



U.S. DEPARTMENT OF EDUCATION

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OFFICE FOR CIVIL RIGHTS  
SOUTHERN DIVISION

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

Delivered by Fax and Surface Mail

October 16, 2003

Ms. Jane E. Genster  
Vice President and General Counsel  
Room 202, Healy Hall  
Georgetown University  
Washington, D.C. 20057

Re: OCR Complaint No. 11-03-2017

Dear Ms. Genster:

In the course of OCR's review of the subject complaint, OCR discovered that Georgetown University applies a "clear and convincing" evidentiary standard to certain types of allegations of sexual harassment. You have indicated that the University intends to revise this standard, but have asked for a letter from our office regarding this matter. This is to confirm our discussions of July 25, 2003, and more recently September 24, during which we explained that federal courts, and therefore OCR, use a preponderance of the evidence standard in resolving allegations of discrimination under all of our statutes, including Title IX. Thus, in order for a recipient's sexual harassment grievance procedures to be consistent with Title IX standards, the recipient must draw conclusions about whether particular conduct rises to the level of sexual harassment using a preponderance of the evidence standard. (See attached Evergreen resolution letter and agreement.)

If you have any further questions about this letter, please feel free to contact me at 202 208 1669.

Sincerely,

Howard Kallem  
Chief Attorney  
D.C. Enforcement Office

Attachment



U.S. DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS, REGION X

Henry M. Jackson Federal Building  
Mail Code 10-9010  
915 Second Avenue, Room 3310  
Seattle, Washington 98174-1099

April 4, 1995

Dr. Jane Jervis  
President  
The Evergreen State College  
Olympia, Washington 98505

Re: The Evergreen State College  
Case No. 10922064

Dear Dr. Jervis:

This letter is to notify you that the Office for Civil Rights (OCR) has completed its investigation of the above-referenced complaint against The Evergreen State College. In the complaint, it was alleged that the College discriminated against a student on the basis of sex. Specifically, the complaint alleged the following:

1. a College faculty member subjected the student to sexual harassment; and
2. the College failed to provide a prompt and equitable resolution to the student's complaint of sexual harassment.

OCR conducted its investigation under the authority of title IX of the Education Amendments of 1972 which prohibits discrimination on the basis of sex in any education program or activity that receives federal financial assistance from the U.S. Department of Education. The College is a recipient of federal financial assistance from this Department.

The first issue investigated was whether the College, through its instructor, discriminated against the student on the basis of sex by subjecting the student to sexual harassment in violation of Title IX. See 34 CFR 106.31(a).

The second issue investigated was whether the College's Title IX complaint or grievance procedures failed to provide a prompt and an equitable resolution of the sexual harassment complaint filed by the student in violation of Title IX. See 34 CFR 106.8(b).

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With respect to the first issue, OCR has determined that the findings in this investigation support a conclusion that the College is in compliance with Title IX. With respect to the second issue, OCR has determined that the findings support a conclusion that the College is not in compliance with respect to the issue investigated. However, as discussed later in this letter, the College has voluntarily agreed to take action that will bring the College into compliance on this issue.

Our findings and conclusions set forth below are based on a review and analysis of written information provided by the student and the College, as well as interviews conducted with the student and College staff.

Findings of Fact--Issue No. 1

1. During winter and spring quarters of the 1990-91 school year, the professor taught a course in Quantum Theory Physics. The class met in the professor's home approximately once a week.
2. The class was attended by approximately seven students, who continued in the class over both quarters. The student began attending the Quantum Theory Physics class during spring quarter 1991, approximately the first week of April. The student had not previously participated in any class taught by the professor. At the time the student began attending class, she had not formally enrolled in the class.
3. The student initiated her attendance in the class by asking the professor if she could attend for the spring quarter and receive two credits. The student had attended approximately eight classes before any of the alleged improper conduct occurred.
4. The student was enrolled in a theater and politics class. The student had previously written a play for that class and was working on it during the spring quarter. In late April or early May, the student gave the professor a copy of her play.
5. In late April or early May 1991, approximately 2 weeks after the professor received a copy of the play, the student met with the professor at his home to review the play. The student's stated opinion is that she was happy to have the professor look at the play since he was a published writer, she was not getting feedback from the professor of the theater and politics class, and she was flattered that he wanted to have an intellectual

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- discussion with her. During this meeting there was no physical contact between them, and the professor's conduct was professional.
6. On May 25 or 26, 1991, the student met at the professor's home to discuss the play which had just then been performed in her theater and politics class. During this second meeting, the professor and the student kissed. There is a conflict of evidence regarding whether or not the kissing was consensual. It is the student's position that the professor initiated the contact and did not respond to her statement that she did not want a romantic relationship. It is the professor's position that the student expressed a romantic interest in him and that the kissing was consensual. OCR lacks sufficient evidence to determine who initiated the contact and whether or not the contact was consented to by the student.
  7. The student officially enrolled in the professor's Quantum Theory Physics class on May 29, 1991. There were no further classes held after this date and the course officially ended on June 4, 1991.
  8. On June 4, 1991, the professor met with the student in his office to review the professor's evaluation of the student's performance in the professor's course. It is the professor's practice to display on his computer screen his evaluation of the student. There is no allegation of any improper conduct on the part of the professor at this meeting.
  9. On or about June 14, 1991, the student met with the professor and she communicated to the professor that she did not want a romantic relationship with him but would like to be friends. She gave him her new address and phone number and set up an appointment to either watch a video or go to a restaurant on June 26, 1991.
  10. On about June 25, 1991, the professor called the student several times but was told the student was not there, so he left messages asking to confirm their planned meeting for the next day. The student did not respond and did not show up for their appointment the next day.
  11. On July 29, 1991, the professor wrote the student a letter. He stated that he was trying to understand why the student was so upset with him, that he wanted to improve her perception of him. He offered an apology to the student for whatever offenses that he may have committed which caused a dissolution of what he perceived their past relationship to be, and to extend to her an offer of his continuing friendship.

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12. The student filed a formal grievance with the College on November 25, 1991, asserting that the professor engaged in inappropriate sexual conduct on May 25 or 26, 1991.

Analysis and Conclusion--Issue No. 1

The issue investigated was whether the College, through its instructor, discriminated against the student on the basis of sex by subjecting the student to sexual harassment in violation of Title IX.

The Title IX regulation states at 34 CFR 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 operated by a recipient which receives or benefits from federal financial assistance.

OCR has jurisdiction over sexual harassment issues under Title IX because such conduct constitutes differential treatment on the basis of sex. OCR defines sexual harassment as the verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different, or conditions the provisions of aid, benefits, services, or treatment protected under Title IX. Sexual harassment occurs where there are unwelcome sexual advances, requests for favors, or other sex-based verbal or physical conduct and (1) submission to such conduct is explicitly or implicitly made a term or condition of an individual's continued participation in the program, or (2) the conduct has the purpose or effect of unreasonably interfering with the individual's participation in the program because the environment has become hostile and offensive. If those responsible for the harassment are employees or agents of the institution, the institution itself is legally responsible for the conduct. If the harassment is carried out by non-agents, the institution will be found in noncompliance if it fails to adequately respond to a notice of harassment.

The evidence is insufficient to support a finding that conduct of a sexual nature took place prior to the May 25 or 26, 1991, meeting at the professor's home. Because of conflicts in the testimony, the evidence does not support a finding that the professor either initiated the sexual conduct during this meeting or that the student communicated to him that such conduct was unwelcome. Subsequent to this May 25 or 26, 1991, meeting in the professor's home, the student did give the professor clear notice that she was not interested in a romantic relationship and expressed an interest in continuing a friendship. His

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subsequent efforts to communicate with her by phone and letter are not inconsistent with her expressed interest for continuing a friendship. OCR cannot find that the professor made any sexual or romantic overtures to the student subsequent to her notice to him that she was not interested in such a relationship.

Because the evidence is insufficient to support a finding that the professor engaged in unwelcome sexual conduct relative to the student or that the professor created an offensive or hostile academic environment for the student, OCR is unable to conclude that the College failed to comply with Title IX with respect to the issue investigated.

#### Findings of Fact--Issue No. 2

1. The College has grievance procedures for use by persons at the College who believe they have been discriminated against within the College community because of race, color, national origin, gender, age, marital status, sexual orientation/preference, religion, or disability. The procedures in effect during the 1990-91 school year provided for a range of independent optional processes for the persons who believe they were discriminated against to pursue in seeking a resolution to their complaint. These include: advice from the affirmative action officer (AAO), direct resolution, verbal notification, mediation, informal resolution, and filing a formal complaint.
2. The formal complaint procedures involve the following steps: filing a complaint, AAO notification of the person alleged to have discriminated, AAO-conducted case resolution conference, AAO investigation, deliberations, decision making, and action. With respect to taking action, the grievance procedures provide, in part, as follows:
  - g. **Action.** If probable cause has been found, and no resolution agreed to . . . , action will be taken as follows:
    - (1) Student as respondent: the campus grievance officer will take action in accordance with the student conduct code and establish guidelines.

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- (3) Faculty as respondent: The academic dean and provost will take action in accordance with Faculty Handbook guidelines.

- .....
3. On November 25, 1991, the student filed a sexual harassment complaint with the College's AAO.
  4. On January 28, 1992, the AAO completed his investigation of the student's sexual harassment complaint. The AAO concluded that the evidence indicated that there was probable cause that the professor made unwelcome sexual advances, requests for sexual favors, and other verbal conduct of a sexual nature which interfered with the student's academic environment.
  5. On February 11, 1992, the AAO and the academic dean met with the professor to discuss resolution, but the professor disputed the AAO's findings and conclusion and refused to enter into the resolution process.
  6. Pursuant to subsection g.(3) of the College's grievance procedures, the provost continued the resolution of the matter by taking action in accordance with the Faculty Handbook. He recommended that the College invoke Mid-Contract Termination With Adequate Cause (MCTWAC). This process is designed to protect the vested rights of College faculty and sets forth the process which the College must follow before taking actions with respect to conduct by a faculty member which could result in termination or in some lesser sanction. One class of action or conduct likely to invoke the use of this process is identified as "serious violations of published standards to which the College holds all faculty . . ." particularly with regard to certain specific policies including the College's sexual harassment policy.
  7. The MCTWAC process follows the following steps:  
Conciliation: The provost attempts to reach a mutual settlement of the matter through discussion with the faculty member and others as appropriate persons of either party's choosing who might contribute to a mutual settlement.

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Statement of Charges: If efforts at mutual settlement prove futile, the provost may issue a Statement of Charges to the faculty member, thereby initiating an informal "contested case."

Faculty Inquiry Committee (Committee): The College president chooses five faculty members out of a pool of 25 to serve on this Committee, with an opportunity for both the provost and the charged faculty member to challenge those selected. Both the faculty member included in the issue and the provost shall have a maximum of two challenges without stated cause and additional challenges for cause.

Informal Conciliation and Hearings: The Committee attempts to reach a satisfactory resolution through an informal "contested case" process which can include reviewing documentation and taking testimony from witnesses. The Committees' procedures may include direct discussion between the parties involved concerning the alleged misconduct.

Formal Hearing: If conciliation fails, the Committee recommends to the provost whether or not to proceed to a formal hearing and, if the provost disagrees with their recommendation, the provost must discuss the recommendation with the Committee before deciding whether to hold a formal hearing. At a formal hearing before an administrative law judge, the burden is on the College to provide clear and convincing proof that the faculty member has engaged in conduct which warrants the sanction proposed by the College. The faculty member has the right to present his/her defense through the presentation of witnesses and documentary or other evidence, as well as the right to confront and cross examine all witnesses.

8. In this case, the Committee held an informal hearing to which they called the student, the professor, the AAO, and others to give testimony. On June 25, 1992, the provost received the Committee's recommendations. The Committee reached the following decision:

It is this committee's unanimous conclusion that the College failed to provide clear and convincing evidence to support its charges against the [professor]. The College's policy states, "the burden of proof of adequate cause rests on the institution. We find that the College did not satisfy this burden of proof. In as much as the respondent's liability is not established, there is no basis for recommending any sanctions against him."



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9. The provost, in consultation with the College's attorney, decided not to proceed to a formal hearing.
10. On June 26, 1992, the professor wrote two letters of commitment to the Committee. He stated he would "not initiate any personal contact with [the student] and [would do his] best to avoid any such contact were she to attempt it." He also stated a commitment to change his overall approach to interacting with students and specifically committing that:

I will reduce my contact with students insofar as it is consistent with the performance of my duties; I will not permit my home to become an extension of school; my social contacts with students under my scholarly supervision will come to an end except where necessitated by the needs of the program. . . .
11. On July 6, 1992, the professor wrote a further letter to the Committee stating among other things that he wanted it understood that his commitments were strictly voluntary and should not be interpreted in any way as his agreeing to any sanctions.
12. On July 8, 1992, the Committee responded to the professor, acknowledging receipt of his letters of commitment, clarifying that the commitment to not contact the student should include letters and phone calls, and stating an expectation that the professor would not unilaterally decide the commitments made were no longer needed without first consulting with the Committee members.
13. No further actions were taken by the College and the professor.

Analysis and Conclusion--Issue No. 2

The issue investigated was whether the College's Title IX complaint or grievance procedures failed to provide a prompt and an equitable resolution of the sexual harassment complaint filed by the student in violation of Title IX.

The Title IX regulation requires that the resolution process provided for in a recipient's grievance procedures be equitable or fair and just. The evidentiary standard of proof applied to Title IX actions is that of a "preponderance of the evidence."

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While we were unable to conclude that the procedures as applied in this case were untimely, OCR found that the College's grievance procedures provide for differing processes for the ultimate resolution of a discrimination complaint depending upon the status of the respondent (the person against whom the charges of discrimination are being brought) in the College's community. When the respondent is a faculty member, as in the instant case, the resolution process shifts to the Faculty Handbook and the MCTWAC, procedures which must be followed in order to take any adverse employment action against a faculty member. The primary focus of the resolution process has shifted from that of resolving the discrimination complaint to determining whether any adverse employment action should be taken against the faculty member. The factual determinations leading to the resolution of an employment action between the College and a faculty member are decided by a Faculty Inquiry Committee, a group comprised of the faculty member's peers. The faculty member has the right to affect the make up of this committee through challenges. The faculty member also has the right to present evidence through witness testimony or documentary or other evidence. And, the standard of evidence required of this committee, in reaching a decision under the MCTWAC resolution process, is one of "clear and convincing proof," a higher standard than that of a "preponderance of the evidence."

The final resolution of a discrimination complaint which formed the basis of the employment action may be decided at this juncture (as in the case before us) as, under the MCTWAC process, a decision in favor of the faculty member closes out a complaint of unlawful discrimination brought against that faculty member.

Thus, OCR concludes that, to the extent that the College's Title IX grievance process requires adherence to provisions of the Faculty Handbook, the process fails to comply with the Department's Title IX regulation requiring a prompt and equitable resolution of student complaints alleging an action prohibited by Title IX. The MCTWAC process does not ensure an equitable resolution of student complaints against faculty members because the Title IX complaint is, in effect, being decided by a group of person whose composition can be influenced by the party against whom the complaint has been made and not by the person bringing the complaint. The faculty member can influence the decision through persuasion (the presentation of his/her case) and the person bringing the complaint can not; and the decision reached by this group must adhere to a heavier burden of proof than that which is required under Title IX. Therefore, the evidence supports a conclusion that the College is not in compliance with Title IX with regard to the issue investigated.

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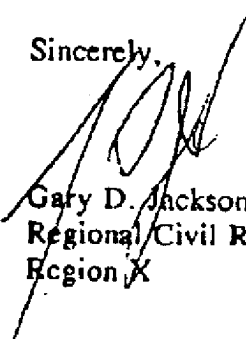
The College and OCR entered into discussions regarding the area of noncompliance identified in the above findings. As a result of these discussions, the College has agreed to take voluntary corrective actions as set forth in the enclosed Settlement Agreement to ensure that its grievance procedures shall provide for a prompt and equitable resolution of complaints alleging acts prohibited under Title IX. OCR has concluded that upon full implementation of the actions and commitments contained in the Agreement, the College will be in compliance with Title IX. Therefore, based on the College's commitment to implement the actions specified in the enclosed Agreement, we are closing the above-referenced case as of the date of this letter.

This determination of compliance with Title IX is contingent upon the College's full implementation of commitments set forth in the Agreement. The College's failure to honor these commitments may result in further action by OCR with respect to this case.

This letter is not intended, nor should it be construed, to cover any other issues regarding compliance with Title IX that may exist and that are not discussed herein.

Thank you and your staff for the cooperation extended to my staff during the investigation and resolution of this case. If you have any questions regarding this letter, please contact W. Frederick Greenlee, Attorney Advisor, at (206) 220-7895.

Sincerely,



Gary D. Jackson  
Regional Civil Rights Director  
Region X

Enclosure

## SETTLEMENT AGREEMENT

### I. INTRODUCTION

A complaint investigation of The Evergreen State College having been conducted by the Office for Civil Rights (OCR), U.S. Department of Education, under the authority granted by title IX of the Education Amendments of 1972, the investigation (Case No. 10922064) having been completed and compliance concerns having been identified, the parties resolve and conciliate this matter as follows:

### II. GENERAL PROVISIONS

- A. The parties to this Settlement Agreement are the College and OCR.
- B. This Agreement shall become effective when the authorized representatives for both parties have signed the Agreement.
- C. It is understood that this Agreement does not constitute an admission by the College of any violation of Title IX or of any other law.
- D. The parties agree that this Agreement resolves only those compliance concerns identified by OCR in the investigation of Case No. 10922064. Any other compliance matters shall be dealt with and resolved in accordance with the procedures and standards in the regulation applicable to such matters.
- E. In consideration of the College's implementation of the provisions of this Agreement, OCR agrees not to initiate enforcement proceedings with respect to the compliance matters addressed in the referenced complaint investigation. It is agreed, however, that in the event the College violates any provision of this Agreement, OCR will take appropriate measures to effect compliance with Title IX with respect to these matters.

### III. SUBSTANTIVE PROVISION

By May 31, 1995, the College will revise its grievance procedures intended for use by persons at the College who believe they have been discriminated against within the College community so that the procedures provide for prompt and equitable resolution of complaints alleging any action prohibited by Title IX. Specifically, as to student complaints against faculty members brought under these procedures which result in proceedings under the Mid-Contract Termination With Adequate Cause process: the College shall ensure that the student complainant is (1) afforded an opportunity to influence the composition of any panel considering the complaint or any sanction against the respondent faculty member that is comparable to that of the respondent faculty member, and (2) an opportunity to present information that is comparable to that of the respondent faculty member. In addition, the College's procedures will incorporate the appropriate evidentiary standard applied to actions brought under

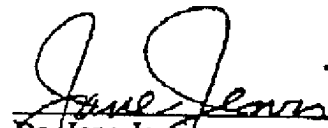
Page 2 - Settlement Agreement, Case No. 10922064

Title IX. The appropriate standard of proof to be applied to the resolution of any and all complaints alleging action prohibited by Title IX, including final decisions as to sanctions, is that of a preponderance of the evidence.

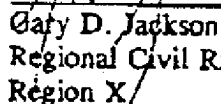
IV. REPORTING PROVISION

By June 30, 1995, the College will provide OCR with a copy of its revised employee and student grievance procedures as described in section III of this Agreement. And, the College will advise OCR as to the method of notice given to the members of its community of the revised procedures.

Signed:

  
\_\_\_\_\_  
Dr. Jane Jervis  
President  
The Evergreen State College

March 27, 1995  
Date

  
\_\_\_\_\_  
Gary D. Jackson  
Regional Civil Rights Director  
Region X

4-7-95  
Date