



**UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS**

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September 24, 2015

Eric W. Kaler, Ph.D.
President
University of Minnesota-Twin Cities
202 Morrill Hall
100 Church Street, S.E.
Minneapolis, MN 55455

Re: OCR Docket # 05-14-2350
University of Minnesota-Twin Cities

Dear Dr. Kaler:

This is to advise you of the disposition of the complaint filed with the U.S. Department of Education (Department), Office for Civil Rights (OCR), against the University of Minnesota - Twin Cities (University) on March 20, 2014.

Specifically, the Complainant alleged that the University subjected a student on the women's gymnastics team (Student A) and other student athletes to a hostile environment based upon sex during the fall of 2013 when the XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXsubjected Student A to sexual harassment, the University had notice of the sexual harassment and failed to take effective steps to end the harassment and remedy its effects.

OCR is responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681-1688, and its implementing regulation at 34 C.F.R. Part 106 which prohibit both discrimination on the basis of sex and also retaliation 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 University is subject to Title IX.

Legal Standard

The Title IX regulation, 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 educational program or activity operated by recipients of Federal financial assistance.

The Title IX implementing regulation, at 34 C.F.R. § 106.8(b), provides that a recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by Title IX.

The Title IX regulation, at 34 C.F.R. § 106.9(a), provides that a recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, 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 the educational program or activity which it operates, and that it is required by Title IX not to discriminate in such a manner.

Under Title IX, recipients are responsible for providing students with a nondiscriminatory educational environment. Sexual harassment that creates a hostile environment is a form of sex discrimination prohibited by Title IX. Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances, requests for sexual favors and other verbal, nonverbal, or physical conduct of a sexual nature. Harassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents. Sexual harassment of a student creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or to receive benefits, services or opportunities in the university's program or activity.

Title IX protects students from sexual harassment in a university's education programs and activities. This means that Title IX protects students in connection with all the academic, educational, extracurricular, athletic, and other programs of the university, whether those programs take place on or off campus. If a student files a complaint of sexual harassment, regardless of where the conduct occurred, the school must process the complaint in accordance with its established procedures. Because students often experience the continuing effects of off-campus sexual harassment in the educational setting, a university should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus. A university should take steps to protect a student who was harassed off campus from further sexual harassment or retaliation from the perpetrator and his or her associates.

To establish a violation of the Title IX regulations prohibiting sexual harassment, OCR must find based on the totality of the circumstances that the university student, employee, agent or visitor subjected the student to a sexually hostile environment, specifically unwelcome conduct of a sexual nature in a university-related program or activity that was sufficiently serious to deny or limit the student's ability to participate in or benefit from the university's program. Conduct is unwelcome if the student did not request or invite the conduct and regarded it as undesirable or offensive.

OCR considers the conduct in question from both an objective perspective and the subjective perspective of the alleged victim of harassment. In analyzing claims of sexual harassment, OCR considers the totality of the circumstances to determine whether the harassing conduct is sufficiently serious that it denies or limits a student's ability to participate in or benefit from the recipient's program based on sex, thereby creating a hostile educational environment. These circumstances include the context, nature, scope, frequency, duration, and location of the incidents, as well as the identity, number, age and relationships of the persons involved. The more severe the conduct the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the harassment is physical. Indeed, a single or isolated incident of sexual harassment may create a hostile environment if the incident is sufficiently severe. In assessing whether a student was subjected to a sexually hostile environment, OCR considers the relationship between the alleged harasser and the subjects of the harassment.

Sexual harassment of a student athlete by a coach can be discrimination in violation of Title IX. In light of the power and authority a coach has over a student athlete, sexually based conduct by the coach toward a student athlete is more likely to create a hostile environment.

Universities are responsible for taking prompt and effective action to stop sexual harassment and prevent its recurrence. If a recipient determines that sexual harassment that creates a hostile environment has occurred, it must take immediate action to eliminate the hostile environment, prevent its recurrence, and address its effects. The extent of a university's responsibilities if a university employee sexually harasses a student is determined by whether or not the harassment occurred in the context of the employee's provision of aid, benefits, or services to students. OCR will consider a variety of factors in determining whether or not the harassment has taken place in this context.

The factors include:

- The type and degree of responsibility given to the university's employee or agent, including both formal and informal authority, to provide aids, benefits, or services to students, to direct and control student conduct, or to discipline students generally;
- the degree of influence the employee or agent has over the particular student involved, including in the circumstances in which the harassment took place;
- where and when the harassment occurred;
- the age and educational level of the student involved; and
- as applicable, whether, in light of the student's age and educational level and the way the university is run, it would be reasonable for the student to believe that the employee or agent was in a position of responsibility over the student, even if the employee was not.

Title IX requires the university to remedy any effects of hostile environment, as well as take steps to end the harassment and prevent its recurrence. More specifically, it should take

immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again. 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 and whether or not the recipient has "notice" of the harassment.

In addition, students who witness sexual harassment may be subjected to a hostile environment even if they were not the targets of the harassment. A series of incidents at the university, not involving the same students could—taken together—create a hostile environment, even if each would not be sufficient.

In addition to counseling or taking disciplinary action against the harasser, effective corrective action may require remedies for the complainant, as well as changes to the university's overall services or policies.

OCR has identified a number of elements for evaluating whether a recipient's grievance procedures provide for the prompt and equitable resolution of complaints. These include:

- a. Notice to students and employees of the grievance procedures, including where complaints may be filed;
- b. Application of the procedures to complaints alleging harassment carried out by employees, other students, or third parties;
- c. Adequate, reliable, and impartial investigation of complaints, including the opportunity for both parties to present witnesses and other evidence;
- d. Designated and reasonably prompt time frames for the major stages of the complaint process;
- e. Written notice to parties of the outcome of the complaint; and,
- f. An assurance that the university will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

Grievance procedures should specify the time frames within which: (1) the university will conduct a full investigation of the complaint; and (2) both parties will receive a response regarding the outcome of the complaint. OCR recommends that the grievance procedures include an appeal process for both parties. Both parties should be given periodic status updates.

To ensure that students and employees have a clear understanding of what constitutes sexual harassment, the potential consequences for such conduct, and how the school processes complaints, a school's Title IX grievance procedures should also explicitly include the following in writing, some of which themselves are mandatory obligations under Title IX.

- A statement of the school's jurisdiction over Title IX complaints;
- Adequate definitions of sexual harassment and an explanation as to when such conduct creates a hostile environment;
- Reporting policies and protocols, including provisions for confidential reporting;
- Identification of the employee or employees responsible for evaluating requests for confidentiality;
- Notice that Title IX prohibits retaliation;
- Notice of a student's right to file a criminal complaint and a Title IX complaint simultaneously;
- Notice of available interim measures that may be taken to protect the student in an educational setting;
- The evidentiary standard that must be used (preponderance of the evidence, i.e., more likely than not that sexual harassment occurred) in resolving a complaint;
- Notice of potential remedies for students;
- Notice of potential sanctions against perpetrators; and
- Sources of counseling, advocacy and support.

In some situations, if the university knows of incidents of harassment, the exercise of reasonable care should trigger an investigation that would lead to a discovery of additional incidents. The specific steps in a recipient'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 university, and other factors. In all cases, however, the inquiry should be prompt, thorough, and impartial. At the conclusion of a university's investigation, both parties must be notified, in writing, about the outcome of the complaint, *i.e.*, whether harassment was found to have occurred.

When taking steps to separate an alleged target of harassment from the alleged perpetrator during and subsequent to an investigation, a university should minimize the burden on the complainant, and thus should not, as a matter of course, remove the complainant from his or her classes, or extracurricular activities, while allowing the alleged perpetrator to remain. Additionally, prior to the outcome of an investigation, a university is required to assess whether the complainant requires protection or any other interim services as a result of the alleged harassing conduct, and if so provide them without cost to the complainant. Examples of interim services include academic support, counseling, changes to class schedules, assignments or tests, and increased monitoring, supervision or security at locations or activities where the harassing conduct occurred.

If a university delays responding to allegations of sexual harassment or responds inappropriately, the university's own inaction may subject the student to a hostile environment. If it does, the university will be required to remedy the effects of both the initial sexual harassment and the effects of the school's failure to respond promptly and appropriately.

Depending on how widespread the harassment was and whether there have been any prior incidents, the university may need to provide training for the larger school community to ensure that students, faculty and staff can recognize harassment if it recurs and know how to respond.

Finally, the university should take steps to stop further harassment and prevent any retaliation against the person who made the complaint (or was the subject of the harassment) or against those who provided information as witnesses. At a minimum, the university'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.

University Policies

The University maintains eight (8) policies and procedures,¹ which viewed together are intended to ensure the following: (i) that students enrolled in the University are not subjected to sexual harassment; (ii) the University will promptly investigate all incidents of sexual harassment of which it has notice; (iii) the University will take appropriate disciplinary action against students, faculty, and staff who violate the University policies and procedures addressing sexual harassment; and (iv) the University will take prompt and effective responsive action to end sexual harassment and prevent its recurrence, and where appropriate, take steps to remedy the effects of sexual harassment on the student.

The University's equal opportunity statement² provides for equal access to and opportunity in its programs, facilities, and employment without regard to race, color, creed, religion, national origin, gender, age, marital status, disability, public assistance status, veteran status, sexual orientation, gender identity, or gender expression.

The University's Title IX statement³ indicates, "Title IX prohibits sex discrimination including sexual harassment and sexual assault in schools, either in athletics or academics. It is most notable as the governing authority over equity of treatment and opportunity for women in athletics. Title IX inquiries and complaints should be directed to the Title IX Coordinator for the University of Minnesota." The statement further indicates that the Title

¹ (1) The Board of Regents Policy, Equity, Diversity, Equal Opportunity and Affirmative Action, (2) The Board of Regents Policy, Sexual Harassment, (3) Administrative Policy Sexual Harassment, (4) The Board of Regents Policy Student Conduct Code, the Definition: Sexual Harassment established by the EOAA, (5) Administrative Procedure Responding to Incidents of Sexual Assault, Stalking and Relationship Violence, (6) Administrative Policy Reporting and Addressing Concerns of Misconduct, (7) The Administrative Policy Sexual Assault, Stalking and Relationship Violence, and (8) Victim Rights Statement.

² <https://diversity.umn.edu/eoaa/equalopportunitystatement>

³ <https://diversity.umn.edu/eoaa/titleix>

XXXXXXXXXXXXXXXX any longer. Student A did not model for the XXXXXXXXXXXXXXXX after September 9, 2013.

OCR's investigation revealed that between September 9 and October 15, 2013, several University Athletic Department personnel learned about and discussed among themselves Student A's complaints about the modeling sessions. During this time period, no one advised Student A to file a grievance with the Equal Opportunity and Affirmative Action (EOAA) office or the Title IX Coordinator. On October 8 or 9, the Director of Athletic Medicine reported the modeling sessions to the University's NCAA compliance officer because Student A was paid for the sessions, which is a possible NCAA compliance violation. The University's NCAA compliance officer did not refer the complaint to the EOAA office or to the Title IX Coordinator.

On October 15, 2013, during a routine medical appointment, the Athletic Trainer and gymnastics team physician asked Student A about the modeling sessions. Student A reiterated her discomfort with modeling for the XXXXXXXXXXXXXXXX. Student A explained that she complained about the modeling sessions because she did not want other gymnasts to experience the embarrassment and humiliation she suffered while modeling for the XXXXXXXXXXXXXXXX. On October 16, 2013, Athletic Department staff reported Student A's complaints to the EOAA office. The EOAA office began an investigation on October 17, 2013. On October 31, 2013, the XXXXXXXXXXXXXXXX resigned from his position at the University prior to the conclusion of the EOAA investigation.

On November 5, 2013, the EOAA office completed its investigation and determined that the XXXXXXXXXXXXXXXX violated the University's policies prohibiting discrimination and sexual harassment. The EOAA office also noted that the XXXXXXXXXXXXXXXX failed to promptly address the XXXXXXXXXXXXXXXX's sexually harassing behavior of which she had notice.

The EOAA's recommendations included:

- Restricting the XXXXXXXXXXXXXXXX's access to the gymnasium where the women's gymnastics team practices, and to team-related practices, competitions, and events.
- Prohibiting the XXXXXXXXXXXXXXXX from working with University athletes in any capacity.
- Communicating to the XXXXXXXXXXXXXXXX that, given his marital relationship with the Team's XXXXXXXXXXXXXXXX, it is not appropriate for him to use current women's gymnastics team members as models for his work as a sculptor, or to otherwise make sculptures of current team members, even if commissioned by their parents.
- Requiring the XXXXXXXXXXXXXXXX to attend sexual harassment training.
- Providing the XXXXXXXXXXXXXXXX with coaching about compliance with University policy.
- Athletic Department-wide sexual harassment training.

- Athletic Department-wide review regarding potential inappropriate nepotism situations in the Athletics Department.

The University reported that it provided training on sexual harassment to all athletic department staff in December 2013. The gymnastics staff interviewed by OCR reported that they do not recall attending sexual harassment training in December 2013.

According to the University, the XXXXXXXXXXXX resigned her position in early September 2014. Student A reached an agreement with the University in November 2014 which resolved the adverse effects of sex harassment experienced by Student A.

Conclusion

In accordance with Section 302 of OCR's *Case Processing Manual*, a complaint may be resolved at any time when, before the conclusion of an investigation, when the recipient expresses an interest in resolving the complaint. Prior to the conclusion of OCR's investigation, the University expressed interest in resolving the complaint. Subsequent discussions with the University resulted in the execution of the enclosed Resolution Agreement (Agreement) on September 18, 2015, which, when fully implemented, will resolve the issues raised in the complaint. In particular, the University agreed to revise its Title IX policies and procedures, train students and staff, conduct climate surveys, establish a working group of students, faculty and administrations and conduct student focus groups.

The provisions of the Agreement are aligned with the complaint allegation and the information obtained during OCR's investigation, and are consistent with the applicable regulations. OCR will monitor the University's implementation of the Agreement until the University is in compliance with the Title IX regulations at issue in the case.

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, Student A 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, we 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.

Page 10 –Mr. Kaler
OCR Docket # 05-14-2350

Student A may file a private suit in Federal court, whether or not OCR finds a violation.

We wish to thank you and the University staff for their cooperation during OCR's processing of this case. In particular, we wish to thank the University's Senior Associate General Counsel Brent Benrud, for his consistent and prompt reports.

If you have any questions, please contact Camille D. Lee, Civil Rights Attorney at 312-730-1561 or Camille.Lee@ed.gov

Sincerely,

Ann Cook-Graver
Supervisory Attorney

Enclosure

cc: Mr. Brent Benrud
Senior Associate General Counsel