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OFFICE FOR CIVIL RIGHTS
SOUTHERN DIVISION

DISTRICT OF COLUMBIA OFFICE
District of Columbia, Virginia, North Carolina

August 8, 2003

Dr. Curtis McCray
President
National Louis University
1000 Capital Drive
Wheeling, Illinois 60090

Re: OCR Complaint No. 04-03-2047

Dear Dr. McGray:

This letter is to notify you that the Office for Civil Rights (OCR) has completed its investigation of the above-referenced complaint against National Louis University (the University) at Tampa received in our Office on February 27, 2003. In her complaint, (b)(7)(C) the Complainant, alleged that the University failed to effectively address her allegations of sexual harassment and as a result a sexually harassing hostile environment had been fostered at the University. She specifically alleged that the University did not appropriately address the following incidents:

- (1) On August 13, 2002, (b)(7)(C) made a sexual remark to the Complainant during class.
- (2) In October 2002, (b)(7)(C) touched the Complainant in an inappropriate manner.
- (3) During one of (b)(7)(C) classes, he made inappropriate remarks of a sexual nature regarding his wife's medical condition and inappropriate comments of a sexual nature about a female client.
- (4) In the course of his comments, (b)(7)(C) referred to his client as "bitch." At that point, a student (b)(7)(C) turned his head towards the Complainant, nodded, and stared at her.
- (5) (b)(7)(C) has "stared [the Complainant] down" in an intimidating manner.

In addition, the Complainant alleged that the University retaliated against her after she filed her complaint with the University on October 21, 2002.

OCR is responsible for enforcing certain Federal civil rights statutes and regulations, including Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulation, which prohibits discrimination on the basis of sex in any program or activity receiving Federal financial assistance (FFA). The University receives FFA from the Department and, therefore, is subject to the provisions of Title IX and its implementing regulation.

In making a determination concerning the allegations, we reviewed information submitted by the University; documents provided by the Complainant; and, conducted telephone interviews with the Complainant, University employees, and students that were in the Complainant's cohort. Documents reviewed by OCR showed that the same allegations presented in the subject complaint had also been brought to the University's attention. The University also conducted an internal investigation into her concerns. Information resulting from the University's investigation was considered by OCR as well. Also, OCR reviewed the University's policy prohibiting sexual harassment and found that it was in accordance with the Department's sexual harassment guidance.

Based on OCR's investigation, there is insufficient evidence to establish that the Complainant was sexually harassed, as alleged. Therefore, we are closing this complaint as of the date of this letter.

The legal standards and factual bases for our findings and conclusions are summarized below.

I. Legal Standards – Sexual Harassment and Retaliation

The regulation implementing Title IX, at 34 C.F.R. §106.31(a) states that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination (e.g., sexually harassed) under any academic, extracurricular, or other education program or activity operated by a recipient which receives from Federal financial assistance.

Sexual harassment is unwelcome conduct of a sexual nature and is a form of discrimination. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.

Sexual harassment of a student by a teacher or other employee can be discrimination in violation of Title IX if it denies or limits, on the basis of sex, the student's ability to participate in or to receive benefits, services, or opportunities in the school's program.

Recipients generally provide aid, benefits, and services to students through the responsibilities they give to employees. If an employee who is acting in the context of carrying out these responsibilities over students engages in sexual harassment and the harassment denies or limits a student's ability to participate in or benefit from a school program on the basis of sex, the recipient is responsible for the discriminatory conduct. If an employee not acting in this context or a student sexually harasses another student and the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the program, and if the school knows or reasonably should have known about the harassment, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence. As long as the school, upon notice or knowledge of the harassment, responds by taking prompt and effective action to end the harassment and prevent its recurrence, the school has carried out its responsibilities under Title IX.

One form of sexual harassment in the educational context occurs when an employee of the institution conditions the granting of a benefit upon the receipt of sexual favors from a student. Another form of sexual harassment is called "hostile environment" sexual harassment. This form of harassment occurs when one or more employees or students of the institution create an atmosphere so infused with hostility toward a member(s) of one sex that the harassment alters the educational environment to the point of interfering with the student's ability to participate in or benefit from the educational program. In the subject complaint, the Complainant raises allegations involving the hostile environment form of sexual harassment.

The Complainant also raised an allegation of retaliation in the complaint for having surfaced her concerns with the University. OCR's regulations prohibit recipients from intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by its regulations.

II. Analysis of the Allegations

II-A. Sexual Harassment Allegations

As mentioned above, this complaint raises allegations involving the hostile

environment form of sexual harassment. To establish such harassment under Title IX, it must initially be shown that the complainant was subjected to unwelcome conduct of a sexual nature that was sufficiently serious to deny or limit the complainant's ability to benefit from or participate in the educational program.

Moreover, Title IX is intended to protect students from sex discrimination, not to regulate the content of speech. OCR recognizes that the offensiveness of speech or a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a sexually hostile environment under Title IX.

The Complainant alleged that, based on the five incidents identified in her complaint, a hostile environment was fostered at the University. Each of the allegations, were evaluated within a framework of a hostile environment theory. In determining whether a hostile environment exists, OCR considers the conduct from both a subjective and objective perspective. Under the subjective perspective, OCR considers the extent to which the conduct actually denied or limited the complainant's ability to participate in or benefit from the educational program. Under the objective perspective, OCR uses the "reasonable person" standard to determine whether the alleged conduct was sufficiently serious to reasonably have affected the complainant in such a way. In evaluating the seriousness of the conduct, OCR considers all relevant factors or circumstances such as the: degree to which the conduct affected one or more students' education; type, frequency, and duration of the conduct; identity and relationship between the alleged harasser and the subject(s) of the harassment; number of individuals involved; context in which the alleged incidents occurred; and, other incidents at the school.

As a first step in the analysis of this complaint, we determined whether a hostile environment was created at the University. OCR looked at the individual allegations of different treatment to determine if one or a combination of identified instances of different treatment on the basis of sex was sufficiently serious as to interfere with or limit the Complainant's ability to participate in or benefit from the University's educational programs or activities and, thus, create a sexually hostile environment.

Allegation 1: On August 13, 2002, (b)(7)(C) made a sexual remark to the Complainant during class.

The Complainant stated that (b)(7)(C) requested students in the class, Advanced Human Development, to write about and discuss the political and historical events that occurred during the year that the students were born. The Complainant alleges that (b)(7)(C) stated to her, "what year could you have

been born in 68?" He then leaned close to her and asked, "how about 69 the year of love?" The Complainant stated to OCR that she found this comment offensive and sexual in nature because the term 69 is also known as a sexual act.

Professor (b)(7)(C) stated to the University and OCR that he did mention the summer of love, 69; however, he added that it was in the context of the class assignment. The University's investigative records revealed that all of the students who were in the subject class were interviewed. OCR's investigation also included interviews with several of the students regarding this allegation. OCR's investigation as well as the University's revealed that most students could not recall the remark. However, those that did stated that they did not find the comment to be sexual in nature and that it was made within the context of the class assignment. The students further stated that the comment was an example of the historical significance of that year—1969. According to the students, the comment was directed at the entire class and was not specifically targeted at one individual.

Additionally, OCR asked students if (b)(7)(C) leaned into anyone, including the Complainant during this discussion, as asserted by the Complainant. All students interviewed by OCR relayed that (b)(7)(C) did not lean into the Complainant or anyone else in the class when making the remark.

OCR has determined that based on the evidence, this sole statement, year of love—69, in context, was not conduct of a sexual nature nor was it sufficiently serious to constitute sexual harassment using a reasonable person standard. No student interviewed, other than the Complainant, considered the professor's use of the number 69 to be sexually suggestive. Rather, they stated that the statement was made within the context of the class assignment. Furthermore, OCR did not receive any corroborating statements from the students that (b)(7)(C) leaned into the Complainant or anyone else in the class when making the remark.

Therefore, based on the evidence, OCR has determined that there is insufficient evidence to establish a violation of Title IX regarding Allegation 1.

Allegation 2: In October 2002, (b)(7)(C) touched the Complainant in an inappropriate manner.

The Complainant brought this allegation to the attention of OCR during an initial phone interview on March 25, 2003. OCR asked the Complainant if the University was aware of the allegation. She stated that she had filed this particular allegation with the Office of Human Rights in the City of Tampa. The Complainant alleged that on two dates, October 1 and October 15, 2002,

(b)(7)(C) touched her breast. During OCR's interview with the Complainant, on July 1, 2003, regarding the first incident, she stated that she believed that, on October 1, 2002, (b)(7)(C) might not have purposely touched her in an inappropriate manner. She stated to OCR that she thinks he may have inadvertently brushed up against her breast. Based on the Complainant's acknowledgement that this touching may not have been willfully done by Dr. Redfering, OCR has determined that there was insufficient detail to further investigate this alleged incident.

Regarding the second incident, said to have occurred on October 15, 2002, the Complainant states that she was in the University's parking lot with (b)(7)(C) when he purposely touched her breast as he was rubbing her forearm. The Complainant stated to OCR that she knew that the touch was purposeful because he stopped and "grinned" at her after touching her breast. The Complainant states that she did not say anything after he touched her and that at the end of the conversation she said that she spontaneously hugged him for giving her "free counseling."

The University became aware of the second incident in February 2003. The University sent the Complainant correspondence dated April 18, 2003, requesting her cooperation regarding its investigation of this particular incident. According to the University, the Complainant to this date has not cooperated with the University's investigation of this matter. The only statement received by the University has been through an interview conducted with (b)(7)(C) regarding the allegation. OCR did interview the Complainant regarding this aspect of her allegation. The Complainant stated to OCR that she did not tell anyone of the alleged incident at the time it occurred, nor did she inform the University of the incident when she filed her formal complaint on October 21, 2002 outlining all the allegations that she felt were discriminatory and created a hostile environment. When OCR asked why she did not report this particular incident to the University, she stated that (b)(7)(C) was her only ally at the University and that she did not want to feel further isolated. However, she had no other classes with this particular professor after October 2002.

OCR's policy states that acquiescence in the conduct or the failure to complain does not necessarily mean that the conduct was welcome. Also, if there is a dispute about whether harassment occurred or whether it was welcome, determinations are made based on the totality of the circumstances. For example, statements by any witnesses; evidence about the relative credibility of the allegedly harassed student and the alleged harasser; evidence that the alleged harasser has been found to have harassed others; evidence of the allegedly harassed student's reaction; or, behavior after the alleged harassment, etc.

In interviews with both the University and OCR, (b)(7)(C) disputed having inappropriately touched the Complainant at any time during his term at the University. He stated that after class, during the third or fourth week in October, he stayed behind after class in the classroom to review a paper, at the Complainant's request. He recalled that the Complainant stood behind his right shoulder as he was reviewing her work and that he turned towards her and accidentally bumped into her. He did not recall which part of her body he bumped into; however, he said that he immediately apologized for the contact and that she accepted it. In addition, the University stated that (b)(7)(C) has never been investigated for allegations of sexual harassment in his educational career.

The account of the incident varies from location to the nature of the physical contact involved. The Complainant stated that it occurred in a parking lot and that she did not tell (b)(7)(C) that she found the physical contact offensive and proceeded to hug him after he had allegedly touched her breast. (b)(7)(C) recalled an accidental bump in the classroom. Also, whether the alleged conduct was unwelcome or perceived as being sexual in nature could not be established. However, that the Complainant acknowledges hugging (b)(7)(C) after the incident is at least some indication that the Complainant did not consider the incident to be serious at the time (the subjective perspective discussed above).

Based on the varied accounts of the incident, and no witnesses to corroborate either version, OCR has determined that there is insufficient evidence to establish a violation of Title IX with regard to Allegation 2.

Allegation 3: During one of (b)(7)(C) classes, he made inappropriate remarks of a sexual nature regarding his wife's medical condition and inappropriate comments of a sexual nature about a female client.

Regarding the investigation of this allegation, (b)(7)(C) stated to the University and OCR that, while teaching a class, Advanced Theories of Personality, he stated to the entire class that when his wife was pregnant she was unable to meet his needs physically, emotionally, or spiritually. He further shared with the class that while his wife was pregnant, he had begun to counsel a client that he found very attractive. These statements were made during a class discussion of psychological transference. The students that were interviewed by OCR and the University stated that these statements were made in the context of discussing ethical standards and professionalism. He was using a personal example to illustrate the concept of transference.

Based on the evidence, OCR has determined that the statements made by

(b)(7)(C) were not sexual in nature. Rather, they were used to illustrate a concept during class discussion. The other students interviewed who heard the same remarks as the Complainant did not find these comments sexually offensive or sufficiently serious to constitute sexual harassment or create a hostile environment.

Thus, OCR has determined that there is insufficient evidence to establish a violation of Title IX concerning Allegation 3.

Allegation 4: In the course of his comments, (b)(7)(C) referred to his client as "bitch." At that point, a student, (b)(7)(C) turned his head towards the Complainant, nodded, and stared at her.

The Complainant stated that (b)(7)(C) used the term "bitch." According to (b)(7)(C) he stated that he referred to a client of his as a "borderline bitch" during a cohort class discussion. He clarified that he explained to the class that he was attracted to a client and that, to maintain a professional relationship with her, he used this clinical term. (b)(7)(C) stated to OCR and the University that he should have chosen a better example than the one he shared with the cohort class.

Regarding the students, most could not recall this comment or the exact word or term used (i.e., "bitch" or "borderline bitch"). The ones that did recall the discussion relayed that he used the term "borderline bitch" to explain that psychologists sometimes become attracted to patients and that patients may become attracted to their therapists. Therefore, in order to maintain a professional relationship between him and a client, he used this term to talk himself out of his attraction to the client. Regardless of which term was used, the students felt that the term was not offensive in the context of the class discussion. Additionally, none of the students interviewed recalled (b)(7)(C) (b)(7)(C) staring at the Complainant after (b)(7)(C) referred to his client as a "borderline bitch."

Based on the evidence, OCR has determined that a reference to the word "bitch" was made in the context of class discussion. No other students found the remark to be sexual in nature and none of the students interviewed recalled (b)(7)(C) (b)(7)(C) staring at the Complainant after making the remark. The Complainant did not provide any evidence to OCR to substantiate that the remark was directed towards her, or that it was sexual in nature. There is insufficient evidence to determine that the remark was severe enough under a reasonable person standard to foster a hostile environment.

Furthermore, the Complainant did not provide any evidence to OCR nor did the investigation find that there was a connection based on sex regarding her

allegation that (b)(7)(C) stared at her after the remark was made. Even assuming that (b)(7)(C) stared at the Complainant after the remark, there was no information to establish that he stared at her because of her sex or that it was severe enough using a reasonable person standard to create or foster a hostile environment.

Therefore, based on the evidence, OCR has determined that there is insufficient evidence to establish a violation of Title IX regarding Allegation 4.

Allegation 5: (b)(7)(C) has "stared [the Complainant] down" in an intimidating manner.

Based on information provided by the Complainant, OCR's April 2, 2003, letter named (b)(7)(C) as the student who allegedly stared at the Complainant. During OCR's interview with the Complainant on July 1, 2003, she stated that she was referring to another student, (b)(7)(C) who she believes stared at her in an intimidating manner. Because of the late date that the Complainant informed OCR of this, OCR did not request a University response to this specific allegation. However, during OCR's interviews with students, we asked them if (b)(7)(C) stared at the Complainant in an intimidating manner. None of the students interviewed by OCR recalled any incident of staring between the two students.

The Complainant did not provide any evidence to OCR that the staring incident occurred as alleged or, if it did, that it was sexual in nature or otherwise based on sex in some way. Therefore, OCR has determined that there is insufficient evidence to establish a violation of Title IX with regard to Allegation 5.

II-B. Retaliation Allegation

As mentioned above, the Complainant alleged that she was retaliated against by the University after she filed her complaint with the University on October 21, 2002. The alleged act of retaliation concerned the University's failure to return her telephone calls. Specifically, the Complainant stated that she attempted to contact Dean Casazza, Dean of Students, a number of times and that the Dean never returned her calls. As a result, the Complainant believes that the processing of her complaint was delayed.

OCR's regulations prohibit recipients from intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by these regulations.

To determine whether a prima facie or initial case of retaliation exists, OCR looks to whether the following four elements are present:

- (1) The complainant engaged in a protected activity, *i.e.*, asserting or protecting a right or privilege secured by the laws OCR enforces;
- (2) The recipient had actual or constructive knowledge of the complainant having engaged in the protected activity;
- (3) The recipient took adverse action against the complainant; and,
- (4) The adverse action was taken by the recipient against the complainant was close enough in time to when the recipient become aware of the protected activity to raise the possibility of a causal connection between the adverse action and the protected activity.

If a *prima facie* or initial case of retaliation is established, OCR determines whether the recipient has a legitimate, nondiscriminatory reason for its action and, if so, whether the recipient's reasons are a pretext or false justification for its actions.

OCR found that the Complainant did engage in a protected activity -- *i.e.*, asserted or protected a right or privilege secured by the laws OCR enforces -- when she filed her complaint with the University on October 21, 2002. It was also found that the University was aware of the Complainant's protected activity when she filed her complaint.

The Complainant alleges that the University took adverse actions against her when Dean Casazza failed to respond to her telephone inquires, resulting in the delay of the processing of her complaint. However, the Complainant did not present sufficient information to establish that either incident constituted an adverse action against her, even if substantiated. OCR's investigation did not find any evidence to show that the University subjected the Complainant to an adverse action. An adverse action is something more than a transient, unpleasant incident. It is an action that significantly disadvantages a person as to his or her status as a student or employee, or his or her ability to gain the benefits of a program or activity. Also, an action could be considered adverse if it would reasonably act or could act as a deterrent to further protected activity. None of these conditions were present in this complaint, particularly given how quickly the University handled her complaint (as discussed below).

Also, while the action complained about occurred close enough in time to when the University learned of the Complainant's concerns, the University provided a legitimate, nondiscriminatory explanation regarding this allegation and their actions. Specifically, the University stated that Dean Casazza received the official complaint when the Office of General Counsel (OGC) delivered a copy of the

complaint to her office on October 26, 2002. The University explained that Dean Casazza neither had any authority to delay the processing of the complaint nor was she involved in the processing of the investigation into the Complainant's allegations. The University stated that Dean Casazza did not respond to the Complainant's telephone inquiries because the University's investigation into the allegations was already underway and being handled by the Office of Diversity, Access and Equity, in accordance with University procedures. OCR reviewed the University's policy on sexual harassment. The policy provides that individuals who believe they have been involved in an incident of sexual harassment should bring it to the attention of their immediate supervisor or the Director of Diversity, Access and Equity located at the Chicago campus.

Regarding the Complainant's contention that she was adversely affected by the University's asserted delay in processing her complaint, the Complainant did not provide any evidence to OCR to establish that this was the case. OCR's policy provides that a university's complaint or grievance must provide for the prompt and equitable resolution of those complaints or grievances. The record shows that the University took prompt action in processing the complaint. Documentation provided by the University showed that the complaint was dated October 21, 2002, and received by the University's OGC on October 22, 2002. The OGC and Office of Diversity, Access and Equity initiated an investigation into the allegations on October 25, 2003. Student and faculty interviews were conducted during the months of November and December 2002, and the Complainant was sent a letter of the University's findings on January 13, 2003. Given the nature of the allegations and the intervening holidays, OCR cannot say that this was an unreasonable period of time in which to resolve the complaint.

OCR's investigation of Allegation 5 found that there was insufficient evidence upon which to conclude that Dean Casazza's failure to respond to the Complainant's inquiries regarding her claim with the University constituted retaliation for her having filed a complaint with the University in violation of Title IX, or that the University did not resolve her complaint in a timely manner.

III. Summary

Regarding the allegations of sexual harassment in this complaint, the evidence did not support the allegations of sexual harassment. OCR determined that neither one incident nor the totality of incidents raised, to the extent they may have occurred, were conduct of a sexual nature or were sufficiently serious as to have created a sexually hostile environment. Moreover, documentation shows that when the Complainant raised her concerns, the University met its obligation of taking prompt action to address them.

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Concerning the allegation of retaliation, OCR determined that there was insufficient evidence to establish that the Complainant was retaliated against for having filed a complaint with the University.

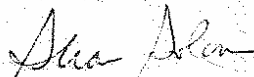
Thus, as previously mentioned, we are closing our investigation of all of the allegations raised in this complaint effective the date of this letter.

We have informed the Complainant that no person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the laws OCR enforces. If any individual is harassed or intimidated because of filing a complaint or otherwise participating in any aspect of OCR case resolution, the individual may file a complaint with OCR alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent provided by law, personal information that, if released, could constitute an unwarranted invasion of personal privacy.

We appreciate your cooperation, especially (b)(7)(C) assistance in the resolution of this case. If you or your staff has any questions, please contact Rita Bhanot at (202) 208-5326.

Sincerely,



Sharon Solomon
Team Leader