



UNITED STATES DEPARTMENT OF EDUCATION
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February 25, 2016

IN RESPONSE, PLEASE REFER TO: 03152352

Valerie Smith, Ph.D.
President
Swarthmore College
500 College Avenue
Swarthmore, PA 19081

Dear Dr. Smith:

This is to notify you of the resolution of the complaint filed against Swarthmore College (the College) alleging discrimination on the basis of sex. The Complainant, XXXXXX, alleged that the College discriminated against XXXXXX (the Student) on the basis of sex by permitting a hostile environment to exist by failing to promptly and equitably respond to XXXXXX complaint of sexual harassment.

OCR enforces Title IX of the Education Amendments of 1972, 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 Title IX and its implementing regulation.

LEGAL STANDARD:

The regulation implementing Title IX, at 34 C.F.R. § 106.31(a), provides 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 program or activity operated by a recipient which receives financial assistance from the Department. Specific obligations are set forth at 34 C.F.R. § 106.31(b), including a recipient's obligation to ensure that its students are not denied or limited in their ability to participate in or benefit from the recipient's programs or activities on the basis of sex.

Sexual harassment is a form of sex discrimination prohibited by Title IX. Hostile environment sexual harassment is unwelcome conduct of a sexual nature that is sufficiently serious that it denies or limits a student's ability to participate in or receive the benefits, services, or opportunities of a school's program. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, such as sexual assault or acts of sexual violence. Sexual harassment of a student creates a hostile environment if the

conduct is sufficiently serious that it denies or limits a student's ability to participate in or benefit from the recipient's program.

In determining whether this denial or limitation has occurred, OCR considers all relevant circumstances, including the degree to which the conduct affected one or more students' education; the type, frequency, and duration of the conduct; the identity of and relationship between the alleged harasser and the subject or subjects of the harassment; the number of individuals involved; the age and sex of the alleged harasser and the subject of the harassment; the size of the school, location of the incidents, and the context in which they occurred; other incidents at the school; and whether there were also incidents of gender-based but non-sexual harassment. A sexually hostile environment may deny or limit a student's ability to receive the benefits, services, or opportunities of a school's program even if there are no tangible effects, e.g., a drop in the victim's grades.

The more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true if the harassment is physical. A single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment. Moreover, a series of incidents at the school, not involving the same students, could -- taken together -- create a hostile environment, even if each by itself would not be sufficient. When responding to reported sexual harassment, a school must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in a school's investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. In all cases, however, the inquiry should be prompt, thorough and impartial.

If there is a dispute about whether harassment occurred or whether conduct was welcome, in cases where it is appropriate to consider whether the conduct would be welcome, determinations should be made based on the totality of the circumstances such as: statements made by any witnesses to the alleged incident; evidence about the relative credibility of the alleged harassed student and the alleged harasser (e.g., the level of detail and consistency of each person's account should be compared to one another and to the existence or lack of corroborative evidence); evidence that the alleged harasser has been found to have harassed others; evidence that the alleged harassed student has made false allegations against other individuals; evidence of the allegedly harassed student's reaction or behavior after the incident such as witness accounts from individuals who saw the student immediately after the incident or evidence of significant changes in the student's behavior in the weeks after the incident; evidence about whether the allegedly harassed student filed a complaint or took other action to protest the conduct after it had occurred (note that failure to immediately report may not be indicative that the alleged harassment did not occur); and any other contemporaneous evidence.

While investigating an allegation of sexual harassment in the school setting, it may be appropriate for a school to take interim measures during the investigation of a complaint. For instance, if a student alleges that he or she has been sexually assaulted by another student, the school may decide to immediately place the students in separate classes to prevent further harassment while the complaint is investigated.

If a student sexually harasses another student, the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the program, and the school knew or reasonably should have known about the harassment, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence.

Appropriate steps to end harassment may include separating the accused harasser and the target, providing counseling for the target and/or the harasser, or taking disciplinary action against the harasser. These steps should not penalize the student who was harassed. In addition, depending on the extent of the harassment, the school may need to provide training or other interventions not only for the perpetrators but also for the larger school community to ensure that all students and school staff can recognize harassment if it recurs and know how to respond. A school may also be required to provide additional services to the student who was harassed in order to address the effects of the harassment, particularly if the school initially delayed in responding or responded inappropriately or inadequately to information about harassment.

Certain acts of sexual harassment, such as unwelcome sexual touching, may also be criminal in nature, in which case it may be appropriate for a school to contact law enforcement authorities. However, contacting law enforcement authorities does not relieve a school of its individual obligation to investigate and address acts of sexual harassment occurring at school or during school-sponsored activities. The legal standards applied for criminal investigations are different than the standards applied under Title IX, and thus a school cannot rely on a police investigation to fulfill its Title IX obligations. Further, certain remedies, such as separating the student reporting the harassment from the alleged perpetrator in classes, in dining facilities, etc., can only be implemented by the school and are the school's responsibility.

OCR uses a preponderance of the evidence standard, (*i.e.*, it is more likely than not that discrimination occurred) when examining allegations of discrimination under all of the statutes it enforces, including Title IX, and in its fund termination administrative hearings. A preponderance of the evidence standard is therefore the appropriate standard for investigating allegations of sex discrimination, including sexual harassment or sexual violence. In order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard.

Finally, a school should take steps to stop further harassment and prevent any retaliation against the person who made the complaint (or was the subject of harassment) or against those who provided information as witnesses. At a minimum, the school's responsibilities include making sure that the harassed students know how to report any subsequent problems, conducting follow-up inquiries to see if there have been any new incidents or any instances of retaliation, and responding promptly and appropriately to address continuing or new problems.

FACTUAL SUMMARY:

Even though OCR did not complete its investigation, prior to entering into a voluntary resolution agreement with the College, OCR had interviewed the Complainant and the Student and reviewed documentation provided by the Student, as well as a position statement provided by the College.

xx – paragraphs redacted – xx

Please be advised, under OCR Docket #03132294, OCR is currently investigating an allegation concerning whether the College fails to promptly and equitably respond to complaints, reports, and/or incidents of sexual violence, of which it has notice, which will include a review of relevant policies and procedures, training, the Title IX Coordinator's role, etc. If OCR determines that the College must take corrective action to remedy systemic compliance concerns, we will notify you of the steps the College must take, as well as when OCR concludes its monitoring of the case.

RESOLUTION:

Under OCR procedures, a complaint may be resolved before the conclusion of an investigation if a recipient asks to resolve the complaint by signing a voluntary resolution agreement. The provisions of the agreement must be aligned with the complaint allegations; the issues investigated, and be consistent with applicable regulations. Such a request does not constitute an admission of liability on the part of a recipient, nor does it constitute a determination by OCR of any violation of our regulations.

Consistent with OCR's procedures, the College requested to resolve the complaint allegations through a voluntary resolution agreement (the Agreement) which was executed on February 18, 2016. Accordingly, OCR is concluding its investigation of this complaint. A copy of the signed agreement is enclosed. As is our standard practice, OCR will monitor the College's implementation of the Agreement.

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

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 law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions, you may contact Amy Niedzalkoski, Team Attorney, at (215) 656-8571 or by email at amy.niedzalkoski@ed.gov.

Sincerely,

/s/

Beth Gellman-Beer
Team Leader

Enclosure

cc: Michael Baughman, Esq.