



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION II

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November 23, 2012

Dr. Matthew Goldstein
Chancellor
City University of New York
535 East 80th Street
New York, New York 10021

Dear Chancellor Goldstein:

On May 23, 2006, the Office for Civil Rights (OCR), United States Department of Education, received a complaint against the City University of New York (CUNY), alleging that “its instituting, by policy and grants to its constituent colleges, a ‘Black Male Initiative’ [BMI]” violated Title VI of the 1964 Civil Rights Act and Title IX of the 1972 Education Amendments. On July 26, 2006, the complainant filed an amended complaint with OCR against CUNY, charging “CUNY itself and those colleges implementing its ‘Black Male Initiative’ with the improper use of race, color, ethnicity and/or sex in terms of assignments, choices, and preferences exercised with respect to *personnel* (faculty and staff) selected at the colleges for administering and carrying out ‘Black Male Initiative Programming.’”

OCR undertook a comprehensive investigation of the allegations and, after determining that CUNY operated a BMI program on 16 of its campuses, OCR opened 18 separate cases. The first of these cases was opened to investigate the original complaint, the second of these cases was opened to investigate the amended complaint, and the remaining 16 cases were opened to investigate the BMI program on the 16 CUNY campuses that had BMI programs as of January 2008.

We regret the substantial delay in resolving these complaints. OCR has spent years collecting facts from CUNY regarding the BMI programs at the various campuses and analyzing that data. Before OCR could reach a finding, the U.S. Department of Justice (DOJ) and OCR issued joint guidance in December 2011 regarding efforts that institutions of higher education could legally take to promote diversity, including race-themed mentoring and support programs.¹ Based on the information already provided by CUNY, and an additional assessment of the current status of the BMI programs, OCR has determined that the allegations are not appropriate for further investigation and resolution. OCR is thus administratively closing these 18 cases as moot, consistent with OCR’s case processing procedures.

¹ “Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Postsecondary Education,” available at: <http://www.ed.gov/ocr/docs/guidance-pse-201111.pdf>.

Discussion

OCR enforces Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, as implemented by regulations at 34 C.F.R. Part 100, which bars institutions that receive federal financial assistance from discriminating on the basis of race, color, or national origin. OCR also enforces Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq., as implemented by regulations at 34 C.F.R. Part 106, which bars educational institutions from discriminating on the basis of sex. The complainant contended in his May 23, 2006 letter that “Title VI and Title IX do not sanction ‘Black Male Initiatives.’ Period.” It is not, however, a *per se* violation of Title VI or Title IX for a postsecondary institution to operate a race-themed and/or gender-themed mentoring and support program. In its 2011 joint guidance, OCR and DOJ explained: “Many institutions operate mentoring, tutoring, retention, and support programs for enrolled students who may need additional assistance in academic or other areas to succeed at the institution. The Departments recognize that a postsecondary institution seeking the educational benefits of diversity not only must enroll a diverse group of students, but also must retain those students.”

As an example of such a mentoring and support program, OCR and DOJ further stated: “An institution could sponsor retention or support programs open to all students that offer content that the institution believes might be of particular interest to a group targeted for retention. Such programs could, for example, hold motivational lectures (*e.g.*, highlighting the accomplishments of Latino business leaders or the artistic achievements of Pacific Islanders), and could include small group follow-up workshops with mentors.” A race-themed or gender-themed mentoring and support program would fall within this category of approaches if it does not exclude students on the basis of their race or sex and does not use race- or sex-exclusive recruiting. Because such a program would not make individual racial classifications, nor impose benefits or burdens on that basis, it would not be subject to strict scrutiny review and would not violate Title VI.

None of the BMI programs or activities excludes persons who are not black and/or male from participating. In the complainant’s May 23, 2006 letter, he asserted that “programs of the Black Male Initiative are advertised and devised and conveyed and geared for black male students only — for their insulation and isolation, for their ‘special’ — meaning *separate* — participation and involvement.” However, CUNY includes on its website a statement aimed at making it expressly clear that BMI programs are open to all, regardless of race, color, national origin, or sex. CUNY describes the BMI as a “new initiative intended to increase, encourage, and support the inclusion and educational success of under-represented groups in higher education, in particular black males. All programs and activities of the Black Male Initiative are open to all academically eligible students, faculty and staff, without regard to race, gender, national origin, or other characteristic.” Similar statements are included in other BMI promotional materials as well. Such statements were not widely included as part of the BMI when CUNY first launched the program, in 2005, but are now part of CUNY’s comprehensive effort to publicize BMI activities and welcome participants.² For example, CUNY also advertises BMI activities and programs through means such as email blasts sent to students campus-wide, BMI websites, a BMI listserv with hundreds of members, flyers distributed around campuses, a BMI page on the independent

² Including such statements on all promotional materials is not a *per se* legal requirement, but can be helpful in clarifying that such programs are open to all.

LinkedIn website (which bills itself as the “World’s Largest Professional Network”), tabling at campus events, and announcements made by professors to their classrooms.

Within the context of this type of broad-based recruitment, it is permissible for a college to conduct race-targeted recruiting. With race-targeted recruiting, a college may intentionally target for recruitment students of particular races, such as those underrepresented at a particular school or program, while also conducting broader recruitment efforts without regard to race. Race-targeted recruiting seeks to ensure that students from particular groups are aware of opportunities, but it does not exclude others from being recruited (or participating). Race-targeted recruiting that is part of a broader recruitment effort made without regard to race is also not subject to strict scrutiny review.

The complainant also stated in his May 23, 2006 letter that “At CUNY’s Hunter College, for instance, the Office of Student Services invited only black males to a planning conference on its “Black Male Initiative,’ at least until we objected.” If Hunter College conducted race-exclusive recruiting, it had, as the complainant suggested, corrected that before the complainant filed his complaint. OCR did not find evidence of race-exclusive recruiting in the BMI program at Hunter College.

The complainant also stated in his May 23, 2006 letter that “at CUNY’s Queensborough Community College plans are underway to have separate counseling, tutoring and mentoring programs for Black males only.” OCR found that although the Queensborough campus initially recruited only black males for participation in a BMI program, the campus substantially revised its practices, revamped its marketing materials, distributed information about the BMI program to all prospective students at recruitment fairs, and sent letters to all incoming freshmen, inviting them to participate in the BMI program.

With regard to discrimination in employment, the subject of the complainant’s July 26, 2006 letter, OCR has limited jurisdiction over claims of employment discrimination under Title VI. 42 U.S.C. § 2000d-3; 34 C.F.R. § 100.3(c). Under OCR’s regulation, OCR has jurisdiction over employment discrimination in two circumstances potentially at issue here. First, OCR may have Title VI jurisdiction if a “primary objective of the Federal financial assistance to a program to which this regulation applies is to provide employment.” Second, OCR may have Title VI jurisdiction even if the primary objective of the Federal financial assistance is not to provide employment but there is discrimination (on the basis of race, color or national origin) that excludes students from participation in, denies students the benefits of, or otherwise subjects students to discrimination, on the basis of race, color or national origin. OCR has not found evidence to support either of these bases of possible Title VI jurisdiction. The primary objective of the Federal financial assistance here is not to provide employment. Further, as stated above, OCR did not find that students had been excluded from participation, denied the benefits of, or otherwise subjected to discrimination on the basis of race, color or national origin.

OCR’s jurisdiction over claims of sex discrimination in employment is broader under the Title IX regulation, as codified at 34 C.F.R. Part 106. However, OCR has not found evidence here to support a claim of sex discrimination in employment. There are a range of women affiliated with the BMI program at CUNY, and, at times over the years, women have held the majority of

leadership positions with BMI programs at CUNY. There are now, in the 2012-2013 academic year, 38 women in leadership positions with the BMI programs across the CUNY campuses. These women hold significant positions with the BMI, including as the lead directors of the BMI programs on their respective campuses, associate or assistant directors of the BMI programs on their respective campuses, director or coordinator of specific sub-components of the BMI programs on their respective campuses, and consultants. At CUNY's Baruch College, for example, all three of the lead positions for BMI are currently held by women. Further, the number of women in leadership positions with BMI has grown steadily over the years, from eight women in leadership positions in the program's initial year, the 2005-2006 academic year, to 23 women in leadership positions with BMI by the 2008-2009 academic year and the 38 women who hold leadership positions with CUNY BMI today.

We note here that the BMI program at CUNY only has three full-time staff, and all three of these positions were widely advertised and broadly recruited. Other officials with the BMI program at CUNY are largely CUNY faculty and staff who volunteer their time, although some of them receive reduced workloads to offset the volunteering. CUNY also widely advertises and broadly recruits for these volunteer opportunities. There are, in addition, 14 part-time BMI staff at CUNY, and the availability of these positions is advertised on CUNY's website. In the past, BMI programs made less extensive use of the Internet in promoting opportunities with BMI, but the Internet is now one of many methods CUNY uses to publicize opportunities for anyone to participate in BMI.

Conclusion

Thus, OCR is, as stated above, closing these complaints as moot. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

It is unlawful to harass or intimidate an individual who has filed a complaint or participated in actions to secure protected rights.

Under the Freedom of Information Act, 5 U.S.C. § 552, it may be necessary to release this letter and related correspondence and records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personally identifiable information that, if released, could constitute an unwarranted invasion of personal privacy.

Page 5 - Dr. Matthew Goldstein

If you have questions regarding OCR's determination, please contact Emma Kim, Compliance Team Attorney, at (646) 428-3824 or emma.kim@ed.gov.

Sincerely,

/s/
Erin Gimbel
Compliance Team Leader

cc: Jane Sovern, Esq.