony from the complainant, I., College administrators, a number of I.'s other students, and several employees or administrators from clinical sites where I.'s students were placed. The student witnesses included F1 and another female student (F3), who testified in support of the complainant. F3 noted that I. had approached her to testify on his behalf.
- Several student or former student witnesses in the hearing process and the sexual harassment investigation noted that I. had made comments to his classes that the College would not take action against him as the result of student complaints. One student witness stated that F2 did not appear as a witness because F2 feared retaliation in her clinical setting.
- Several witnesses who were interviewed during the subsequent administrative investigation of sexual harassment (described below) provided information about I.'s intimidating and retaliatory behavior. This information was not taken into account by hearing committee, however, because the committee had already issued its recommended decision before the sexual harassment investigation was completed.

- On February 23, 2007, the hearing committee issued its Proposed Decision and Recommendation, with a copy provided to the complainant. The committee found that I. had: conducted an informal clinical evaluation of the complainant after being directed not to evaluate her; delayed her make-up exam until he received documentation not required of other students; and intentionally recorded an inaccurate failing grade for the complainant.³ It concluded that I.'s actions constituted harassment; were arbitrary, capricious, and/or improper; and infringed on the complainant's rights as a student.
- The committee recommendations included the VP/I meeting with I.'s students; I. attending anti-harassment training; unannounced student evaluations in each of I.'s classes; and documentation of the findings in I.'s permanent record for a defined time period.⁴
- The complainant appealed the Decision/Recommendation on March 7, 2007, and her concerns included the following: a) the committee should have taken into account evidence submitted at the hearing regarding I.'s sexual harassment as well as retaliation; b) I. was provided with her evidence for review prior to the hearing much earlier than she was provided with his; and c) the determination regarding the make-up examination was factually inaccurate⁵. The complainant also believed that the recommended actions did not go far enough, and requested that I.'s employment be terminated. She stated that, at a minimum, he should be removed from any position of authority over the remainder of her program; that he should formally apologize; and that he should be required to demonstrate through testing that he received adequate training.
- On April 23, 2007, the College President issued the Final Hearing Decision to both the complainant and I. The President did not make substantive changes to the factual findings or conclusions. The President modified the actions to be taken in the following ways: a) the VP/I's meeting with students was expanded to cover all cohorts; b) the unannounced student evaluations were also expanded to cover all cohorts, and the limited time period was removed; and c) documentation would remain in I.'s permanent record, and not be removed.
- The President did not take action to limit I.'s interaction with the complainant or remove his authority to evaluate her performance during the remainder of her program. The complainant still had to complete the remainder of spring session, summer session, and fall session to finish the program. The complainant was subject to I.'s evaluation authority for class or clinic during spring session and the first one-half of summer session.
- On April 25, 2007, the VP/A issued the document that was placed in I.'s personnel file. It outlined the factual findings and the College's determination. The VP/A directed I. to refrain from any form of harassment, retaliation, or other

³ This grade was subsequently corrected.

⁴ The Dean of Instruction assigned to the Program, the VP/I, and the College President comprised the general line of supervisory authority over I.'s position with respect to imposition of any disciplinary action.

⁵ The Decision/Recommendation states that the complainant was not allowed to take the make-up exam until I. was provided the phone records. In fact, I. allowed her to take the exam only after the Intern Dean directed him to do so, but then he refused to grade it until the VP/SPS told I. she had the phone records.

improper action against students or staff, and stated that failure to comply would result in additional disciplinary measures.

Sexual Harassment Investigation

- As mentioned above, while the Student Grievance Procedure process progressed, a parallel process was taking place with respect to the sexual harassment allegations contained in the November 16, 2006 Petition. The Investigator contacted the complainant before the end of November, explained that her sexual harassment allegations would be investigated separately, and set up a meeting for December 1. The complainant later rescheduled this meeting to December 19, and then again to January 2, 2007.
- During the January 2, 2007 meeting, the Investigator interviewed the complainant and had her fill out an Unlawful Discrimination Complaint form. These allegations were then treated by the College as a new complaint, filed that day, that was separate from the November 2006 Petition. The next day, the Investigator provided the complainant with copies of California regulations regarding the College's responsibility to investigate discrimination complaints.
- Over the next three months, the Investigator interviewed ten out of the fourteen students in the complainant's cohort and attempted unsuccessfully to interview three more, including F2. She also interviewed two former students identified by the complainant as witnesses, and attempted to interview a third. Finally, the Investigator interviewed six College administrators and/or faculty members.
- The students interviewed included F1 and F3. F3 specifically told the Investigator that she was concerned about future retaliation by I.
- The sexual harassment investigation focused on sixteen specific examples of alleged sexual harassment or other inappropriate actions by I. that had been identified by the complainant in either her written complaint or her initial interview with the Investigator. The examples included six allegations directly involving the complainant. The remainder concerned incidents or information relayed to the complainant by others. The examples included allegations of inappropriate comments and touching.
- A fair amount of factual information regarding the sexual harassment allegations was contained in the evidence that had been presented at the Student Grievance Procedure hearing. Because that was considered by the College to be a separate process, most of this information, including the witness testimony, was not reviewed by the sexual harassment Investigator. I. requested that the Investigator review his binder of written materials from the hearing, and she did.
- On March 26, 2007, the Investigator provided a written report of her investigation to the VP/A. The VP/A issued a written decision to the complainant and I. on March 30, 2007.
- The written decision outlined factual findings and separate conclusions as to each allegation. As to the allegations involving the complainant, the College found that over the course of C's enrollment I. had: a) once exhibited inappropriate but not sexually harassing conduct; b) once whispered an

- inappropriate and sexually harassing comment; c) touched the complainant's hair one time in a manner that was inappropriate and unwelcome; and d) once touched the complainant in an inappropriate and sexually harassing manner during the demonstration of a skill.
- The College did not find that I. sexually harassed the complainant by attempting to add himself to her electronic mail friends list. The complainant had alleged that I. flirted with her before she filed her sexual harassment complaint and treated her rudely after. As to this allegation, the College did not find that flirting occurred, and noted that any change in the interaction between I. and the complainant was attributable to the filing of the November 2006 Petition, not the sexual harassment complaint, and should have been addressed in the Student Grievance Procedure hearing.
 - Seven of the allegations involving other individuals were not confirmed by the College because the individuals involved could not be contacted or the allegations were not supported by the evidence gathered. These seven included an allegation regarding I.'s inappropriate behavior involving F2 at a College-sponsored party. Of the remaining four allegations, the College found the following: a) an oral complaint that was filed by I.'s class in 2002 which involved I. handing out a sexist cartoon and commentary in class was dealt with appropriately by administrators; b) I. once made a comment to another female student about her clothing that was inappropriate but did not constitute sexual harassment; and c) I.'s conduct in walking another female student to class was unwelcome but did not constitute sexual harassment.
 - The College's written decision concluded that, in the specific instances outlined, I.'s behavior was inappropriate, unwelcome, or constituted sexual harassment. The College considered each incident separately, however, and did not reach a conclusion as to whether I.'s conduct overall created a sexually hostile educational environment for the complainant and other female students. The College also did not include its previous retaliation findings from the Student Grievance hearing in an overall assessment of hostile environment.
 - The notice of decision to the complainant stated that the College would take "appropriate disciplinary measures" but that the details were confidential personnel matters. The complainant was advised that any future retaliation by I. was prohibited, and that she should contact the VP/A immediately if retaliation occurred.
 - The notice of decision to I. informed him that a copy of the notice would be placed in his personnel file, and states that any further inappropriate, unwelcome, and/or sexually harassing behavior could result in additional discipline, up to and including termination. The notice also states that any retaliation against the complainant or witnesses was prohibited.
 - Despite the sexual harassment investigation findings, the College again did not limit I.'s interaction with the complainant or remove his authority to evaluate her performance during the remainder of her program.
 - On April 16, 2007 the complainant appealed the sexual harassment decision, raising two major concerns. The appeal noted that the College failed to analyze

the separate instances of sexually harassing or inappropriate behavior together, and made no finding on the issue of whether I. had created a sexually hostile environment. In addition, it stated that the findings were incomplete because some witnesses were not contacted or were not able to be contacted, and because the College did not take the Student Grievance hearing evidence into account in reaching its sexual harassment decision. It also pointed out that the 2002 complaint was written, not oral as stated in the College's decision

- In addition, the appeal noted that the complainant's allegation regarding I. treating her rudely after filing her November 2006 petition should have been investigated under this process because the original Petition had also included her sexual harassment allegations.
- On May 29, 2007, the College notified the complainant in writing that the College Governing Board had approved and adopted the administrative determination of her sexual harassment complaint, and that she had the right to appeal to the Chancellor's Office.
- I. wrote a memorandum to the VP/A on April 19, 2007 in response to the sexual harassment decision and requested that the memorandum be placed in his personnel file. I.'s counsel also responded to the decision by letter dated April 23, 2007. Taken together, these documents contest the College's decision on several counts, and request that the College reopen the investigation and remove the negative letter from I.'s personnel file. By letter dated May 10, 2007, the College replied that it would not reopen the investigation.

Additional Information Gathered by OCR

- In addition to reviewing the College's investigative materials, OCR interviewed a number of administrators and some faculty members regarding their knowledge of past complaints of either retaliation or sexual harassment by I.
- OCR established that the complaint filed by I.'s class in May 2002 was written, not oral, and obtained a copy from a witness. In the written complaint, among other concerns, the students described the same comments made by I. that they had related during the hearing and investigation -- comments in which I stated that the College would never take disciplinary action against him.
- Administrators and faculty members interviewed did not recall any other past complaints of retaliation, but several acknowledged that they had heard from others that I. made statements to students similar to the one noted in the May 2002 complaint. No one was aware of any concrete action taken in response to such statements by I.
- The May 2002 complaint did not include allegations of sexual harassment, but did complain of a cartoon I. handed out in class that was sexist and derogatory concerning women's roles.
- Most administrators and faculty members interviewed also did not remember any past reports of sexual harassment by I. One witness told OCR that I. had been removed from the lab at some point because students were not comfortable with the way he was touching them. However, the witness did not remember what

year this allegedly occurred, what students were involved, or what administrators were involved. The witness had no documentation of the incident, and no other faculty members or administrators interviewed had knowledge of this alleged incident.

- OCR also reviewed I.'s personnel file, including copies of past student evaluations, and it contained no documentation of previous retaliatory or sexually harassing conduct by I.

College's Responsive Actions and Subsequent Events During 2007-2008

- In sum, the following responsive action resulted from the College's combined retaliation and sexual harassment decisions: documentation of the decisions and College action were placed in I.'s personnel file; anti-harassment training; the VP/I was to meet with students in the Program annually to inform them of their rights and provide an opportunity to voice any concerns; and an unannounced student evaluation for all Program classes.
- After meeting with the Faculty Association, the President decided to have the VP/I administer a student survey to Program students, rather than unannounced student evaluations.
- In terms of implementing the responsive action, the VP/A was responsible for responding to any future allegations of sexual harassment or related retaliation. The VP/I was responsible for meeting with students in the Program and conducting the student surveys. The President was responsible for locating and arranging for I.'s training.
- I. remained the instructor for the complainant and her class, including F1 and F3, for a non-clinical class during the spring session. The College stated that there were only two full-time instructors in the Program, and the Program Director had other class assignments.
- Neither the complainant nor F1 raised allegations about I.'s conduct in this class during spring 2007 session. However, on April 29, 2007, F3 emailed the Program Director and stated that she felt harassed and ridiculed by I.'s email exchanges with F3 from late-March forward regarding this class. The Program Director referred F3 to the Intern Dean and the VP/SPS.
- On May 21, 2007, F3 met with the VP/SPS and reported that her prior relationship with I. had been excellent, but had deteriorated in a number of ways since F3 testified on the complainant's behalf at the Student Grievance Hearing.
- The VP/SPS reviewed the Student Grievance Procedure with F3, and referred her to mediation (a required step in that procedure). The mediator met with both parties, F3 and I., separately and together in late May 2007. The mediation summary indicates that the parties reached agreement to resolve the matter.
- Other administrators, including the VP/A and the VP/I, received general information that F3's allegations were being processed by the VP/SPS as a student grievance and that they were in mediation. However, the administrators did not consider the allegations as possible retaliation against a witness who testified on the complainant's behalf under both previous procedures. As a

- result, F3's allegations were not reviewed in the context of the ongoing monitoring of I.'s conduct and the College's previous disciplinary directive that he no longer engage in retaliation against students.
- The spring session ended on May 25, 2007, and the summer session began on May 29. The complainant and others in the intern class, including F1 and F3, had I. as their instructor for the first half of the summer session, and the Program Director taught the second half of the session. F3 did not raise additional concerns about retaliation during summer session.
 - On July 2, 2007, the College hired a new Dean of Instruction (New Dean) who was assigned to the Program Division. The New Dean was made aware of the Student Grievance hearing decision and the sexual harassment investigation decision involving I., but responsibility for monitoring I.'s conduct and enforcing the College's responsive action was assigned to higher-level administrators--the VP/A, the VP/I, and the President.
 - The New Dean, who was I.'s direct supervisor, was not directed to have a heightened awareness regarding I.'s conduct toward students, received no information about the student survey, and was not told what type of training I. was required to attend.
 - The summer session ended on August 9, 2007. The complainant indicated to OCR that she had no contact with I. in terms of classes or clinical evaluations after the first half of the summer session. Fall session ran from August 10 through mid- December 2007.
 - The VP/I met first with Program cohorts in late August/early September 2007, and explained the Student Grievance Procedure and the Sexual Harassment Complaint Process. He told students that retaliation against a student submitting a grievance or harassment complaint would not be tolerated. The VP/I did not clarify that discrimination and discrimination-related retaliation complaints should not be processed under the Student Grievance Procedure.
 - By letter to OCR dated September 10, 2007, received as a cc: by the College on September 24, the complainant alleged that since the time of the Student Grievance hearing and the sexual harassment investigation, I. had retaliated against her and others who participated. She specifically alleged that I. gave F1 and her inaccurate and negative Clinical Evaluation Summary ratings for their summer 2007 clinical performance, and that F3 received a similar negative clinical evaluation.
 - The VP/SPS wrote the complainant and F3 letters, dated October 3, 2007, acknowledging receipt of the September 10 letter. The VP/SPS stated that the College would be investigating the allegations, offered to meet with both students, and asked that they contact her by October 9 if they wished to meet. Otherwise, she stated the investigation would be based on the facts set forth in the letter.
 - Neither the complainant nor F1 responded to the letter from the VP/SPS. The complainant stated that she did not receive it until October 10, 2007, which was after the meeting deadline stated in the letter.

- The VP/SPS also left voice-mail messages for F1 and F3, asking them to call her regarding the allegations in the September 10, 2007 letter. F1 returned the call on October 18, and stated that she would provide her information through that voicemail message. F1's message stated that she believed I. had treated her differently in the evaluation process since she testified on behalf of the complainant, and that he had given her a negative rating on her summer 2007 Clinical Evaluation Summary in retaliation for her participation as a witness.
- By letter dated October 22, 2007, the VP/A reminded the complainant of the College's previous findings, and of his previous statement to the complainant that any retaliation by I. was prohibited. The VP/A asked the complainant to contact him immediately if I. exhibited retaliatory behavior.
- The VP/SPS wrote F1 a letter, dated October 23, 2007, as a follow-up to the voicemail message exchange. The letter stated that the College would create a transcript of F1's voicemail for use in the investigation of the clinical evaluations, and that it would review past and current clinical evaluations for possible inconsistencies. The VP/SPS again offered to meet with F1.
- In October 2007, the complainant became aware that I. was requesting that his office hours be changed because, he alleged, the complainant was "abusing them." The complainant also became aware that I. was spreading rumors that she had assaulted him. These allegations were then added to the College's investigation. The Investigator who investigated the original sexual harassment allegations was assigned to conduct the investigation.
- Meanwhile, the VP/I met again with the cohorts in mid-October 2007, and distributed anonymous student surveys to be completed outside the presence of instructors. The VP/I clarified to students that they were not required to file a new grievance or complaint if they experienced retaliation from participating in a previous grievance/complaint. Rather, they were directed to just contact the VP/A.
- At the time of the survey, there were three cohorts---freshman, sophomore, and intern (the complainant's class). The freshman and sophomore cohorts had generally positive responses. The intern cohort responses were much more mixed between negative and positive. Two interns made negative comments about I., but there were no responses specifically relating to sexually harassing conduct/comments by I., or to retaliatory conduct.
- The VP/I reviewed the survey results and concluded there was no information that warranted additional action by the College. He felt that the general concerns raised about I. were already being dealt with through actions resulting from the complainant's grievance and sexual harassment decisions.
- With respect to the training requirement, the President began researching possible trainings and discussing the training with I., but stated that this training was delayed because of the additional allegations of retaliation that arose and a visit from an external review committee that took place in fall 2007. The President stated that these issues took priority at the time.
- On October 29, 2007, a team from the external review committee visited the College and performed an unannounced site evaluation of the Program. It

issued findings on November 19, covering a number of issues. With respect to sexual harassment and retaliation, the team reported that the College had found that I. sexually harassed students and engaged in arbitrary and capricious actions, but there had been only minimal action taken to assure the same type of behavior did not persist.

- In November 2007, the Investigator conducted her investigation of the new retaliation allegations against I. Regarding F3, the investigator reviewed documentation of F3's initial report of the problem to the VP/SPS, and interviewed I. With respect to the clinical evaluation summaries, the investigator reviewed several sets of I.'s summaries, analyzed student absences, and reviewed attendance policies. The investigator also reviewed facts contained in the complainant's September 10, 2007 letter, and F1's October 18 voicemail to the VP/SPS. Finally, the investigator interviewed I., the Program Director, a College Evaluator in the Program, and a Clinical Evaluator at the clinical placement at issue. As to I.'s alleged false accusations regarding the complainant, the investigator reviewed relevant documentation and email records, and interviewed I.
- The Investigator issued an investigative report to the President on December 4, 2007. The College notified the complainant, F1, and F3 of the findings that pertained to each of them by letters dated December 21, 2007.
- The College found that I. treated F3 differently after she testified at the complainant's Student Grievance hearing, and that his treatment was negative and retaliatory. The notice to F3 stated that the College would take "appropriate disciplinary measures", but that the details were confidential personnel matters. However, the notice informed F3 that I. would be barred from attending her class graduation ceremony, and that he would no longer be teaching in the Program effective spring 2008. No individual relief was provided to F3, nor is there documentation that she requested any.
- With respect to the clinical evaluation summary ratings for the complainant and F1⁶, the College concluded that I. rated the complainant inaccurately solely for the purpose of retaliating against her for having filed her grievance. Likewise, the investigator determined that I.'s rating of F1 was solely for the purpose of retaliating against her for supporting the complainant's grievance. The notice to both students provided the same information regarding corrective action as was provided to F3. In addition, the College noted that it took action to change both students' evaluation documents so that I.'s rating and comments (and their written response) were deleted.
- Regarding I.'s alleged false allegations about the complainant's behavior, the College determined that I.'s October 2007 request for a change in office hours/location because of the complainant had no reasonable rationale, and that the complainant never threatened or assaulted I. The investigator also found that I. had provided inaccurate and derogatory information about the complainant to a

⁶ Even though the September 10, 2007, letter stated that F3 had received a similar negative rating, the sexual harassment investigator found that I. did not rate F3.

College administrator to retaliate against her for filing her grievance. The notice to the complainant outlined these findings and included the same information noted above regarding I. not attending graduation and no longer teaching in the Program.

- Based on the additional findings of retaliation, the College directed I. not to attend the Program graduation ceremony that took place on December 11, 2007, and he did not.
- The College also permanently reassigned I. to teach classes outside of the Program, effective spring 2008. I. filed a grievance regarding his reassignment, which was ultimately denied.
- The three classes comprising I.'s spring 2008 reassignment fell under three different Deans of Instruction, including the New Dean. By memorandum dated January 11, 2008, the VP/I informed the three Deans that the primary oversight and supervision of I. would be assigned to the New Dean. It also noted that each Dean had been apprised that the College would not tolerate any form of sexual harassment or retaliation by I. against students, and that each Dean must be especially sensitive to any concerns that a student may have in these areas. The VP/I also informed the three Division Chairs covering these classes that any student concerns should be directed to the Deans.
- The College states that it no longer plans to conduct student surveys of I.'s classes since he has been removed from the Program. The College noted that students have the choice of taking I.'s currently assigned classes with other instructors instead of I., and two of the classes are held in open areas that are visible to faculty and certificated staff.
- On January 11, 2008, the College responded to the external review team finding that it took only minimal action in response to the allegations of sexual harassment and retaliation by I. against students. It outlined the responsive action that it took as a result of the initial complaints. The College also noted that it more recently had investigated additional allegations of retaliation, removed I. from the Program, and initiated additional disciplinary proceedings.
- In addition to the reassignment of classes the College issued a Statement of Charges and initiated formal disciplinary action against I. in January 2008. The College's Governing Board went forward with the discipline, adopting the Statement on February 5, 2008. I. filed an appeal and the action was settled prior to an administrative hearing.
- I. took leave during spring 2008 session, and was not assigned any classes for summer 2008. The College provided OCR two certificates of completion indicating that I. completed a Discrimination and Harassment Prevention training on June 18, 2008, and a Sexual Harassment training for instructors on August 12, 2008.
- I. returned to the College as an instructor beginning the fall 2008 session. I.'s class assignments remain outside of the Program.
- The New Dean is no longer with the College, but another Dean of Instruction has been assigned to oversee and supervise I. In addition, the VP/I. has retired. His replacement has been briefed regarding the complaints filed against I. and the

College's resulting findings. OCR has not received information indicating that the College has a specified monitoring system in place with respect to I.'s current classes, including a method for soliciting input from students regarding his conduct.

Revised Complaint Procedures

- On November 7, 2007, the College's Governing Board adopted the Merced Community College District Complaints of Unlawful Discrimination Policy and Procedures (BP 3430), replacing the one-page flowchart entitled Merced College Unlawful Discrimination Complaint Process. The newly adopted Complaint Procedures designate the EOO as the responsible officer to receive all discrimination complaints, and requires annual distribution of a copy of the Procedures and information about how to file a complaint.
- The Complaint Procedures provide for both informal and formal resolution of complaints, but the informal process is optional. Once a formal complaint is filed, the accused is notified of the filing and of the "general nature of the complaint." The Complaint Procedures have a one-year filing timeframe; provide for confidentiality of the investigative process; prohibit retaliation; and provide reasonable timeframes for the investigation, determination, and appeal process. The complainant receives a copy of the investigative report and of the College's determination and proposed resolution, and may appeal first to the College Governing Board and then to the Chancellor's Office.
- The Complaint Procedures include a list of threshold requirements that must be met prior to the College initiating an investigation of a formal written complaint. The complaint must be filed on a form prescribed by the Chancellor's Office, and must be filed by "one who alleges that he or she has personally suffered unlawful discrimination or by one who has learned of such unlawful discrimination in his or her official capacity as a faculty member or administrator."
- In November 2007 the College also informed OCR that it was in the process of revising its Student Grievance Procedures. OCR provided input to the College, and the revised Student Grievance Procedures were adopted on January 8, 2008. The revised Student Grievance Procedures (AP 5530) clearly state that they do not apply to complaints of discrimination, including harassment, on protected bases such as race, sex, disability, etc., and refer students to the applicable procedure.

Compliance Determination

Issue 1: Whether the College provided a prompt and equitable resolution to the complainant's internal complaints of sexual harassment and retaliation, including reaching the appropriate determination as to:

- a. *whether I. discriminated against the complainant on the basis of sex by creating a sexually hostile environment in the Program; and*
- b. *whether I. retaliated against the complainant for complaining about his sexual harassment by initially delaying her make-up exam and then refusing to grade it until she submitted documentation regarding her absence that was not required of other students.*

Since the College was actively investigating the complainant's allegations when she filed her OCR complaint, the focus of our investigation centered on assessing whether the College provided a prompt and equitable resolution to her internal complaints. This included a review of the College's written policies and procedures as well as the steps that it took to investigate and resolve the complainant's internal complaints. OCR also reviewed the College's determinations in light of the evidence it gathered, as well as additional evidence gathered by OCR, to assess whether the determinations met OCR legal standards.

With respect to the procedural requirements of the Title IX regulations, OCR found the College in compliance with 34 C.F.R. §106.9 because it has written policies prohibiting discrimination on the basis of sex, including sexual harassment, and it regularly notifies students and employees of these policies. OCR further noted that the College has designated employees, a Title IX Coordinator and the EOO, to coordinate compliance with the regulations and investigation of complaints in accordance with 34 C.F.R. §106.8(a).

However, OCR determined that at the time the OCR complaint was filed the College had not yet adopted and published a grievance procedure providing for the prompt and equitable resolution of sex discrimination complaints, including related allegations of retaliation. The one-page flowchart depicting the Unlawful Discrimination Complaint Process provided inadequate notice to students of the complaint procedure, and implied that informal resolution was required prior to filing a formal complaint. In addition, the Student Grievance Procedures contained language that could be interpreted to apply to discrimination and/or retaliation complaints, and was in fact used to process the complainant's retaliation allegations. However, these procedures contained elements that did not meet the Title IX equitability standard—for example, an informal resolution attempt was required, and the burden of proving the case at hearing was placed on a complainant. Neither of the two procedures was summarized in major College publications such as the Catalog or Class Schedule. For these reasons, OCR found that the College was not in compliance with 34 C.F.R. §106.8(b) at the time the complaint was filed.

In response to student allegations of sexual harassment and related retaliation by an employee, the College must conduct a prompt, thorough and impartial inquiry designed to reliably determine what occurred. OCR determined that College administrators' (specifically the Program Director and Intern Dean) initial response to the complainant's concerns was timely and supportive. The administrators met with the complainant,

encouraged her to file a complaint if she wished, alerted upper-level administration, and provided written information regarding the sexual harassment policy and discrimination complaint procedures. OCR also noted that upper-level administrators met with I. early in the process to reportedly share the concerns raised by the complainant and other students. However, the evidence does not indicate that any interim action was taken against I. in response to his statements in class the following day that these “rumors” were untrue and nothing would happen as a result. This incident, especially when coupled with the complainant’s allegations of retaliation and I.’s previous similar statements, should have alerted the College to monitor I.’s conduct more closely throughout the process.

In addition to the College conveying information to the complainant regarding the discrimination complaint procedures, the College administrator in charge of the Student Grievance Procedures met with the complainant and explained that process. Shortly after this time, the complainant filed the same complaint with three different offices, specifically noting that it compromised the overall view of the situation to divide the allegations into separate complaints. Nevertheless, the College split the allegations and required the complainant to proceed under both the Student Grievance Procedures and the Unlawful Discrimination Complaint Process. Because the complaint also included allegations about I.’s professionalism and teaching, it may have been appropriate to process those allegations under the Student Grievance Procedures. However, the retaliation allegations related back to the complainant’s initial verbal complaint, later reiterated in her petition, which included incidents of alleged sexual harassment. The retaliation allegations therefore should have been processed as part of the sexual harassment investigation under the Unlawful Discrimination Complaint Process, instead of the Student Grievance Procedures.

Use of the Student Grievance Procedures met the “prompt” portion of the regulatory standard, but was not an equitable means of responding to the complainant’s retaliation allegations for a number of reasons. The Procedures require the complainant to participate in informal resolution with the faculty member involved before a student files a formal complaint--this is inappropriate for complaints of harassment or related retaliation. In addition, the complainant was required to present and argue her own case at hearing, including locating and requesting witnesses to attend, and bore the burden of proof. The College is responsible under the Title IX regulations for fact-finding and reaching a determination as to whether retaliation occurred; it may not place this burden on student complainants.

Further, the College provided a complete copy of the complainant’s complaint materials, including details regarding her allegations of sexual harassment, to I. This documentation included personal information about the complainant and other individuals who may have been victims of sexual harassment or witnesses, and should not have been provided to the alleged harasser. The confidentiality of the parties and witnesses in an investigation of sexual harassment allegations should be protected to the greatest extent possible. To the extent that both parties were required to share

evidence to be presented at hearing, the complainant was required to provide her evidence to I. months before the hearing, and only received I.'s evidence the week before the hearing. Finally, some of the witnesses interviewed during the sexual harassment investigation also provided information about I.'s retaliatory conduct. However, because the complainant's allegations were split between two processes on two different timelines, this evidence could not be reviewed or considered by the hearing committee.

Even though OCR identified several areas of non-compliance regarding the process used by the College to reach a determination on the complainant's allegations of retaliation, we note that a number of elements of an equitable process were followed. For example, the Hearing Committee heard testimony from relevant witnesses and reviewed pertinent documentation. The hearing was conducted in a manner that did not require the complainant to be in I.'s presence. The College reached factual findings and conclusions regarding each allegation of retaliation, although it did not specifically link the conclusions to Title IX protected activity. Finally, the complainant received written notice of the decision and was presented with an opportunity to appeal.

In addition, OCR concluded that the facts gathered during the College's internal process support a determination that I. retaliated against the complainant for raising allegations of sexual harassment by initially delaying her make-up examination and then refusing to grade the examination until she submitted documentation regarding her absence that was not required of other students.⁷ Even though not alleged in the OCR complaint, OCR also notes that the College concluded that I. further retaliated against the complainant by: a) conducting an informal clinical evaluation of the complainant after being directed not to do so; and b) intentionally recording an inaccurate failing grade for the complainant. OCR's additional interviews and document review did not yield evidence that I. had an established history of retaliation against students that related to protected activity under Title IX. However, the facts did establish that the College was on notice that I. historically commented to students that he believed he could behave inappropriately and still not be disciplined.

With respect to the College's investigation and resolution of the sexual harassment allegations, OCR also found that the process was sufficiently timely. There was some delay in scheduling the initial meeting with the Investigator, but that was at the request of the complainant. OCR determined that the investigation was generally thorough, including interviews with relevant witnesses and review of pertinent documents. The College again provided a written decision and notice to the complainant, included factual findings and conclusions, and provided her with the opportunity to appeal the decision. These are all elements of an appropriate procedural response.

⁷ As noted in footnote 5., the College's written decision did not accurately reflect the factual basis for its conclusion. However, OCR did not find that this factual inaccuracy had a material effect on the College's remedy for the retaliation.

However, OCR identified several areas in which the College's response to the sexual harassment allegations did not meet the "equitable" portion of the regulatory standard. First, the complainant was required to file a new complaint on a prescribed form during her first interview by the Investigator. Even though the complainant had filed a written complaint including sexual harassment allegations on November 16, 2006, her complaint was considered filed on the date she was interviewed---January 2, 2007. This resulted in the College not reaching a determination regarding the one allegation of retaliation included in this investigation because the alleged change in the tone of interaction between I. and the complainant was attributed to the filing of a student grievance.

Second, the sexual harassment investigation did not include consideration of the hours of witness testimony generated during the Student Grievance Hearing, much of which related to the sexual harassment allegations. As a part of the College's internal procedures, this information should have been provided to and reviewed by the Investigator. Finally, the College determination analyzed each of the sixteen alleged incidents separately and did not reach a conclusion as to whether I.'s overall conduct created a sexually hostile environment for the complainant and other female students. As explained at the outset of this letter, a determination of whether a hostile education environment exists should be based on all of the circumstances of the case. The College should have considered all confirmed inappropriate, unwelcome, and/or sexually harassing conduct exhibited by I. as a totality and determined whether a hostile environment had been created. Further, the hostile environment determination should have included consideration of the College's previously established finding that I. had engaged in several acts of retaliation against the complainant, and administrators' knowledge that he periodically made statements implying that any student complaints against him would be futile.

The evidence gathered and the factual findings reached during the College's Student Grievance Hearing and sexual harassment investigation, taken as a whole, were sufficient to establish that I. discriminated against the complainant on the basis of sex by creating a sexually hostile environment in the Program. The facts documented by the College indicate that I.'s conduct toward the complainant and other female students, when viewed over the time period at issue, was sufficiently serious to limit the complainant's ability to participate in and benefit from the program. This is particularly true when taking into consideration I.'s repeated acts of retaliation toward the complainant and his general assertions to students that College administrators would never take action against him. However, OCR's additional interviews and document review did not yield evidence that I. had an established history of sexual harassment against students.

Once sexual harassment and retaliation by I. against the complainant was established, the College was responsible for taking corrective action that is reasonable, timely and effective. It was necessary for the response to be designed to stop the harassment/retaliation, eliminate the hostile environment, and remedy the effects of the

harassment/retaliation. The College was also required to take steps necessary to prevent additional retaliation against those who participated in the internal procedures. The College took a number of corrective actions following its Student Grievance Procedures and sexual harassment investigation determinations. These actions included documentation being placed in I.'s personnel file, a training requirement, and a student survey process. The College specifically directed I. not to engage in any further sexually harassing or retaliatory conduct, or risk stronger disciplinary action. The College also informed the complainant that any further harassment or retaliation by I. was prohibited, and should be reported immediately.

OCR found that the College's documented corrective actions were generally reasonably calculated to stop the sexual harassment and retaliation and remedy the hostile environment. However, the College did not take sufficient action to remedy the effects of the harassment and retaliation on the complainant. The College took no formal steps to limit I.'s interaction with the complainant or remove his authority to evaluate her performance during the remainder of her program. OCR understands that instructional personnel in the Program were limited. However, given the College's findings of both sexually harassing conduct and retaliation directed toward the complainant as an individual, some means of shielding her from I.'s presence and authority should have been implemented.

In addition, OCR determined that the College did not effectively implement all of the corrective actions. For example, I.'s training requirement was delayed until he returned to the College in summer 2008. Even though I. became engaged in additional investigations and ultimately went out on leave in spring 2008, becoming unavailable for training, the College had an ample amount of time after the April 2007 decision to implement this requirement. Further, the College did not put in place an effective means of monitoring I.'s conduct toward the complainant and other students who participated as witnesses in the internal processes. Although a group of administrators had assigned responsibilities, I.'s continued negative conduct toward students was not recognized as potential retaliation. In addition, the New Dean, as I.'s direct supervisor, was not made a part of the monitoring process until after additional retaliation allegations were filed.

Issue 2: Whether the College provided a prompt and equitable resolution to additional allegations of retaliation by I., including reaching the appropriate determination as to whether he retaliated against the complainant and other student witnesses for pursuing an internal complaint or testifying during the internal complaint processes.

With respect to F3's allegations of retaliation by I. because of her participation as a witness in the Student Grievance Hearing, OCR found that the College did not initially respond in an equitable manner. F3's allegations were not recognized as ongoing retaliatory conduct by I., which, if confirmed, should have been the basis for additional disciplinary action. Instead, F3 was directed to the Student Grievance Procedures and participated in a mediation process with I. As noted above, the Student Grievance

Procedures process is an inappropriate means of responding to retaliation complaints relating to a Title IX protected activity. Although in this particular instance the allegations were apparently resolved through mediation as to F3 personally, the College did not initially pursue the allegations as evidence of I. violating the directives contained in his letter of reprimand. Again, this raises serious concerns about the effectiveness of the College's system for monitoring I.'s conduct. Only after the complainant filed additional allegations of retaliation several months later did the College take action to go back and investigate F3's claims, reach findings, and implement corrective action.

Once the complainant alerted the College about the clinical evaluation summary retaliation claims involving herself and F1, OCR found that the College did take prompt action to initiate an investigation of those allegations. F3's allegations were later added to the investigation. After the complainant raised the issue, the College also included in its investigation I.'s action of spreading of untrue rumors about the complainant's behavior. It is of concern that I.'s negative communications about the complainant, which included correspondence and conversations with College administrators, were not identified as potential ongoing retaliatory conduct until the complainant found out about it and affirmatively raised this as an issue. Again, had an effective monitoring system been in place, administrators should have independently responded to I.'s derogatory statements about the complainant in the context of its previous directive to him to cease any retaliation.

OCR concluded that the investigation and resolution of these additional retaliation claims met Title IX regulatory standards. The investigation was prompt and sufficiently thorough, and the conclusions reached were supported by the evidence. The three students each received written notice of the College's determination that I. had in fact retaliated against them in the manner alleged. In addition, OCR found that the corrective action imposed by the College was appropriate. The College initiated more serious disciplinary action against I. because he had continued to retaliate even after the original findings of sexual harassment and retaliation. The College also barred I. from attending the students' graduation ceremony, and reassigned him permanently away from the Program. Further, the College provided appropriate individual remedies to the complainant and F1 by clearing their educational record of I.'s retaliatory comments. Finally, the College at that point implemented a more targeted monitoring arrangement that assigned the New Dean primary responsibility for oversight and supervision of I.'s future conduct, and directed other deans assigned to I.'s classes to be especially sensitive to student concerns regarding sexual harassment or retaliation. However, no system was put in place to proactively obtain information from students in I.'s newly assigned classes. In addition, the New Dean has since left the College, and I.'s supervision is assigned to another Instructional Dean. OCR has not received information indicating that I. will be subjected to heightened monitoring by his current supervisory Dean.

Following its investigation of the additional retaliation allegations the College took action, with input from OCR, to modify the Student Grievance Procedures. Around the

same time the College also adopted District wide Complaints of Unlawful Discrimination Policy and Procedures. The Student Grievance Procedures now clearly exclude discrimination, including harassment, complaints. The District wide Discrimination Complaint Procedures for the most part now describe a process that meets the requirements of 34 C.F.R. §106.8(b). However, the new Discrimination Complaint Procedures require a complaint to be filed on a form prescribed by the State Chancellor's Office or it will be considered defective. This requirement, if enforced, would unduly limit the ability of individuals to file complaints of discrimination unless the College offers assistance in transferring complaint information to the prescribed form when a complaint is not presented on the form. In addition, the Discrimination Complaint Procedures provide that complaints may be filed only by one who has personally experienced the discrimination or by a faculty member or administrator who has learned of the discrimination in his/her official capacity. The regulation, at 34 C.F.R. §106.8(b), requires grievance procedures that provide for the resolution of "student and employee complaints" alleging any action that would be prohibited by the Title IX regulations. The current definition of complainant in the Procedures unduly limits the ability of individuals to file complaints of discrimination, and therefore does not meet the "equitable" requirement of §106.8(b). In addition, the new Discrimination Complaint Procedures are still not summarized in major College publications such as the Catalog and Class Schedule, therefore not meeting the "publication" requirement of §106.8(b).

Conclusion

In summary, the evidence established that the College failed to comply with Title IX and the applicable regulations with respect to some aspects of its resolution of the complainant's internal complaints of sexual harassment and retaliation. OCR notes that the College has taken action over the course of the investigation that has resolved some of the identified areas of non-compliance. For example, problems identified with respect to use of the Student Grievance Procedures have been resolved because the modified Procedures no longer apply to discrimination, harassment, or related retaliation complaints. The newly adopted District wide Discrimination Complaint Procedures resolve most of the areas of concern raised by the previous flowchart process. Further, I. did complete two training sessions in summer 2008.

Procedural areas that remain to be resolved relate to the following: assistance in transferring complaint information to the prescribed form; providing complaint information to the accused; ensuring that relevant evidence from other internal procedures is considered; determinations of hostile environment; consideration of individual remedies; implementation of effective monitoring systems; modification of the Discrimination Complaint Procedures regarding the definition of complainant; and publication of the Procedures. In addition, an effective monitoring system must be implemented by I.'s current supervisory Dean, and I. must complete his required training in 2008-09.

Resolution

On September 15, 2008, OCR presented its findings to College representatives. On December 2, 2008, the College signed the enclosed Resolution Agreement. OCR determined that the commitments outlined in the Resolution Agreement will, when fully implemented, address the unresolved areas of noncompliance identified through the investigation of case number 09-07-2037. Accordingly, OCR is closing the investigative phase of the case.

OCR is concurrently notifying the complainant of its determination. OCR will monitor the Resolution Agreement until all agreed-upon actions have been completed, and may reopen the investigation and/or take other enforcement action if the College fails to implement its provisions.

OCR wishes to thank you and your staff for your assistance and cooperation in resolving this case. If you have any questions about this letter, please contact Stephen Chen, Team leader, at (415) 486-5555.

Sincerely,

A handwritten signature in black ink, appearing to read "Arthur Zeidman", with a date "12/6" written to the right of the signature.

Arthur Zeidman
Regional Director

Cc: Mr. David Robinett, Esq.

Enclosure

**Resolution Agreement
Merced College
Case Number 09-07-2037**

In order to resolve the above-referenced complaint filed with the U.S. Department of Education, Office for Civil Rights (OCR), Merced College agrees to take the following action.

- 1) Once the California Community College Chancellor's Office and OCR have resolved any dispute regarding the subject provision in the model Complaints of Unlawful Discrimination Policy and Procedures, the College will modify its Complaints of Unlawful Discrimination Policy and Procedures (BP 3430) by removing the following requirement:
 - a. a complaint may only be filed by one alleging s/he has personally suffered discrimination or by a faculty member or administrator who learns of discrimination in his/her official capacity.

OCR acknowledges that the College has adopted the provision above in accordance with policy language provided by the Chancellor's Office, based upon the language set forth in title 5, section 59328, of the California Code of Regulations. OCR has notified the College that this provision is not consistent with the protections established by federal law.

The College will contact the Chancellor's Office, in concert with OCR, to notify the Chancellor of the required revisions, and execute the necessary revisions once the Chancellor and OCR have resolved the conflicting policy language at issue. Pending resolution of this issue with the Chancellor's Office, the College will not use this provision as a basis for declaring a complaint defective and not accepting it for investigation.

- 2) The College will regularly publish a summary notice of its Complaints of Unlawful Discrimination Policy and Procedures in sources such as the Catalog and Class Schedule. The summary notice will also be included in the Policies, Regulations, and Procedures portion of the College's website. The summary notice will provide information about how to file a complaint under the Procedures.
- 3) The College will implement effective measures, through training and/or written guidance, to ensure that administrators and other individuals who receive and/or process complaints under the Complaints of Unlawful Discrimination Policy and Procedures:
 - a. are aware that allegations of discrimination, including harassment, and any related retaliation are to be processed under this procedure and not the Student Grievance Procedures;

- b. offer to assist complainants with transferring complaint information to the Unlawful Discrimination Complaint Form when complaints are not presented on the form;
 - c. do not provide complaint documents to the accused;
 - d. consider relevant evidence that has been presented in another College forum where the same or related issues have been addressed;
 - e. reach a finding based on the totality of the evidence, including any related retaliation, when analyzing hostile environment harassment allegations;
 - f. consider individual remedies when discrimination, including harassment, or retaliation is found; and
 - g. develop an effective system to implement corrective action and monitor future conduct when discrimination, including harassment, or retaliation is found.
- 4) Because the instructor in this case has returned to a teaching position at the College, the College will:
- a. implement an effective system of monitoring his conduct, with primary oversight responsibilities assigned to his supervisory Dean; and
 - b. require the instructor to complete at least one training session during the 2008-09 academic year regarding his obligation under College policy and Federal law not to retaliate against individuals complaining of discrimination, including harassment.

Reporting:

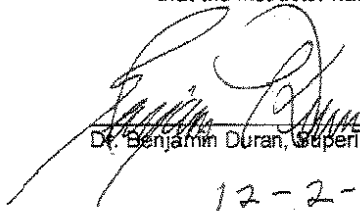
- 1) By December 1, 2008, the College will have notified the California Community College Chancellor's Office in writing of the requirements of this Agreement as it relates to the College's Complaints of Unlawful Discrimination Policy and Procedures (BP 3430).

Once the Chancellor and OCR have resolved the conflicting policy language at issue, within 30 days the College will submit to OCR a draft of the modified Complaints of Unlawful Discrimination Policy and Procedures. Incorporating OCR's input, if any, the College will finalize and distribute the Policy and Procedures within 60 days of the date OCR provides input, and will confirm distribution to OCR by the same date.

- 2) By December 1, 2008, the College will submit to OCR a draft of its summary notice of the Policy and Procedures. Incorporating OCR's input, if any, the College will finalize the notice and include it in College publications such as the

Catalog and Class Schedule, and on the website, by January 15, 2009, or at the next printing date for periodic or annual publications. The College will confirm publication to OCR following the printing dates for each affected periodic or annual publication.

- 3) By December 1, 2008, the College will report to OCR what effective measures it plans to take to implement provision 3) above. The report will include a description of planned training and/or a draft of proposed written guidance. Incorporating OCR's input, if any, the College will fully implement these measures and report implementation to OCR by January 15, 2009.
- 4) By December 1, 2008, the College will describe to OCR the monitoring system it has in place, including how it will obtain information from students regarding the instructor's conduct. On or before June 1, 2009, the College will confirm to OCR that the instructor has completed the required training session.



Dr. Benjamin Duran, Superintendent/President
12-2-08

Date