



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

July 11, 2000

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



Dr. Henry T. Yang  
Chancellor  
University of California, Santa Barbara  
Santa Barbara, California 93106

(In reply, please refer to Docket Number 09-99-2140.)

Dear Chancellor Yang:

This letter is to inform you that the Office for Civil Rights (OCR), U.S. Department of Education (Department) is closing the above-referenced complaint filed against the University of California, Santa Barbara (hereinafter University). Ms. Marta Bortner (hereinafter complainant) stated that the University discriminated against her on the basis of sex. Specifically, she alleged that:

- (1) she was retaliated against by being dismissed from the Bachelor of Fine Arts (BFA) Program after informing the Director and the Chair that actions of an instructor in the program were "inappropriate and sexually offensive;" and,
- (2) when a written complaint about the retaliation was filed, the University did not respond promptly or adequately.

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

OCR has completed its investigation and found insufficient evidence to establish that the University retaliated against the complainant as alleged above. During the course of the investigation, OCR had compliance concerns regarding the processing of the complaint of retaliation. However, prior to reaching any conclusions of law, the University provided OCR with a written assurance that it would institute actions to address the concerns raised by OCR with regard to how the University responds to allegations of retaliation. The University's voluntary resolution plan (VRP) is attached. OCR has determined that the VRP, when fully implemented by the University, will resolve the issues raised by the complaint. OCR also took into account a written clarification provided to OCR by University counsel explaining the University's complaint resolution procedures more fully. OCR is therefore closing its investigation as of the date of this letter. OCR is informing the complainant of this closure by concurrent letter.

During this investigation OCR interviewed University staff members, including one witness who the complainant identified as able to corroborate her allegations. OCR also reviewed documents submitted by both the complainant and the University. This letter contains a summary of the applicable legal standards, the facts gathered during the investigation, and OCR's conclusions.

### ***Legal Standards***

The implementing regulations for Title IX provide in part, at 34 C.F.R. section 106.31(a) that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity.

When individuals who are participating in a program or activity operated or sponsored by an educational institution are subjected to sexual harassment, they are receiving treatment that is different from other students because of their sex. OCR defines sexual harassment in the education setting as: unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct based on sex where (1) submission to such conduct is explicitly or implicitly made a term or condition of the individual's education or is used as a basis for decisions affecting a person's education (quid pro quo); or (2) such conduct has the purpose or effect of unreasonably interfering with the individual's education by creating an intimidating, hostile, or offensive environment (hostile environment).

The Title IX regulation at 34 C.F.R. § 106.71 incorporates by reference the procedural regulations implementing Title VI of the Civil Rights Act of 1964. The Title VI regulation at 34 C.F.R. § 100.7(e) prohibits recipients of Federal financial assistance through the Department from intimidating, threatening, coercing or otherwise discriminating against any individual for the purpose of interfering with any right or privilege secured by the statute or regulations, or because s/he has filed a complaint, testified or participated in any manner in an investigation, proceeding, or hearing under the laws enforced by OCR.

Recipients are also required at § 106.8(b) to provide a grievance procedure for the prompt and equitable resolution of student and employee complaints of violations of Title IX.

OCR uses a five-step analysis in evaluating claims of retaliation. The first step is to determine whether the complainant engaged in an activity protected under Title IX. The second step is to determine whether the University thereafter subjected the complainant to adverse actions. The third step is to determine whether there is sufficient nexus between the protected activity and the adverse action that gives rise to an inference of retaliation. In order to demonstrate this nexus, the evidence must establish both that the adverse action followed the protected activity and that the person engaging in the adverse action had knowledge of the protected activity. If these elements are shown, a prima facie case of retaliation is established.

The next step in the analysis is to determine whether the University could offer a legitimate nonretaliatory reason for the adverse action. Finally, OCR determines whether there is evidence that establishes that the explanation is a pretext for retaliation.

### **CONSIDERATION OF ALLEGATIONS**

#### Allegation 1

On June 8, 1999, OCR interviewed the complainant and her mother by telephone. The complainant informed OCR that she was a sophomore in the Bachelor of Fine Arts (BFA) program at the University in June 1998. The complainant attended an end-of-the year party for faculty and students at the BFA Director's house on June 6<sup>th</sup>, 1998. She returned home to her apartment and shortly thereafter was visited by one of her BFA instructors. The instructor entered her apartment and engaged in what she characterized as sexually aggressive and offensive behavior. The following day, June 7<sup>th</sup>, the complainant phoned her mother to relate the incident and tell of her intention to inform the BFA Director. The complainant contacted the Director on June 8<sup>th</sup> and on Monday, June 9<sup>th</sup> at the behest of the BFA Director, she spoke with the Chair of the BFA program about the incident.

The information collected by OCR establishes that the Division Director and the Program Chair promptly heard the complainant's allegations and advised her of her right to pursue this matter through a formal Title IX grievance procedure, which she declined. She was also invited to identify other witnesses who might wish to pursue this matter further with the Program Chair. Subsequently, the contract of the alleged harassing individual was not renewed. OCR has no definitive information as to why this action took place.

On December 8, 1998, at the quarterly faculty review, the complainant was dismissed from the BFA program. The stated grounds of the faculty was that the complainant had experienced a steady decline in her performance and academic record. The complainant transferred to the Bachelor of Arts program and has obtained her degree.

OCR determined that the complainant engaged in a protected activity when she made a complaint of sexual harassment to the Department Chair and Division Director of the program. Further, the complainant was subject to adverse treatment when she was dismissed from further participation in the BFA program. The decision to dismiss the complainant was made by persons, some of whom, had immediate knowledge of her protected activity. This adverse action followed the protected activity and was sufficiently close in time to make a connection to the protected activity plausible. Given these circumstances, OCR concluded it was appropriate to offer the University the opportunity to articulate a non-retaliatory explanation for the complainant's dismissal from the BFA program and to examine whether the articulated reason was or was not a pretext for retaliation.

The non-retaliatory reason articulated by the University was that the dismissal was justified on the basis of a steady decline in the complainant's academic and performance record as an upper division student in the BFA program.

Through information provided by the complainant and the University, OCR learned that during the week of June 3 through June 5, the BFA faculty were observing classes and gathering information in order to evaluate the progress of all students in the BFA program. On Friday, June 5<sup>th</sup> the complainant met with the BFA faculty to receive her evaluation. Although she was recommended to continue in the advanced classes in the Fall, her overall performance was judged to be "adequate but not outstanding". The complainant explained to OCR that, at this time, it was apparent to her that she was "not proceeding as expected." This realization describes events taking place prior to her engaging in the protected activity. In fact, it was at this evaluation that the complainant explained she thought she was being placed on probation. (However, from information provided by the University, OCR learned that she was not placed on probation until her midterm evaluation in the Fall, October 1998.) At the end of this quarter on December 8, 1998, the complainant was "released" from the BFA program.

According to the University, the Bachelor of Fine Arts (BFA) actor training program is designed to provide professionally oriented training to undergraduate students preparing for a career in acting. The BFA degree differs from the Bachelor of Arts (BA) degree in that the latter is a more broadly based degree with a liberal arts orientation not focused toward the acting profession. Students must audition to participate in the BFA program and are expected to consistently produce "A" work. Completion of the program depends upon successful progress and recommendation by the faculty. The literature provided to interested students entitled "University of California at Santa Barbara, Bachelor of Fine Arts (BFA) Program in Acting", page two states: "The faculty believes that it has a responsibility to discourage students who, in its judgment, have not maintained the expected professional standards." Students are again alerted in the "BFA in Acting—General Regulations" document that: "Progress through the BFA program depends upon successful completion of all courses at each level, and recommendation forward by all faculty: Acting, voice, and movement" [emphasis in original].

Data provided to OCR indicated that the complainant's grades showed a steady decline from when she started the BFA program in Fall 1997 to when she was dismissed in Fall 1998. Additionally, the University provided OCR with information regarding other students in the BFA program for the five quarters prior to winter 1999. This data showed that there were other students who had also been dropped from the BFA program who had similar grade declines in the program as did the complainant. These data and chronology of events lend support to the University's contention that the decision to dismiss the complainant from the program was due to her failure to perform satisfactorily in the program rather than retaliation for reporting an incident of sexual harassment.

Given a recommendation by the complainant, OCR interviewed a part time instructor in the BFA program about the complainant's performance in the program and his perspectives about her dismissal. The instructor related to OCR that he had had the complainant in two classes and he had given her an A grade in both courses. However, he also noted that the complainant was often late with required work projects and frequently ready with an excuse as to why she was late or not ready to perform. Even though this witness did not share all of

the adverse perspectives of many of his colleagues, he found their perspectives sincerely held and understandable.

When OCR specifically inquired about the sexual harassment incident, the instructor indicated that he strongly supported the complainant's reporting of the incident. However, he assured OCR that there was no correlation between the complainant's reporting of the sexual harassment incident in June 1998 and the complainant's later dismissal from the conservatory program in December 1998.

OCR has limited authority and qualification to scrutinize academic determinations in higher education. This task is all the more daunting at the upper division level and in a field as subjective as acting performance. Nonetheless, OCR cannot abandon its duty to examine adverse treatment of individuals who have engaged in protected activities in any arena. Having interviewed a range of witnesses, including an individual supportive of the complainant's abilities, OCR must conclude that it could not establish that the faculty's articulated reason for dismissing the complainant is a pretext for retaliation. Accordingly, OCR could not sustain the first allegation by a preponderance of the evidence.

#### Allegation 2

On March 4, 1999, the complainant's parents wrote a letter to Chancellor Yang, stating that they thought their daughter's dismissal was a retaliatory response to her earlier complaint of sexual harassment. Specifically the letter stated:

"We believe our daughter has been harassed by the members of the Department and has experienced retaliation after filing an informal complaint about the behavior of one of the faculty members."

Shortly thereafter, the complainant sent a letter to Alan J. Wyner, Acting Dean of Undergraduate Studies, ratifying her parents' allegations and authorizing them to represent her.

In response, Dean Wyner provided the complainant with two documents entitled: "University Policy on Faculty Conduct and the Administration of Discipline" and "Campus Procedures for Enforcement of the Faculty Code of Conduct". However, the complainant was not directed to any individual at the University with the knowledge, expertise, or authority to address compliance with 34 CFR § 100.7(e). Ultimately, such action was skillfully and thoroughly taken, but only after the University received notice of this complaint from OCR.

The Title IX regulation 34 CFR § 106.8(b), requires that persons alleging retaliation for filing a Title IX complaint have a prompt and equitable forum for addressing his/her concerns. Frankly, OCR found the array of fora available to address civil rights concerns complex and difficult for the lay individual or uninitiated to understand or negotiate. For this reason, it concerned OCR that all those persons likely to receive complaints of retaliation might not be as well-informed as necessary as to how the various venues work and inter-relate or might not be clear as to their duty to promptly refer students alleging retaliation to persons with

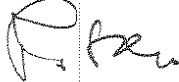
expertise and direct authority in these matters. Given this concern and the chronology of the processing of the allegation of retaliation, OCR sought the University's voluntary cooperation in ensuring sound procedures and practices in this area. Though the University steadfastly denied any violation of law, this cooperation was readily given by the University. The remedy assurances necessary to resolve this matter were provided. Consequently, OCR is closing this case based on the University's assurances.

This letter pertains exclusively to the specific issues raised by this complaint. It is not intended, and should not be interpreted, to express opinions as to the University's compliance with respect to any issue not discussed in this letter, nor does it preclude OCR from investigating any future allegation of discrimination.

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

I want to express our appreciation for the courtesy and cooperation that your staff extended to the staff of OCR. If you have any questions regarding this matter, please contact Vicki Riordan at (415) 556-4233.

Sincerely,



Robert E. Scott  
Team Leader  
Office for Civil Rights

Enclosures

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA  
OFFICE OF THE GENERAL COUNSEL



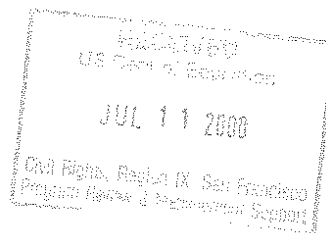
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July 10, 2000

Paul D. Grossman  
Chief Regional Attorney  
Office of Civil Rights  
Department of Education  
50 United Nations Plaza, Suite 239  
San Francisco, California 94102



Re: Docket No. 09-99-2140

Dear Mr. Grossman:

This will confirm our agreement on behalf of the Santa Barbara campus of the University of California ("UCSB") with respect to students who may allege retaliation for bringing claims of sexual harassment, or who may allege other violations of Title IX of the Educational Amendments of 1972, or of Title VI of the Civil Rights Act of 1964, or section 504 of the Rehabilitation Act of 1973. These students will have available as a resource to respond to the student's complaints, and to conduct the initial investigation, individuals with expertise in investigating such Civil Rights issues. The individuals with expertise include the campus's Title IX Coordinator, the Affirmative Action Officer, and the Americans with Disabilities Coordinator.

The Office of the Executive Vice Chancellor on the UCSB campus will insure that no later than January 15, 2001, department chairs and deans and senior campus administrators will receive written guidance or in-service training as to their responsibilities to prevent and respond to allegations of retaliation. This guidance/training will specifically include steps to be taken to make individuals alleging harassment/retaliation aware of the full range of expert resources available to assist them and respond to their allegations.

Dated:

July 10, 2000

David M. Birnbaum / smv  
University Counsel

smv

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