



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGION IX
CALIFORNIA

50 BEALE ST., SUITE 7200
SAN FRANCISCO, CA 94105

March 25, 2016

Dr. Elliot Hirshman
President
San Diego State University
Office of the President
5500 Campanile Drive
San Diego, California 92182-8000

(In reply, please refer to case no. 09-16-2012.)

Dear President Hirshman:

On October 13, 2015, the U.S. Department of Education, Office for Civil Rights (OCR), received a complaint against San Diego State University (University). OCR investigated whether the University discriminated against the complainant on the basis of sex.¹ Specifically, OCR investigated the following issues:

1. Whether the University discriminated against the complainant on the basis of sex when it failed to provide her an equitable resolution in a sexual harassment complaint that she filed against another student/employee; and
2. Whether the University subjected the complainant to retaliation for advocating for her rights when the Title IX coordinator found her responsible for sexually harassing the respondent in her complaint, and for providing false information, and subsequently denying her an opportunity to appeal these adverse findings.

OCR investigated this complaint under the authority of Title IX of the Education Amendments of 1972 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 its regulation as enforced by OCR.

OCR gathered evidence by reviewing documents and other information provided by the complainant and the University. Prior to OCR completing its investigation, the University voluntarily agreed to address the areas of concern identified by OCR with respect to respect both issues. This letter summarizes the applicable legal standards, the relevant facts obtained during the investigation, and the terms of the resolution reached with the University.

¹ OCR previously provided the University with the identity of the complainant. We are withholding her name from this letter to protect her privacy.

Issue 1: Whether the University discriminated against the complainant on the basis of sex when it failed to provide an equitable resolution in a sexual harassment complaint filed against another student/employee.

Legal Standard

The regulations implementing Title IX, at 34 C.F.R. §106.31, prohibit discrimination based on sex by recipients of Federal financial assistance. Universities 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.

Under the Title IX and the regulations, once a university has notice of possible sexual harassment between students, it is responsible for determining what occurred and responding appropriately. The university is not responsible for the actions of a harassing student, but rather for its own discrimination in failing to respond adequately. A university may violate Title IX and the regulations if: (1) the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the educational program; (2) the university knew or reasonably should have known about the harassment; and (3) the university fails to take appropriate responsive action. These steps are the university's responsibility whether or not the student who was harassed makes a complaint or otherwise asks the university to take action.

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 university must promptly conduct an impartial inquiry designed to reliably determine what occurred. The response must be tailored to stop the harassment, eliminate the hostile environment, and remedy the effects of the harassment on the student who was harassed. The university must also take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate.

Facts Gathered to Date

- The California State University (CSU) System is composed of 23 campuses, including the University's campus. The CSU system develops and promulgates executive orders regarding various policies and procedures, including sexual harassment and student conduct.² The executive orders apply to all CSU campuses.

² OCR has not completed its review of CSU sexual harassment policies and procedures or notice of non-discrimination for compliance with Title IX and its implementing regulations as a part of this investigation because a review of CSU sexual harassment policies and procedures is being conducted under OCR investigation number 09-15-2116, which is still pending.

- For the 2014-15 school year and through the 2015 school year covered by this investigation, the University's Title IX website provided links to the CSU Executive Orders specific to the sexual misconduct policy and complaint procedures, and stated that the University follows these procedures in handling any complaints of sexual harassment on its campus.
- On June 3, 2014, CSU issued Executive Order 1096 (EO 1096 (2014)), entitled the "Systemwide Policy Prohibiting Discrimination, Harassment, Retaliation, Sexual Misconduct, Dating and Domestic Violence, and Stalking against Employees and Third Parties and Systemwide Procedure for Addressing Such Complaints by Employees and Third Parties." The sexual violence allegation at issue in this complaint was investigated under EO 1096 (2014).
- Relevant to this investigation, EO 1096 (2014) defined harassment as unwelcome verbal and nonverbal conduct of a sexual nature that included, but was not limited to sexual advances or propositions.
- Pursuant to EO 1096 (2014), the University could determine that circumstances warranted initiating an investigation, even if a complaint had not been filed and independent of the intent or wishes of the complainant.
- EO 1096 (2014) allowed for review of an investigation through an appeal process. A complainant could appeal an investigative determination by identifying the specific evidence that supported a finding of harassment. Respondents had no appeal right under EO 1096 (2014).
- On June 23, 2015, CSU revised and re-issued EO 1096 (2014) (EO 1096 (2015)). The revisions included a section stating that either the complainant or the respondent may file an appeal on any investigated outcome, and that both parties would be informed of this right upon receiving written notice of the outcome of an investigation.

The Complainant's Complaint of Sexual Harassment

- The complainant is a graduate student at the University and a former residential graduate and academic initiatives assistant with the University's residential education office. This is a supervisory position. Currently, the complainant is on a leave of absence.
- The respondent was an undergraduate student who worked as a part-time academic mentor and assistant with the residential education office under the supervision of the complainant.
- On October XX, 2014, the respondent informally complained to a colleague at work about the complainant after the complainant sent the respondent a picture of a vibrator. The respondent told the colleague that she had concerns about the complainant's overly familiar and "clingy" behavior toward her, and that she was

afraid for her personal safety. The colleague raised the matter with his supervisor, the front desk security manager. The manager elevated it to her supervisor, the assistant director of residential affairs (assistant director). The assistant director asked that the respondent put her concerns in writing, which she did the next day. The respondent also provided email and text message screen shots between her and the complainant.

- On October XX, 2014, the assistant director and director of residential affairs (director) met with the complainant to discuss the respondent's concerns. The complainant submitted a written statement of her version of the events, which contained admissions of inappropriate actions and statements that confirmed the allegations of the respondent. The complainant admitted that she "crossed boundaries and made some inappropriate remarks" but stated that the respondent also did not set appropriate boundaries with her and should take responsibility for it.
- On October XX, 2014, the complainant was terminated from her position. The complainant responded with a letter protesting the termination and enclosed an unsigned draft complaint alleging that she was sexually harassed by the respondent. The complainant alleged that the respondent made romantic advances toward her. When the complainant rebuffed those advances, the respondent conspired to make a sexual harassment complaint against the complainant, resulting in the complainant's termination.
- On December XX, 2014, the complainant submitted a second complaint, this time signed. It made the same allegations of sexual harassment against the respondent. In addition, the December complaint named four additional individuals allegedly involved. The complainant alleged that the manager conspired with the respondent to enhance the respondent's complaint against the complainant by exaggerating the respondent's report of harassment. She also alleged that the director, the assistant director, and the associate vice president of campus life (vice president) conspired to deny the complainant her due process rights by terminating her employment based on the respondent's report of harassment.

April XX, 2015 Investigation Findings

- The investigation of the complainant's October and December complaints was assigned to the California Attorney General's office on January 13, 2015. A Deputy California Attorney General (investigator) investigated the complaints. The investigator also considered the events and circumstances raised by the earlier informal report of sexual harassment by the respondent made on October XX, 2014. The factual findings made by the investigator were based upon interviews with eight witnesses and review of documents provided by the complainant, the respondent, and the University. The investigator made the following findings:

- At the beginning of the 2014 school year, the complainant socialized primarily with her graduate student colleagues, but by late September early October, she became alienated from those friends. They distanced themselves from complainant due in large part to the complainant's inappropriate, "clingy", and socially awkward behavior, some of which occurred after the complainant had been drinking. The complainant stated that after her graduate student friends began to distance themselves from her, she started to spend more time with other friends at school.
- The complainant, as a supervisor and graduate student, was in a position of authority over the respondent. Starting in late September, the complainant and respondent began interacting more frequently.
- The complainant stated that the respondent attempted to groom the complainant for a romantic relationship by sharing her sexual history and experiences, encouraging the complainant to engage in sexual acts or relationships, and generally behaving in a possessive manner toward the complainant. On October XX, 2014, the complainant said that she asked the respondent about why she cared so much about the complainant's relationship status, and the respondent stated that she did not know it bothered the complainant and promised not to discuss it again. The complainant believed that this conversation prompted the respondent to make the October XX, 2014 sexual harassment complaint against the complainant.
- The respondent stated that the complainant behaved in an overly familiar manner and "creeped her out" by hanging around the respondent too much. The respondent denied attempting to develop a romantic relationship with the complainant, but admitted to discussing her personal life with complainant, including her romantic life. The respondent stated that she also made clear several times that she did not feel comfortable with the complainant's increased attention.
- Although the investigator found that both the complainant and the respondent lacked credibility at times, he concluded that the respondent was more credible because her testimony was generally consistent with that of other witnesses, while the complainant "told several significant lies...contradicted herself, and provided a series of false excuses for her behavior."
- The investigator found that although both the complainant and respondent behaved inappropriately toward one another, the complainant bore greater responsibility for the behavior because of her position as a graduate student and supervisor. He concluded that because of this, the complainant in fact was responsible for sexually harassing the respondent, and further that the complainant's decision to file a complaint against the respondent after her informal complaint constituted a false charge of

sexual harassment in violation of the University's policies. The investigator also found that the complainant's allegations against the additional individuals were unsubstantiated.

- The University reviewed the investigator's report. On April XX, 2015, the University issued notice to the complainant that the investigator's report would be adopted in full. The University also informed the complainant of her appeal rights.

The Complainant's Appeal

- On April XX, 2015, the complainant filed an appeal of the University's findings. The complainant presented the following arguments in favor of her appeal:
 - the investigator's credibility findings were based on statements made by other witnesses, which the complainant could demonstrate were false; and
 - the investigator exceeded the scope of his authority by making factual findings against the complainant and by determining that the complainant made a false report of sexual harassment.
- On July XX, 2015, the University responded to complainant's appeal. With respect to the complainant's concern that the investigator's credibility findings were inaccurate, the University upheld the investigator's finding because the complainant did not show that the finding was erroneous or unsupported by a preponderance of the evidence.
- With respect to the complainant's appeal of the adverse findings against her, namely 1) that she sexually harassed the respondent and (2) that she made a false charge of sexual harassment, the University explained that her appeal was limited to the issues that she raised in her complaint. In effect, she was in the position of a respondent for the adverse findings against her and was not permitted to appeal.
- This response was delivered more than one month after CSU revised and re-issued EO 1096 to provide that either the complainant or the respondent may file an appeal as to any investigated outcome.

Analysis

Under Title IX, the University does not have an obligation to provide an appeal process. However, if the University does provide such a process, it must ensure that the process for resolving the complaint at the appeal stage is both equitable and prompt. See generally 34 C.F.R. §§ 106.31 and 106.8. The facts gathered to date raised concerns for OCR that the complainant who was in the position of a respondent with respect to the adverse findings was not given an equal opportunity to appeal. In addition, at the time her appeal was pending, the newly revised University policies provided that she could appeal any investigated outcome. At present, OCR has not yet conducted an

interview with the complainant or with University staff. Accordingly, this matter remains unresolved. Prior to completing the investigation, the University expressed an interest in entering into the enclosed resolution agreement. The agreement provides, among other things, that the University will review the complainant's appeal of the determination that she sexually harassed the respondent and made a false report of sexual harassment.

Issue 2: Whether the University subjected the complainant to retaliation for advocating for her rights when the Title IX coordinator found her responsible for sexually harassing the respondent in her complaint, for providing false information, and subsequently denying complainant an opportunity to appeal these adverse findings.

Legal Standard

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 universities 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 university, under circumstances that suggest a connection between the protected activity and the adverse action. If a preliminary connection is found, OCR asks whether the university can provide a nondiscriminatory or nonretaliatory 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.

Facts Gathered to Date

- As noted above, the complainant filed a sexual harassment complaint, which was investigated by a neutral third party. The data provided by the University shows that the Title IX coordinator had no involvement in the investigation of the complaint beyond reviewing the investigator's report, and adopting the findings therein.
- On April XX, 2015, the complainant filed an appeal of the University's findings. The complainant argued that, among other things, the investigator exceeded his authority by making a finding that the complainant harassed the respondent and made a false report of sexual harassment.
- On July XX, 2015, the University declined review of these findings under EO 1096 (2014), explaining that the scope of the appeal was limited to the complainant's complaint of sexual harassment against the respondent. The complainant reported to OCR that the Title IX coordinator denied her appeal, however the data provided by the University shows that the appeal was decided by the internal investigations manager in the office of the Chancellor.

- On July XX, 2015, the Title IX coordinator sent the complainant an email. The Title IX coordinator explained that the investigator made findings outside the scope of the complainant's original complaint because the University had an obligation to investigate all incidents of potential harassment and discrimination, whether or not a complaint had been filed. Therefore, the investigator was obligated to consider the respondent's report of sexual harassment. The coordinator further explained that the complainant's appeal was decided under EO 1096 (2014), which provided limited appeal rights that did not include a right for the complainant to appeal the adverse finding against her.
- On June XX, 2015, EO 1096 (2014) was revised and reissued and included a right for the both the complainant and respondent to appeal with respect to any investigated outcome. However, counsel for the University told OCR that it applied the EO 1096 (2014) policy to any complaint pending on appeal at that time. OCR has not reviewed the other complaints pending on appeal during the period after the 2015 policy was issued.

Analysis

To determine whether the University retaliated against the complainant, OCR first examined whether the complainant engaged in a protected activity. In this case, the complainant filed a sex discrimination complaint on October XX, 2014, and again on December XX, 2014. OCR determined that filing a complaint about sex discrimination constitutes protected activity.

Second, OCR considered whether the complainant was subjected to an adverse action by the University. Here, the University found the complainant was responsible for sexually harassing the respondent in her complaint and providing false information to the University in the course of filing her complaint. OCR determined that being found responsible for sexual harassment and providing false information constituted an adverse action that could well dissuade a reasonable person from making or supporting a charge of discrimination.

Next, OCR considered whether the circumstances under which this decision was made suggested a connection between the protected activity and the adverse action. In this case, the complainant filed her complaint on October XX, 2014, and the University issued its decision on April XX, 2015. Assuming that there is a causal connection for the sake of this analysis, OCR found that the University provided legitimate, nondiscriminatory reasons for the findings and the appeal decision. With respect the findings, the investigator making the findings upon which the appeal determination was based was a neutral third party, unaffiliated with the University. The findings were supported by the evidence and the investigator was permitted under existing policy to reach findings on any issue identified during the investigation. With respect to the appeal, the University asserted that its decision was based on application of the University's 2014 policy, which did not allow respondent appeals; the complainant was effectively a respondent with respect to the adverse findings, and therefore had no appeal right available under the 2014 policy.

OCR found no evidence of pretext related to the investigator's findings or the University's affirmation of them. Prior to completing the investigation, the University expressed an interest in entering into the enclosed resolution agreement, which is described below.

Summary and Resolution

Based on the facts gathered to date, as discussed above, OCR has concerns that the complainant was not given an equitable opportunity to appeal the finding that she sexually harassed a student/employee and made a false report of sexual harassment, even though at the time her appeal was pending, the applicable University policies provided an opportunity for both parties to appeal any investigated outcome.

Prior to concluding its investigation and to address the concern identified above, the University, without admitting any violation of law, entered into the enclosed resolution agreement, which is aligned with the complaint allegations and the information obtained by OCR during its investigation.

Under the agreement, the University will: (i) respond to the complainant's April XX, 2015 appeal of the investigative findings that she sexually harassed a student/employee and made a false report of sexual harassment, as required by the current EO 1096 (2015) policy; (ii) notify the respondent that the complainant has appealed the finding and provide her updates and a final determination based on this process, including any appeal rights required under the policy; (iii) draft written guidance and conduct training for staff responsible for investigating and responding to complaints of Title IX sexual harassment; and (v) provide OCR documentation of the completion of all items as required by the terms of the Agreement.

Based on the commitments made in the enclosed resolution agreement, OCR is closing the investigation of this complaint as of the date of this letter, and notifying the complainant concurrently. When fully implemented, the resolution agreement is intended to address all of OCR's compliance concerns in this investigation. OCR will monitor the implementation of agreement until the University is in compliance with Title IX and its implementing regulations, which were at issue in this complaint.

This concludes the investigation of this complaint. OCR's determination in this matter should not be interpreted to address the University's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

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.

Please be advised that the University may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the complainant may file another complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document 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 the law, personal information that, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

Thank you for your cooperation in resolving this case. If you have any questions regarding this letter, please contact Abony Alexander, Civil Rights Attorney, at Abony.Alexander@ed.gov.

Sincerely,

/s/

Zachary Pelchat
Team Leader

Enclosure

cc: Marc Mootchnik, University Counsel