



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

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April 20, 2018

Mr. Geoffrey Mearns
President
Ball State University
Administration Building, Room 101
Muncie, IN 47306

Re: OCR Docket #05-17-2275

Dear Mr. Mearns:

This is to advise you of the completion of the complaint resolution activities by the U.S. Department of Education (Education), Office for Civil Rights (OCR), of the above-referenced complaint filed against Ball State University (University) alleging discrimination based on sex and disability.

Specifically, the complaint alleges the following:

1. The University subjected a male student (Student A) to discrimination based on sex in XXXXXX by failing to respond appropriately to a report that he had been subjected to XXXXXX by a male student (Student B);
2. The University subjected Student A to discrimination based on sex in XXXXXX by imposing on him at the request of a female student (Student C) a no-contact order with respect to contact with Student C but not granting Student A's request that a no-contact order be imposed on Student C with respect to contact with him; and
3. The University subjected Student A to discrimination based on disability (visual impairment) in XXXXXX by imposing a no-contact order that XXXXXX, a condition with which he was unable to comply due to his disability.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131 - 12134, and its implementing regulation, 28 C.F.R. Part 35. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance from the Department, and Title II prohibits discrimination on the basis of disability by public entities. OCR is also 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 prohibits discrimination based upon sex in any educational program or activity operated by a recipient of Federal financial assistance. As a recipient of Federal financial assistance from the Department and a public entity, the University is subject to these laws.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

During its investigation, OCR reviewed data provided by Student A and the University and interviewed Student A and University personnel. Prior to OCR making a final determination with regard to allegation #1 or allegation #3, the University expressed an interest in resolving the allegations. On April 18, 2018, the University signed the enclosed Resolution Agreement, which, when fully implemented, will address allegations #1 and #3 in the complaint. OCR will monitor the implementation of the Resolution Agreement. In addition, based on its investigation, OCR determined using a preponderance of the evidence standard that there is insufficient evidence to conclude that the University subjected Student A to discrimination based on sex as alleged in allegation #2. The reasons for this determination are explained below.

Legal Standards

The Title IX regulation, at 34 C.F.R. § 106.8(b), requires recipients to adopt and publish grievance procedures providing for the prompt and equitable resolution of complaints alleging any action that would be prohibited by Title IX, including sex discrimination, sexual violence and other types of sexual harassment. The procedures for addressing and resolving complaints of sex discrimination should be written in language that is easily understood, should be easily located, and should be widely distributed.

The Title IX regulation, at 34 C.F.R. § 106.31, provides generally that, except as provided elsewhere in the regulation, no person shall on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination in education programs or activities operated by recipients of financial assistance from the Department.

In analyzing whether a student was subjected to different treatment on the basis of sex in violation of Title IX, OCR first determines if there are any apparent differences in the treatment of similarly-situated students on the basis of sex. If such differences are found, OCR evaluates the reasons, if any, offered by the recipient to explain any differences in treatment to determine whether the reasons are legitimate and non-discriminatory and whether they are a pretext for unlawful discrimination. Additionally, OCR examines whether there is other information showing that the recipient treated the student in a manner that was inconsistent with its established policies and procedures or whether there was any other evidence of sex discrimination.

The Section 504 regulation, at 34 C.F.R. § 104.4, and the Title II implementing regulation, at 28 C.F.R. § 35.130(a), provide generally that no qualified student with a disability shall on the basis of disability be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any programs or activities which receive financial assistance or by any public entity.

The regulation implementing Section 504, at 34 C.F.R. § 104.44(a), requires that postsecondary institutions make such modifications to their academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of disability, against a qualified applicant or student with a disability. The Title II implementing regulation, at 28 C.F.R. § 35.130(b)(7), states that a public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid

discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

University Policies and Procedures

The University's Code of Student Rights and Responsibilities (Code)¹ describes behavioral requirements for University students and contains disciplinary procedures when a student violates the Code. The Code applies to all on-campus conduct and certain off-campus conduct of students. The University's Office of Student Rights and Community Standards (SRCS) administers the Code and investigates allegations of misconduct.

The Code contains specific policies and grievance procedures related to complaints of sexual harassment of University students. The University's Sexual Harassment and Misconduct Policy (SHMP) appears at "Appendix K" of the Code.² The SHMP states that the Code covers complaints of discrimination based on sex including sexual violence "made against any Ball State University student or student organization including off-campus conduct."

The SHMP sets forth procedures the University uses to investigate such complaints. In particular, a student may file a complaint alleging that another student violated the Policy by contacting the University's Title IX Coordinator. The Title IX Coordinator assigns a Title IX investigator to discuss the matter with the complainant and to conduct an initial Title IX assessment. The investigator is to share information related to resources, interim measures, and the options for proceeding including the right to contact law enforcement, or proceed with a University remedies-based resolution or a resolution through the adjudication process. The SHMP states, "When a student reports an incident of sexual harassment or misconduct there are a number of immediate and interim steps that can be provided" and states that the University will provide appropriate interim measures and accommodations, listing "Issuing written, administrative 'no contact instruction'" as one of the options. The SHMP does not require that no-contact orders be issued on request.

Facts

Student A was an undergraduate student at the University in XXXXXX. On XXXXXX, Student A informed the Director of SRCS (Director) that he had been XXXXXX; the University informed OCR that at the time of the report, Student B was on suspension from the University for a disciplinary incident unrelated to Student A or alleged XXXXXX. Student A submitted a written complaint on XXXXXX, alleging XXXXXX. He also requested a no-contact order with regard to Student C, writing that Student B had been "manipulating" Student C into providing information about Student A. Student A told OCR that Student C was a friend of both Student A and Student B. Student A said he told Student C at one point that he was afraid that Student B

¹ <http://cms.bsu.edu/-/media/www/departamentalcontent/student%20rights/pdfs/ball%20state%20code%20of%20student%20rights%20and%20responsibilities%2020162017%20final.pdf?la=en>

² <http://cms.bsu.edu/-/media/www/departamentalcontent/student%20rights/pdfs/appendix%20k%20-%20sexual%20harassment%20and%20misconduct%20policy%202017.pdf?la=en>

was trying to get information from her about him and that he told Student C several times in text messages not to speak with Student B.

The University's Response to Student A's Complaint against Student B

The Director met with Student A on XXXXXX. Student A said the Director told him his complaint would be processed as a remedies-based complaint because Student B was no longer a student at the University. Student A said that, in addition to his request for a no-contact order against Student C, he asked for a change in his grades from XXXXXX, as he XXXXXX, a no-contact order against Student B, and a no trespass order against Student B so he could not come on campus. The Director told OCR that they also talked about counseling; he said Student A was XXXXXX. Student A said he believes the Director "briefly" referenced resources available at the University counseling center and confirmed that XXXXXX.

The Director said he agreed based on what Student A said and what the Director already knew of Student B based on prior interactions that it was appropriate to ban Student B from campus; he said Student A was seeking a restraining order through local law enforcement, so the University coordinated the ban from campus with that process, sending Student B the notice of the ban from campus in XXXXXX. Student A told OCR he had no contact with Student B after he made the XXXXXX report to the University.

The Title IX Coordinator said the complaint against Student B was not investigated because Student B was no longer a student; she said that banning him from University property was as much as the University had the authority to do. She said that if Student B were to re-enroll, she believes the University would investigate the complaint. The Director said that since the University had no jurisdiction over Student B and had no reason to disbelieve Student A, it took responsive actions as if the XXXXXX happened as alleged; further, he found Student A credible based on what Student A described and his previous personal interactions with Student B.

With regard to Student A's request for grade modifications, the Deputy Title IX Coordinator met with Student A on XXXXXX. The Deputy Title IX Coordinator subsequently contacted faculty members from Student A's courses in XXXXXX by email dated XXXXXX; the faculty members agreed to change Student A's grade from XXXXXX to XXXXXX. The Deputy Title IX Coordinator confirmed this in email messages to Student A on XXXXXX. Student A told OCR that he was satisfied with this grade adjustment.

The University's Responses to Student A's and Student C's requests for No-Contact Orders

In order to assess whether to grant Student A's request for a no-contact order regarding Student C, the Director met separately with Student A and Student C in XXXXXX. The Director advised OCR that Student A told him that Student C had not contacted him since he had asked her the previous week not to have any further contact with him. He said he concluded that it was not necessary to issue a no-contact order against Student C because she had stopped communicating with Student A already. He also said Student C shared with him XXXXXX she had received from Student A; he further said Student C expressed concern to him about what Student A might do if he knew Student C had talked with the Director about Student A.

On XXXXXX, Student C contacted the Director to assert that Student A had harassed her, including by XXXXXX and saying XXXXXX. The Director said he was particularly concerned that the final phrase could be considered a threat toward Student C, so he granted her request for a no-contact order. Student A was ordered not to contact Student C, not to XXXXXX, and not to XXXXXX.

The Director sent the order to Student A on XXXXXX, by email, and Student A responded the same day, saying, “I can assure you as stated at previous meetings that I do not intend on having any contact with her whatsoever.” The next day, Student A responded to the Director and acknowledged that he could have communicated with Student C “in a more constructive way,” but said he had not knowingly communicated with Student C since XXXXXX.

Student A subsequently filed a Title IX complaint against Student C on XXXXXX. As part of its processing of this complaint, the University imposed a no-contact order on Student C. The University investigated the complaint and determined that Student C was responsible for a violation of University policy.

Student A’s Disability-Based Objections to The No-Contact Order Imposed upon Him

Student A told OCR he cannot XXXXXX, so he could not comply with an order to XXXXXX. He said this constitutes discrimination based on disability. Student A said he is registered as a student with a disability with the University and receives modifications; documentation from the University confirmed that Student A provided the University a letter indicating that he XXXXXX and that it approved modifications for the XXXXXX academic year for his courses. The documentation refers only to courses and is silent as to compliance with University rules or directives.

Student C accused Student A of violating the no-contact order when he was near XXXXXX; the Director informed Student A of the allegation by letter dated XXXXXX. According to the University, Student A informed the Director on XXXXXX, of his inability to XXXXXX, but did not request a modification of the order based on his disability; Student A informed OCR that on multiple occasions, he informed the Director that the documentation of his disability was available in the Disability Services office. By letter dated XXXXXX, the Director informed Student A that he was dismissing the allegation against Student A because Student A had been visiting a friend on XXXXXX, but expanding the no-contact order to include XXXXXX. Student A informed OCR he was not charged with any additional violations of the no-contact order and also said that in XXXXXX, the University modified the no-contact order to remove the requirement that he XXXXXX, although he was still required to make every reasonable effort to avoid contact with Student C.

Analysis and Conclusion

In making a determination regarding compliance, OCR must often weigh conflicting evidence and determine whether the preponderance of the evidence substantiates the allegation. The

evidence established with regard to allegation #2 that, at the time Student A requested a no-contact order be given to Student C, he indicated that the students had not had any contact since Student A requested that Student C not contact him. The evidence established that when Student C requested a no-contact order the next month, she provided copies of messages from Student A to another student that could be construed as threatening toward Student C, and she had previously provided to the University XXXXXX that Student A directed to her.

The SHMP states, “When a student reports an incident of sexual harassment or misconduct there are a number of immediate and interim steps that can be provided” and states that the University will provide appropriate interim measures and accommodations, listing “Issuing written, administrative ‘no contact instruction’” as one of the options. The SHMP does not require that no-contact orders be issued on request. Therefore, OCR determined that the University’s action to grant Student C the no-contact order while denying Student A a no-contact order was not inconsistent with its policies and procedures and was based on the evidence presented by the parties when they requested the order. In addition, as the University later granted Student A a no-contact order with regard to Student C when he made a complaint about specific conduct he found harassing, the evidence suggests that the denial of his February request was based not on his sex, but on the specific facts of which the University was aware at the time. Accordingly, OCR determined that the evidence is insufficient to establish a violation of the applicable regulation with regard to allegation #2.

OCR has not made a finding with regard to allegations #1 and #3, but determined that it is appropriate to resolve these allegations with the enclosed Agreement.

This concludes OCR’s investigation of the complaint and 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. 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 individual may file 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.

The complainant may file a private suit in federal court, whether or not OCR finds a violation.

OCR wishes to thank the University for the courtesy and cooperation extended to OCR during its investigation. In particular, we wish to thank Ms. Melissa Holloway, Counsel for the University.

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If you have any questions, please contact me at 312-730-1611 or by email at Jeffrey.Turnbull@ed.gov.

Sincerely,

Jeffrey Turnbull
Team Leader

Enclosure

cc: Ms. Melissa Holloway