



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

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CLEVELAND, OH 44115

REGION XV
MICHIGAN
OHIO

July 11, 2014

Mary Ann Poirier, Esq.
General Counsel
University of Dayton
300 College Park
Dayton, Ohio 45469-1660

Re: OCR Docket #15-13-2199

Dear Ms. Poirier:

This letter is to notify you of the disposition of the above-referenced complaint filed on July 17, 2013, with the U.S. Department of Education's Office for Civil Rights (OCR) against the University of Dayton (the University), alleging that the University's sexual harassment policy and grievance procedures did not comply with the requirements of Title IX of the Education Amendments of 1972.

OCR is responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681 *et seq.*, and its implementing regulation, 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in education programs and activities operated by recipients of Federal financial assistance from the Department. As a recipient of Federal financial assistance from the Department, the University is subject to Title IX. Accordingly, OCR had jurisdiction to investigate this complaint.

Based on the complaint allegation, OCR opened an investigation into whether the University failed to adopt and publish grievance procedures providing for the prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by the Title IX implementing regulation, as required by the regulation at 34 C.F.R. § 106.8(b).

Prior to the completion of OCR's investigation, the University requested to voluntarily resolve the complaint pursuant to Section 302 of OCR's *Complaint Processing Manual* (the *Manual*) and signed the enclosed resolution agreement (the *Agreement*), which, once implemented, will fully address the allegations raised in this complaint.

Applicable Legal Standards and OCR Policy

The Title IX regulation, at 34 C.F.R. § 106.8(b), requires a recipient to adopt and publish procedures that provide for the prompt and equitable resolution of student and employee complaints alleging sex discrimination, including complaints of sexual harassment. In evaluating whether a recipient's grievance procedures satisfy this requirement, OCR will review all aspects of a recipient's policies and practices, including the following elements that are critical to achieve compliance with Title IX:

- (1) notice to students and employees of the procedure, including where complaints may be filed;
- (2) application of the procedure to complaints alleging discrimination and harassment carried out by employees, other students, or third parties;
- (3) provisions for adequate, reliable, and impartial investigation of complaints, including the opportunity for both the complainant and the respondent to identify witnesses and other evidence;
- (4) designated and reasonably prompt timeframes for the major stages of the complaint process;
- (5) written notice to both parties of the outcome of the complaint; and
- (6) assurance that the recipient will take steps to prevent recurrence of any sex discrimination or harassment found to have occurred, and to correct any discriminatory effects on the grievant and others, if appropriate.

Title IX does not require a school to adopt a policy specifically prohibiting sexual harassment or to provide separate grievance procedures for sexual harassment complaints. However, a school's nondiscrimination policy and grievance procedures for handling discrimination complaints must provide effective means for preventing and responding to sexual harassment. Thus, if, because of the lack of a policy or procedure specifically addressing sexual harassment, students are unaware of what kind of conduct constitutes sexual harassment or that such conduct is prohibited sex discrimination, a school's general policy and procedures relating to sex discrimination will not be considered effective. A grievance procedure applicable to sexual harassment complaints cannot be prompt or equitable unless students know it exists, how it works, and how to file a complaint. Distributing the procedures to administrators, or including them in the school's administrative or policy manual, may not by itself be an effective way of providing notice, as these publications are usually not widely circulated to and understood by all members of the school community.

Grievance procedures may include informal mechanisms for resolving sexual harassment complaints to be used if the parties agree to do so. OCR has frequently advised schools, however, that it is not appropriate for a student who is complaining of harassment to be required to work out the problem directly with the individual alleged to be harassing him or her, and

certainly not without appropriate involvement by the school (e.g., participation by a counselor, trained mediator, or, if appropriate, a teacher or administrator). In addition, the complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process. In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis.

If a school provides for appeal of the findings or remedy, it must do so for both parties. Schools must maintain documentation of all proceedings, which may include written findings of facts, transcripts, or audio recordings.

With regard to Title IX grievance procedures that apply to complaints of sexual harassment, OCR also examines whether the recipient:

- (1) provides training for those implementing grievance procedures (Title IX Coordinator, investigator, adjudicators). This includes training in: handling of complaints of sexual harassment/violence; the school's grievance procedures; and confidentiality requirements;
- (2) does not allow conflicts of interest (real or perceived) by those handling the procedures;
- (3) informs complainants at regular intervals of the status of the investigation;
- (4) includes a range of potential remedies and sanctions;
- (5) addresses confidentiality for the complainant/victim; and
- (6) disallows evidence of past relationships.

Finally, in order to ensure that students and employees have a clear understanding of what constitutes sexual violence, the potential consequences for such conduct, and how the school processes complaints, a school's Title IX grievance procedures that apply to sexual harassment should also explicitly include the following in writing:

- (1) a statement of the school's jurisdiction over Title IX complaints;
- (2) adequate definitions of sexual harassment (which includes sexual violence) and an explanation as to when such conduct creates a hostile environment;
- (3) reporting policies and protocols, including provisions for confidential reporting;
- (4) identification of the employee or employees responsible for evaluating requests for confidentiality;
- (5) notice that Title IX prohibits retaliation;

- (6) notice of a student’s right to file a criminal complaint and a Title IX complaint simultaneously;
- (7) notice of available interim measures that may be taken to protect the student in the educational setting;
- (8) the evidentiary standard that must be used (preponderance of the evidence) (*i.e.*, more likely than not) in resolving a complaint;
- (9) notice of potential remedies for students;
- (10) notice of potential sanctions against perpetrators; and
- (11) sources of counseling, advocacy, and support.

The University’s Title IX Policies and Procedures

During its preliminary investigation, OCR reviewed several versions of the University’s Title IX policies and grievance procedures and related materials, and spoke with the University’s general counsel. OCR learned that in 2010 the University initiated a Sexual Misconduct Education Prevention and Response Task Force (Task Force) comprised of 15 members from the University’s faculty, staff, and student body to review and recommend improvements to the University’s sexual misconduct prevention measures, education, policies and procedures, response protocols, and support services. As a result of the Task Force’s recommendations, the University hired a Coordinator of Sexual Violence Prevention Education to facilitate prevention education. Additionally, in January 2012, the University appointed and trained a Title IX Coordinator and four Deputy Title IX Coordinators, each with a specific focus (*i.e.* students, faculty, staff, and athletics). The University also created a web link to the Title IX Coordinators’ names and contact information on the footer banner of every University internet and intranet webpage. The University also provided OCR with a list of 25 faculty and staff who have been designated and trained to investigate Title IX complaints (investigators).

OCR also reviewed the Title IX policies and procedures that had been published in both the employee and faculty handbooks. All of the materials reviewed by OCR set forth differing complaint processes for students, employees, and faculty members. OCR’s review noted that the previous policy and complaint procedure for students did not apply to harassment committed by University personnel and third parties. In addition, the former policies did not sufficiently ensure that interim measures were taken to protect a complainant during an investigation and nor that the University would take steps to correct the discriminatory effects of sexual harassment on the victim(s) and others as appropriate. However, during the course of OCR’s investigation, the University replaced those policies and procedures with one comprehensive non-discrimination and anti-harassment policy and a corresponding complaint process that applies to employees, faculty, and students. OCR confirmed that the various other policies had been removed from the current versions of both the faculty and employee handbooks and the University’s website. OCR notes, however, that although the University’s newly published Title IX policy and grievance procedures indicate that the Title IX Coordinator has ultimate oversight over the complaint

process, the University's new materials do not clearly identify the individual responsible for overseeing the various investigators who are charged with investigating complaints under the policy.

The following materials were identified by the University as its current policies and procedures for implementing Title IX and were reviewed by OCR during the preliminary investigation. All of the Title IX materials described below can be found online at the University's website.

- Nondiscrimination and Anti-Harassment Policy and Equity Complaint Process

In December 2013, the University provided OCR a copy of its newly approved policy entitled "Nondiscrimination and Anti-Harassment Policy" (policy) and the accompanying complaint process entitled "Equity Complaint Process for Resolving Complaints of Harassment, Sexual Misconduct and Other Forms of Discrimination" (complaint procedure), which took effect January 1, 2014.

The policy includes a statement on nondiscrimination and prohibits discrimination on the basis of, among other protected categories, sex/gender. The statement on nondiscrimination includes a provision clarifying that sexual harassment, which includes acts of sexual violence, is a type of sex-based discrimination prohibited by the policy. The statement on nondiscrimination also prohibits retaliation.

The policy states that interim remedial measures may be implemented as appropriate during investigation, as well as additional remedial or disciplinary measures to address any harassing or discriminatory behavior or retaliation found to have occurred. The policy states that, even where a violation of this policy is not found to have occurred, the University may recommend that mediation, counseling, or other restorative steps be taken. It also states that, where a respondent is found in violation, the University will impose appropriate sanctions or consequences and will act to end the discrimination, prevent its recurrence, and remedy its effects on the victim and the University community. The policy lists the name, title, and contact information for the Title IX Coordinator and Equity Compliance Officer as well as the four Deputy Title IX Coordinators. The new policy clearly states which Deputy Coordinator handles complaints against students, complaints against faculty, complaints against non-faculty employees, and complaints involving equity in athletics.

The complaint procedure states that complainants should engage in a pre-complaint resolution effort prior to making a complaint. This section of the complaint procedure encourages parties to first attempt discussing the issue with the person causing the problem. It states that parties are not required to engage in pre-complaint resolution efforts where impractical or where the party believes that doing so would not be effective. The complaint procedure does not clearly state that the pre-complaint process is voluntary and therefore the pre-complaint process may be interpreted by some readers as a required preliminary step except in certain circumstances. The complaint procedure also does not specifically state that the parties can end the informal process at any time. The complaint procedure clearly states, however, that some discrimination

complaints, such as complaints of sexual assault, may not be appropriate for pre-complaint resolution. The complaint procedure sets forth the major stages of the investigation, requires written notice of all dispositive findings, and provides timeframes for each stage.

The complaint procedure also offers an informal resolution process. The informal resolution process involves a basic fact-finding inquiry as opposed to the formal process, which involves a more extensive inquiry into the facts and circumstances. The informal resolution process is encouraged by the University for parties who wish to resolve the situation cooperatively and expeditiously. If the parties have not achieved a resolution within 10 working days, the University will commence the formal resolution process to be conducted simultaneously with the ongoing informal resolution process. The complaint procedure indicates that informal resolution is optional; however, it does not state that the parties may choose to terminate the process at any time. The complaint process does not include a statement that in some cases, such as complaints of sexual assault, use of the informal process is not appropriate.

- Sexual Harassment and Student Conduct Sections of the Student Handbook (University Hearing Board Accountability Hearings)

The University's student handbook contains two sections that relate to its Title IX policy and complaint procedure: "Student Conduct" and "Sexual Harassment." The "Sexual Harassment" section contains a summary of the University's Non-Discrimination and Anti-Harassment Policy referenced above, restates the new policy's definition of sexual harassment and retaliation, and sets forth an outline of the corresponding complaint process for students. The contact information for the University's Title IX Coordinator and the four Deputy Coordinators are included as well. This section of the handbook also contains the procedures for accountability hearings involving sexual harassment complaints. The "Student Conduct" section of the handbook sets forth the appeals procedure and states that, in cases of sexual harassment, both parties have the right to an appeal. The University's Judicial Review Committee reviews those appeals.

- Sexual Harassment Misconduct Resource Guide and Online FAQs

The University has also published a brochure for students entitled "Sexual Harassment Misconduct Resource Guide" and an online webpage for "frequently asked questions." The brochure provides the same sexual harassment policy and procedure information that is printed under the "Sexual Harassment" tab in the student handbook.

- Nondiscrimination Resource Center Website

Finally, on January 15, 2014, the University informed OCR that it had launched its new "Nondiscrimination Resource Center" website, which is designed to serve as a central repository of information that covers all unlawful discrimination and all possible categories of complainants and respondents (i.e. students, faculty, staff, and visitors). A link to this website can be found on the footer of every University webpage and the footer of every University intranet page with the title "Nondiscrimination /Title IX Policy." The website includes links to all the above listed materials. The website also has an electronic complaint form that allows individuals to file a

complaint online. On January 10, 2014, the University's president e-mailed the entire University community to inform them of the new Nondiscrimination and Anti-Harassment Policy and complaint process. The e-mail also referenced the new resource website.

Voluntary Resolution and Conclusion

As noted above, before the conclusion of OCR's investigation, the University expressed interest in voluntarily resolving this complaint pursuant to Section 302 of the *Manual*. The *Manual* provides that a complaint may be resolved before the conclusion of an OCR investigation if a recipient asks to resolve the complaint and signs a resolution agreement that addresses the complaint allegations. Such a request does not constitute an admission of liability on the part of the University, nor does it constitute a determination by OCR that the University has violated any of the laws that OCR enforces. The provisions of the resolution agreement are to be aligned with the complaint allegations or the information obtained during the investigation and consistent with applicable regulations. Under the terms of the enclosed Agreement, the University will:

- Revise its policies and procedures related to sex discrimination, including sexual harassment and sexual violence, to fully comply with Title IX, and adopt, implement, and publicize the revised policies and procedures.
- Train relevant staff on the revised policies and procedures.
- Conduct periodic climate assessments of campus climate to assess the effectiveness of steps taken pursuant to the Agreement.

In light of the signed Agreement, OCR finds that this complaint is resolved, and OCR is closing its investigation as of the date of this letter. OCR will, however, monitor the University's implementation of the Agreement.

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 harmed individual may file a complaint alleging such treatment. A complainant may have the right to file a private suit in Federal court, whether or not OCR finds a violation.

We appreciate the University's cooperation during OCR's preliminary investigation and resolution of this complaint. We also appreciate the University's timely submission of its first monitoring report pursuant to the Agreement, which OCR received on July 3, 2014, and is currently reviewing. The target date for completion of our review of this report is September 19, 2014. If you do not hear from OCR by that date, or if you have any questions regarding

resolution of this complaint or the implementation of this Agreement, please contact Lisa M. Lane, Supervisory Attorney/Team Leader, at 216-522-2678 or by email at Lisa.M.Lane@ed.gov. Should you choose to submit future monitoring reports electronically, please send them to OCRCleMonitoringReports@ed.gov.

Sincerely,

/s/

Meena Morey Chandra
Acting Director

Enclosure