



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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December 19, 2017

IN RESPONSE, PLEASE REFER TO: 03-14-2379

Chris A. Wood, President
Davis & Elkins College
Halliehurst Hall
100 Campus Drive
Elkins, WV 26241

Dear Mr. Wood:

This refers to the complaint filed with the U.S. Department of Education (Department), Office for Civil Rights (OCR), against Davis and Elkins College (the College). The Complainant, XXXXXX, alleged, on behalf of XXXXXX (the Student), that the College discriminated against XXXXXX.¹

OCR enforces Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681, and its implementing regulation, 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in any education program or activity operated by a recipient of Federal financial assistance. As a recipient of Federal financial assistance from the Department, the College is subject to these laws.

OCR applies a preponderance of the evidence standard to determine whether the evidence is sufficient to support a particular conclusion. Specifically, OCR examines the evidence in support of and against a particular conclusion to determine whether the greater weight of the evidence supports the conclusion or whether the evidence is insufficient to support the conclusion.

In reaching a determination in this complaint, OCR reviewed documentation provided by the Complainant and the College. OCR also interviewed the Complainant, the Student, other witnesses, and College staff. After carefully considering all of the information obtained during the investigation, OCR determined that the College's response to the Student's report of sex discrimination did not comport with the requirements of Title IX. The College agreed to resolve the concern through the enclosed resolution agreement.

Legal Standard

¹By letter dated September 5, 2014, consistent with the OCR procedures in effect at that time, we notified the parties that OCR would investigate whether the College failed to promptly and equitably respond to complaints, reports, and/or incidents of sexual violence of which it had notice and whether students were subjected to a sexually hostile environment. However, in accordance with the subsequent revision to that procedure, OCR's investigation focused on the allegation raised by your complaint: the College's failure to promptly and equitably respond to XXXXXX.

Sexual Harassment and Sexual Violence

Sexual harassment is unwelcome conduct of a sexual nature and is a form of sex discrimination prohibited by Title IX. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, including acts of sexual violence.

When a student sexually harasses another student, the harassing conduct creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the recipient's program. If a recipient knows or reasonably should know about student-on-student or third party harassment that may create a hostile environment, Title IX requires the recipient to respond in a prompt and equitable manner by taking immediate action to eliminate the harassment, prevent its recurrence, and address its effects. These duties are a recipient's responsibility, regardless of whether a student has complained, asked the recipient to take action, or identified harassment as a form of discrimination. If, upon actual or constructive notice, a recipient delays responding to allegations of sexual harassment and/or sexual violence or responds inappropriately, the recipient's own action may subject a student(s) to a hostile environment. If it does, the recipient will be required to remedy the effects of both the initial sexual harassment and/or sexual violence and the effects of the recipient's failure to respond promptly and appropriately. A recipient's obligation to respond appropriately to sexual harassment complaints is the same regardless of the sex or sexes of the parties involved.

Title IX Coordinator

The Title IX regulation at 34 C.F.R. § 106.8(a) requires schools to designate at least one employee to coordinate efforts to comply with Title IX and to notify students and employees about that designated coordinator. A Title IX coordinator's core responsibilities include overseeing the recipient's response to Title IX reports and complaints and identifying and addressing any patterns or systemic problems revealed by such reports and complaints. The Title IX coordinator must have knowledge of the requirements of Title IX, of the recipient's own policies and procedures on sex discrimination, and of all complaints raising Title IX issues throughout the recipient.

Title IX Grievance Procedures

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

1. notice to students and employees of the grievance procedures, including where complaints may be filed;
2. application of the grievance procedures to complaints filed by students or on their behalf alleging sexual harassment carried out by employees, other student, or third parties;

3. provision for adequate, reliable and impartial investigation of complaints, including the opportunity for both the complainant and alleged perpetrator to present witnesses and evidence;
4. designated and reasonably prompt time frames for the major stages of the complaint process;
5. notice to the complainant and alleged perpetrator of the outcome of the complaint; and
6. assurance that the school will take steps to prevent recurrence of any sexual harassment and remedy discriminatory effects on the complainant and others, if appropriate.

Notice of Non-Discrimination

The regulation implementing Title IX, at 34 C.F.R. § 106.9, requires a recipient to implement specific and continuing steps to notify all applicants for admission and employment, students and parents, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of sex in its education programs or activities, and that it is required by Title IX not to discriminate in such a manner. The Notice of Non-Discrimination must also state that questions regarding Title IX may be referred to the recipient's Title IX coordinator or to OCR.

Findings of Fact

Background

Davis and Elkins College is a four-year private college that offers Associate's and Bachelor's degrees and is located in Elkins, West Virginia. As of fall 2015, the College reported a total of 796 students, 56% of which are female (446) and 44% of which are male (350).

Notice of Nondiscrimination

The 2013-2014 Student Handbook included a Notice of Non-Discrimination that prohibited discrimination on the basis of sex in the College's educational program, activities, admissions or employment practices. The 2013-14 Student Handbook also included contact information for the Title IX Coordinators at that time, including their names. The College Catalog for the 2013-2014, 2014-2015, and 2015-2016 school years published a Nondiscrimination Statement noting that the College does not discriminate on the basis of sex (among other bases) and provided contact information for the Title IX Coordinator. However, the 2013-2014 College Catalog did not identify the Title IX Coordinator by name, and did not provide a telephone number for that person. The Nondiscrimination Statement also appeared in the personnel and faculty handbooks for all relevant years, but did not include contact information for the College's Title IX Coordinator.

Title IX Coordinator

On December 1, 2014, the College hired a new Title IX Coordinator and designated four Deputy Title IX Coordinators (the Director of Human Resources, Vice President for Student Affairs, Vice President for Academic Affairs and NCAA Compliance Coordinator).

Prior to that time, the 2013-2014 Guide identified the Director of Human Resources and Vice President for Student Affairs as the Title IX Coordinators, and provided their address, phone number and email address.

OCR's investigation established that from August 2011 to August 2013, the Title IX Coordinator was the Head Coach for the Cross Country Team, whom previously served as Athletic Director. In August 2013, the College appointed a new Title IX Coordinator, who serves as the Director of Human Resources. From August 2013 through January 2014, the Vice President for Student Affairs served as co-coordinator for Title IX.

The College's website includes a subsection devoted to Title IX; those pages identify the Title IX Coordinator and deputy coordinators by name, explain how a student or employee may report sexual harassment or sexual assault, provide a list of resources for victims, and refer individuals to OCR for additional information.

Title IX Policies and Procedures

The Student first reported incidents relevant to this complaint to College personnel on December 11, 2013. At that time, the College's Guide to Gender Based & Sexual Misconduct (the 2013-14 Guide), which was included in the 2013-2014 Student Handbook, was the policy that applied to the Student's report. The College reported that it initiated a comprehensive review of all of its policies and procedures in 2013, and, as a result, the Board of Trustees adopted the College's Sexual Misconduct Policy in October 2014, which superseded the Guide. That policy was then revised in 2015 (the 2015 Revised Policy).²

In addition to the above, the College maintained a separate Sexual Misconduct Policy for faculty and employees (Employee/Faculty Policy) from 2011 through October 2014. The October 2014 Sexual Misconduct Policy also subsequently superseded the Employee/Faculty Policy.

Below is a summary of the 2013-14 Guide and the 2015 Revised Policy.

1. Guide to Gender Based & Sexual Misconduct (2013-2014)

The 2013-14 Guide provides definitions and examples of misconduct, including sexual harassment, sexual assault, sexual exploitation, dating violence, domestic violence, and stalking, among others. In addition, the 2013-14 Guide identifies by name, title, address, phone number and email the College's Title IX coordinators (the Director of Human Resources and the Vice President for Student Affairs). The 2013-14 Guide refers students to the student conduct referral process for misconduct exhibited by a student, and Human Resources for misconduct exhibited by employees.

² The Sexual Misconduct Policy was revised again in September 2017. The revisions were not substantive and included formatting changes, identifying a College counselor and chaplain by name, and adding or modifying the definitions for dating violence, expulsion, and suspension.

The 2013-14 Guide states that the College's investigation will be conducted in a thorough and prompt fashion, and that the Respondent will be notified that a report has been filed and will be given written notice of the allegations and have the opportunity to submit a written statement within five business days. According to the 2013-14 Guide, both parties will be given the opportunity to meet separately with the Director of Human Resources to review policy and procedure, and a specially trained investigator will interview the parties and any witnesses, although character witnesses are not permitted. The 2013-14 Guide states that the investigator will also gather any pertinent documentation and prepare a report.

The 2013-14 Guide states that, following the conclusion of the investigation, a determination of whether or not to proceed to the administrative resolution phase will be made, which is based on whether reasonable cause exists to believe that a policy violation may have occurred. If not, the 2013-14 Guide states that the procedure will be concluded at this point but the College will institute other forms of remedial, community-based efforts such as educational initiatives and/or training. In addition, the 2013-14 Guide states that, after the conclusion of the investigation, both parties will be notified in writing and will be advised that they are permitted to review the investigative materials. In cases where a party refuses to participate, and where it is determined that reasonable suspicion exists to believe a policy may have been violated, the 2013-14 Guide provides that a hearing panel will convene and determine a finding based on the information available to them.

According to the 2013-14 Guide, if reasonable suspicion exists to move to the administrative resolution phase of the process, both parties will have the opportunity to review the investigative report and documentation from the investigation. The 2013-14 Guide states that the Respondent will be given the opportunity to respond with either (1) no response, (2) not responsible or (3) responsible. The 2013-14 Guide states that, if the Respondent accepts responsibility, the Vice President for Student Affairs will be notified and will determine the appropriate sanction, and the Vice President for Student Affairs will schedule a meeting with the Respondent to inform him or her of the sanctioning outcome within five calendar days. According to the 2013-14 Guide, both parties will be made aware of the sanctioning decision and both parties will have the opportunity to appeal, although the acceptance of responsibility is not appealable. The 2013-14 Guide states that, if the Respondent declines responsibility or chooses not to respond, a hearing panel will be convened. According to the 2013-14 Guide, both parties will be notified of any administrative resolution and sanctions, if applicable.

The 2013-14 Guide states that, ideally, hearing panels will be convened within 30 days after the receipt of the initial report and both parties will be given at least five calendar days to prepare for the hearing. The Guide states that the hearing panel will thoroughly review the investigative report and documentation prior to the hearing, and all testimony and interactions with the panel are conducted via closed-circuit television so that only the person providing the testimony is in the hearing room with the hearing panel during the testimony.

According to the 2013-14 Guide, the panel uses the preponderance of the evidence standard, and the Vice President for Student Affairs will decide appropriate sanctions where it is found that a student is responsible. The 2013-14 Guide specifies that the Vice President for Student Affairs will render a sanctioning decision within five calendar days following receipt of notice of the

panel’s decision, and both parties will be provided written notice of the hearing panel determination, and sanctions, if applicable.

The 2013-14 Guide states that both parties may appeal the decision and sanctions to the Vice President for Academic Affairs within five business days following the date of the sanctioning letter, and that both parties will be notified of an appeal and may submit a short written response. According to the 2013-2014 Guide, if the Vice President for Academic Affairs determines that a change in the hearing panel’s decision is warranted, the hearing panel will be reconvened. In addition, the 2013-2014 Guide states that the Vice President for Academic Affairs may also change the sanction by making it less or more severe, and the Vice President for Academic Affairs will notify both parties of the final decision in writing.

2. *Gender-Based Discrimination, Harassment, and Sexual Misconduct Policy (September 15, 2015)*

The College revised the 2013-2014 Guide in October 2014 to reflect updated guidance from OCR, adopting a new policy entitled the Gender-Based Discrimination, Harassment, and Sexual Misconduct Policy, which superseded the 2013-2014 Guide. In September 2015, the College revised those procedures again (the 2015 Revised Policy). The 2015 Revised Policy applies to all students, employees, and third parties, regardless of whom might be the victim or the perpetrator of any policy violations.

The 2015 Revised Policy states explicitly that it addresses the College’s responsibilities under Title IX, which prohibits discrimination on the basis of sex, noting that the College is committed to stopping incidents of Sexual and Gender-Based Misconduct, preventing their recurrence, and addressing and remedying their effects within the College community. The 2015 Revised Policy identifies the College’s Title IX Coordinator by name and title, and provides her telephone number, email address, and physical location at the College.

The 2015 Revised Policy designates three ways an individual may report an incident of Gender-Based Discrimination, Harassment and Sexual Misconduct to the College: (1) to the Title IX Coordinator or Deputy Title IX Coordinators; (2) to the College’s office of Campus Safety and Security; or (3) to any “responsible employee” of the College. The 2015 Revised Policy also explains how an individual may make an anonymous report online. The 2015 Revised Policy requires the assigned Title IX Coordinator to meet with the reporting party within five business days following the filing of a report or being put on notice of a possible incident of Sexual or Gender-Based Misconduct. The 2015 Revised Policy provides that the Title IX Coordinator will make an assessment, after meeting with the Reported Victim and if possible and prudent the Respondent, as to whether or not there are reasonable grounds for believing that the conduct at issue constitutes Gender-Based Discrimination, Harassment and Sexual Misconduct. According to the 2015 Revised Policy, if the Title IX Coordinator determines there are no reasonable grounds for believing that the conduct at issue falls within the Revised Policy, the Title IX Coordinator “will determine in separate consultation as appropriate with the Reported Victim, the Respondent and/or other College administrators and document the appropriate resolution of the Complaint.” The 2015 Revised Policy states that, if reasonable grounds exist for believing that the conduct at issue falls within the 2015 Revised Policy, the Title IX Coordinator will determine whether the

case can be resolved through informal resolution or whether a formal Title IX investigation is warranted to resolve the case.

The 2015 Revised Policy states that, as soon as is practicable after the Title IX Coordinator's initial assessment, if the Reported Victim wishes to pursue resolution through the College or if the College otherwise determines that an investigation is warranted, the Title IX Coordinator will schedule an initial meeting with the Respondent. The 2015 Revised Policy states that, during that meeting, the Title IX Coordinator will provide the Respondent with sufficient information to respond to the substance of the allegations, review with and provide the Respondent with a written copy of the 2015 Revised Policy, explain the College's procedures for resolving the complaint, and refer the Respondent to a counselor or other resources; and discuss possible appropriate interim measures.

The procedures of the 2015 Revised Policy concerning formal resolution of Title IX complaints state that it is the College's goal "to provide for an adequate, reliable and impartial investigation of each report, including the opportunity for both the Reported Victim and the Respondent to present witnesses and evidence." The 2015 Revised Policy states that, once the Title IX Coordinator determines that a formal investigation is warranted, she will appoint an investigator or an investigative team with specific training and experience investigating allegations of Gender-Based Discrimination, Harassment and Sexual Misconduct, and will notify both parties in writing of the investigator's name. The 2015 Revised Policy provides that the investigation and resolution of all reports will generally be completed within 60 to 90 days; if the process extends beyond that timeframe, the Title IX Coordinator and/or Investigator will notify the parties, and will provide periodic updates to the parties. In addition, this timeframe may be extended for good cause.

The 2015 Revised Policy states that during an investigation, the parties will have an equal opportunity to present witnesses and evidence to the investigator. The 2015 Revised Policy states that the investigatory process will typically be completed within 30 business days after the investigation begins and will result in a written report describing the investigation and explaining whether there is reasonable cause to believe that the Respondent violated the policy. The 2015 Revised Policy states that the written report is provided to the Title IX Coordinator and will be used in determining whether the policy has been violated. According to the 2015 Revised Policy, the assigned Title IX Coordinator, in conjunction with the investigator, will present the report to the remaining Title IX Coordinators (minus the Title IX Coordinator who serves as the appeal person) to determine whether a policy violation occurred based on the preponderance of the evidence standard, which means that a policy violation was more likely to have occurred than to not have occurred. According to the 2015 Revised Policy, both parties are provided with written notice of the outcome, the rationale for the decision, and the instructions for filing an appeal.

The 2015 Revised Policy states that, if the preponderance of the evidence establishes that it is more likely than not that the Respondent violated the policy, the assigned Title IX Coordinator will determine an appropriate sanction in conjunction with the appropriate administrator. The 2015 Revised Policy states that the sanction will be issued within five business days following receipt of the written decision. The 2015 Revised Policy states that both parties have the right to appeal the finding within five business days upon receipt of the written notice, and identifies the College staff member who hears appeals for students, staff, and faculty.

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Legal Analysis

Notice of Non-Discrimination

OCR has determined that the Notice of Non-Discrimination employed by the College at the time of the alleged incidents during the 2013-2014 academic year did not meet the requirements of the regulation implementing 34 C.F.R. § 106.8(a) and 106.9(a) because it did not identify the Title IX Coordinator by name and did not provide a telephone number for the Title IX Coordinator. Notwithstanding, however, the College's current Notice of Non-Discrimination meets the requirements of 34 C.F.R. § 106.8(a) and 106.9(a).

Title IX Coordinator and Training

OCR has determined that the College's designation and notice of the Title IX Coordinator, both at the time of the alleged incidents and currently, meets the requirements of the regulation implementing 34 C.F.R. § 106.8(a). Specifically, the College has designated an individual to serve as its Title IX Coordinator, has published her contact information widely, and has ensured that the Title IX Coordinator has adequate training to conduct her duties. The College has also designated several deputy Title IX Coordinators, and has clearly designated the deputy coordinators as individuals who assist the Title IX Coordinator, with the Title IX Coordinator overseeing the College's Title IX activities as a whole.

OCR does not have any concerns regarding the implementation of training to students and staff. However, as discussed more fully below, OCR has concerns that the training of the Title IX Coordinator and Investigative Staff who handled various aspects of the complaint filed by the Student was insufficient as several Title IX Team members did not conduct an equitable investigation and resolution of the complaint.

Title IX Grievance Procedures

OCR notes that the 2013-2014 Guide did not meet all of the requirements of Title IX. Specifically, the 2013-2014 Guide did not include the following components:

- The 2013-2014 Guide did not adequately state that it applied to complaints alleging discrimination or harassment carried out by third parties;
- The 2013-2014 Guide did not adequately provide for an adequate, reliable and impartial investigation, including an opportunity to present witnesses and evidence. Although the Guide stated that the investigator will interview the complainant, respondent, and any witnesses, as well as gather relevant documentation, the Guide did not state that an investigation would be adequate, reliable, and impartial, and did not state that the parties would have the opportunity to present other evidence.
- The 2013-14 Guide did not provide designated timeframes for several major stages of the grievance process, including for the Respondent to be notified of a complaint, for the completion of the investigation, and for filing any appeal.

- The 2013-2014 Guide contained an assurance that the institution would take steps to prevent further harassment, but did not explicitly mention that the College would correct any discriminatory effects on the complainant and others, if appropriate.

OCR concludes that the College's current Title IX policy (the 2015 Revised Policy) meets the requirements of 34 C.F.R. § 106.8(b).

XX – paragraphs redacted – XX

Conclusion

To resolve the areas of non-compliance identified above, the College entered into the attached Resolution Agreement, signed on November 1, 2017. Once the Resolution Agreement is fully implemented, the College will be in compliance with Title IX with respect to the issues addressed in this letter. OCR will monitor the College's implementation of the Resolution Agreement until the College is in compliance with the statutes and regulations at issue in the case.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the College's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. 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.

Please be advised that the College must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, or participates in an OCR proceeding. If this happens, the individual may file a retaliation complaint with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives 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 privacy.

Thank you for your cooperation in this matter. In particular, we would like to thank Jim Newberry for his assistance throughout our investigation of this complaint. If you have any questions, please contact Lucy Glasson at 215-656-8533 or at lucy.glasson@ed.gov.

Sincerely,

/s/

Beth Gellman-Beer
Team Leader/Supervisory Attorney
Philadelphia Office

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Enclosure

cc: Jim Newberry, Esq.