



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION XI
NORTH CAROLINA
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VIRGINIA
WASHINGTON, D.C.

May 9, 2014

General J.H. Binford Peay III, Superintendent
Virginia Military Institute
201 Smith Hall
Lexington, Virginia 24450

RE: OCR Complaint #11-08-2079
Letter of Findings

Dear General Peay:

This letter advises you of the outcome of OCR's investigation of the above-referenced complaint that was filed with the District of Columbia Office of the Office for Civil Rights (OCR), U.S. Department of Education (the Department), against Virginia Military Institute (VMI) under Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681 et seq. The complaint alleged as follows:¹

- 1) VMI's Title IX complaint procedures do not provide for equitable resolution of cadet and employee complaints;
- 2) VMI permits an environment hostile to female cadets both in the barracks and in the classroom;
- 3) VMI's marriage and parenthood policy discriminates against female cadets;
- 4) VMI's tenure/promotion and sabbatical processes discriminate against female faculty; and
- 5) VMI's Fitness Test (VFT) discriminates against female cadets because it uses a scale based only on male performance.

OCR investigated the complaint allegations pursuant to its authority under the Title IX regulation, 34 C.F.R. Part 106, which prohibits discrimination on the basis of sex in educational programs and activities receiving Federal financial assistance from the Department. Because VMI receives financial assistance from the Department, it is subject to the provisions of Title IX and its implementing regulation.

¹ Please note that allegations 1, 2 and 5 in this document are referred to as allegations 4, 3 and 5 in the Voluntary Resolution Agreement because the resolution agreement uses the numbering from OCR's original letter of notification to VMI.

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

By letter dated November 19, 2008, OCR closed allegation 5 because it was resolved when VMI discontinued using one VFT scale based on male performance standards to evaluate all cadets and initiated the use of two VFT scales based on male and female performance standards.

This letter summarizes the facts and conclusions found by OCR during its investigation and resolution of the remaining four allegations of this complaint. Based on the investigation, OCR determined that VMI's grievance procedures failed to comply with the requirements of Title IX and that VMI failed to provide a prompt and equitable response to complaints of sexual harassment and sexual violence² as required by Title IX, thereby permitting a sexually hostile environment to exist for cadets that limited or denied their access to the educational opportunities provided by VMI. OCR further determined that VMI's marriage and parenthood policy did not comply with Title IX regulations; VMI addressed this finding by revising its policy to bring it into compliance. Finally, prior to the conclusion of OCR's investigation of VMI's tenure and promotion processes, VMI agreed to revise its tenure and promotion policies.

During the course of this investigation, VMI enhanced its sequence of training programs throughout the year for cadets and staff on sexual assault and related issues; in 2012-13, this included seven programs for first-year cadets, 16 programs for other groups of students, and five programs for staff, while staff with special responsibility for Title IX issues took part in 16 different training activities. VMI enhanced the role and training of its Title IX coordinator, initiated an annual employee climate survey, and developed a draft revised unified Title IX policy and grievance procedures for review and approval by OCR that, when fully implemented, will address the findings reached concerning this allegation.

Legal Authority

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, denied the benefits of, or subjected to discrimination in education programs or activities operated by recipients of Federal financial assistance.

Sexual Harassment

Under Title IX, colleges and universities that receive Federal financial assistance 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.³ Sexual harassment is unwelcome conduct of a sexual nature, which

² Throughout this document, unless otherwise noted, the term "sexual assault" is used to refer to "sexual harassment and sexual violence."

³ The applicable legal standards described herein are more fully discussed in OCR's 2011 Dear Colleague Letter on Sexual Violence, which is available at: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html> (Apr. 4, 2011); for further clarification on this topic, see "Questions and Answers on Title IX and Sexual Violence" (Apr. 29, 2014), which is available at: <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>. See also OCR's 2010 Dear Colleague Letter on Harassment and Bullying, which is available at: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html> (Oct. 26, 2010); and OCR's

can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, including sexual harassment or other 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.

A recipient violates a student's rights under Title IX regarding student-on-student sexual harassment when the following conditions are met: 1) the harassing conduct is sufficiently serious to deny or limit an individual's ability to participate in or benefit from the educational program (*i.e.*, a hostile environment exists); 2) the recipient knew or reasonably should have known about the harassment; and 3) the recipient fails to take appropriate responsive action. OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt, thorough, and reasonably calculated to eliminate any hostile environment and its effects and prevent the harassment from recurring. These duties are a recipient's responsibility, regardless of whether a student has complained, asked the recipient to take action, or identified the harassment as a form of discrimination.

OCR considers a variety of related factors to determine if a sexually hostile environment has been created and also considers the conduct in question from both an objective and subjective perspective. Factors examined include the type of harassment; the frequency and severity of the misconduct; the age, sex, and relationship of the individuals involved; the setting and context in which the harassment occurred; and other relevant factors. 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. A single or isolated instance of sexual harassment may create a hostile environment. Even if the sexual harassment did not occur in the context of an education program or activity, a recipient must consider the effects of the off-campus sexual harassment when evaluating whether there is a hostile environment on campus or in an off-campus education program or activity because students often experience the continuing effects of off-campus sexual harassment while at school or in an off-campus education program or activity. If a student files a complaint with the recipient, regardless of where the conduct occurred, the recipient must process the complaint in accordance with procedures that meet Title IX requirements.

Once a recipient knows or reasonably should have known about sexual harassment that may create a hostile environment for its students, the recipient must take immediate and appropriate steps to investigate or otherwise determine what occurred. If an investigation reveals that sexual harassment created a hostile environment, the recipient must then take prompt and effective steps reasonably calculated to end the sexual harassment, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects. A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment. If a recipient delays responding to allegations of sexual harassment or responds inappropriately, the recipient's own action may subject the student to a hostile environment. If it does, the recipient will be required to remedy the effects of both the initial sexual harassment 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 irrespective of the sex or sexes of the parties involved.

In addition, if there is an incident involving potential criminal conduct, the recipient must determine, consistent with state and local law, whether appropriate law enforcement or other authorities should be notified. A law enforcement investigation does not relieve the recipient of its independent Title IX obligation to investigate the conduct; a recipient should not wait for the conclusion of a criminal investigation or proceeding before responding itself, including by beginning its own investigation and, if needed, by taking immediate steps to protect the complainant⁴ during the pendency of its investigation and resolution of the complaint.

Sexual harassment of a student by a faculty member or other school employee also violates Title IX. Recipients are responsible for taking prompt and effective action to stop the harassment, prevent its recurrence and remedy its effects. A recipient is responsible under Title IX regulations for the nondiscriminatory provision of aid, benefits, and services to students. If an employee who is acting (or who reasonably appears to be acting) in the context of carrying out these responsibilities over students engages in sexual harassment, the recipient is responsible for the discriminatory conduct. The recipient is also responsible for remedying any effects of the harassment on the complainant, as well as for ending the harassment and preventing its recurrence. This is true whether or not the recipient has notice of the harassment. A recipient has notice of harassment if a responsible employee actually knew or, in the exercise of reasonable care, should have known about the harassment.

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:

⁴ Throughout this document, unless otherwise noted, the term "complainant" refers to the student who allegedly experienced the sexual assault.

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. written 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.

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

1. a statement of the recipient's jurisdiction over Title IX complaints;
2. adequate definitions of sexual assault 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) in resolving a complaint;
9. notice of potential remedies for students;
10. notice of potential sanctions against perpetrators; and
11. sources of counselling, advocacy and support.

The procedures for resolving complaints of sexual harassment should be written in language that is easily understood, be easily located, and should be widely distributed. It is permissible for a school to have either one grievance procedure that applies to all sex discrimination and harassment or separate procedures for discrimination and harassment. However, a recipient's grievance procedures for handling discrimination complaints must meet the Title IX requirement of affording a complainant a prompt and equitable resolution. In addition, a school may have one grievance procedure for complaints by students and employees or separate procedures for complaints by students and complaints by employees.

In addition, recipients should provide training to employees about its grievance procedures and their implementation. All persons involved in implementing a recipient's grievance procedures (e.g., Title IX coordinators, investigators and adjudicators) must have training or experience in handling complaints of sexual harassment, and in the recipient's grievance procedures as well as applicable confidentiality requirements. In sexual violence cases in particular, the fact-finder and the decision-maker also should have adequate training or knowledge regarding sexual violence. Recipients should also provide training about its grievance procedures and their implementation to any employees likely to witness or receive reports of sexual harassment; including teachers, recipient law enforcement unit employees, recipient administrators, recipient counselors, general counsels, health personnel, and resident advisors. Recipients need to ensure that their employees are trained so that they know to report sexual harassment to appropriate officials, and so that employees with the authority to address sexual harassment know how to respond properly.

Pending the outcome of an investigation of a report or complaint, Title IX requires a recipient to take steps to ensure equal access to its education programs and activities and to protect the complainant as necessary, including taking interim measures before the final outcome of an investigation. Such interim measures minimize the risk of harm and continued harassment while the recipient conducts its inquiry. The recipient should undertake these interim measures promptly once it has notice of the harassment allegation and should provide the complainant with periodic updates on the status of the investigation. The specific interim measures implemented and the process for implementing those measures will vary depending on the facts of each case. In general, when taking interim measures, recipients should minimize the burden on the complainant. For example, if the complainant and alleged perpetrator share the same class or residence hall, the recipient should not, as a matter of course, remove the complainant from the class or housing while allowing the accused to remain without carefully considering the facts of the case. Recipients should also check with complainants to ensure that the interim measures are effective, and if ineffective, identify alternatives. Recipients should also ensure that the complainant is aware of his or her Title IX rights and any available resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance, and the right to report a crime to campus or local law enforcement.

Throughout the recipient's investigation and in any hearing, both parties must have equal opportunity to present relevant witnesses and other evidence. Also, the recipient must use a preponderance of the evidence standard for investigating allegations of sexual harassment. If a recipient provides for appeal of the findings, it must do so for both parties. The recipient must maintain documentation of all proceedings.

For Title IX purposes, if a student requests that his or her name not be revealed to the accused or asks that the recipient not investigate or seek action against the accused, the school should inform the student that honoring the request may limit its ability to respond fully to the incident, including pursuing disciplinary action against the accused. The recipient should also explain that Title IX includes protections against retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs. If the student still requests that his or her name not be disclosed to the accused or that the recipient not investigate or seek action against the accused, the recipient will need to determine whether or not it can honor such a request while still providing a safe and

nondiscriminatory environment for all students, including the student who reported the harassment. If the school determines that it can respect the student's request not to disclose his or her identity to the accused, it should take all reasonable steps to respond to the complaint consistent with the request.

Parental Status and Pregnancy Discrimination

The Title IX regulation at 34 C.F.R. § 106.40 also addresses parental status and pregnancy. Section 106.40(a) prohibits different treatment of male and female students on the basis of their actual or potential parental status, while § 106.40(b) prohibits discrimination on the basis of pregnancy and related conditions. The regulation at § 106.40(b)(1) provides that a school "shall not discriminate against any student, or exclude any student from its education program or activity ... on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity." In addition, § 106.40(b)(4) requires a school to treat pregnancy and related conditions "in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy" that the school administers, operates, offers or participates in with respect to admitted students. More generally, § 106.40(a), states that a school "shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex."

Employment Discrimination

The Title IX regulation at 34 C.F.R. §106.51 prohibits discrimination on the basis of sex in employment in educational programs and activities operated by recipients of Federal financial assistance. Under 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 employment under any education program or activity operated by a recipient which receives Federal financial assistance. "A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex." 34 C.F.R. § 106.51(a)(1), (2). This regulation applies to hiring, promotion, consideration for and award of tenure, as well as selection and financial support for sabbaticals and leaves of absence to pursue training. 34 C.F.R. § 106.51(b).

Background

VMI is a state college providing undergraduate education with military training. Originally all male, it admitted its first female cadets in 1997. VMI currently has about 1,600 cadets, 90% of whom are male and 10% of whom are female. VMI's chief executive is the Superintendent. VMI's Commandant oversees the military training of the cadets and reports to the Superintendent. VMI's cadets are organized as a regiment of two battalions, each of which has five companies. As part of its investigation, OCR reviewed documentation provided by VMI and current and former members of the VMI community, interviewed VMI staff and cadets, and other witnesses, and visited VMI's campus.

Facts and Analysis

Allegation 1: VMI's Title IX complaint procedures do not provide for equitable resolution of cadet and employee complaints.

The Title IX Coordinator

VMI has designated the Inspector General⁵ as its Title IX coordinator to coordinate its efforts to comply with and carry out its Title IX responsibilities and has notified cadets and employees of the coordinator's name or title, office address, and telephone number, as required by 34 C.F.R. § 106.8(a). In addition to his Title IX responsibilities, the Title IX coordinator investigates or coordinates issues under other Federal statutes (Title VI and Title VII of the Civil Rights Act of 1964) or as directed by the Superintendent. VMI includes notices about its Title IX coordinator and his contact information in a variety of publications, such as "The Class System" (posted in every cadet room); "Sexual Harassment Policy"; and the new "Employee Discrimination Policy". In addition, VMI provides notice about its Title IX coordinator on its website on the "Inspector General & Title IX Coordinator Office" page, where his name, title, office address, telephone numbers, and a link to his email address are listed. Accordingly, OCR finds that VMI's notifications about its Title IX coordinator comply with the requirements of Title IX.

Schools must make sure that all designated employees have adequate training as to what conduct constitutes sex discrimination and sexual harassment and are able to explain how the grievance procedures operate. The current Title IX coordinator has military investigation experience, including on sexual harassment issues, and has attended multiple Title IX conferences, investigation training sessions, and Title IX coordinator workshops. For example, VMI's record indicates that he has participated in 11 Title IX training activities in the 2012-13 academic year. The Title IX coordinator currently has three assistants reporting to him who are authorized to receive and investigate complaints of sexual harassment and who have also attended a number of training activities. Accordingly, OCR finds that VMI's Title IX coordinator has adequate training on what constitutes sexual harassment and that he understands how VMI's grievance procedures operate.

The Grievance Procedures

VMI has four policies⁶ that address Title IX grievances: the sexual harassment policy, the sexual assault policy, the sex discrimination policy for use by employees and the sex discrimination policy for use by cadets.⁷ OCR examined each of these policies in light of Title IX requirements and determined that each of the four policies was not in compliance with

⁵ Throughout this document, unless otherwise noted, the Inspector General shall be referred to as the Title IX coordinator.

⁶ In order to address OCR determinations with respect to the four policies, VMI will replace them with a single, unified policy, which, pursuant to the Agreement it signed to resolve this complaint, VMI has submitted to OCR for review and approval.

⁷ VMI also has a foundational document addressing discrimination, equity, and civility: the "Superintendent's Statement on Equity at VMI." Although it encourages members of the VMI community to report impermissible discrimination, it does not explicitly address Title IX standards. We note that any sex discrimination allegations reported under this Statement must be addressed in accordance with Title IX requirements.

Title IX requirements. OCR determined, however, that VMI uses the appropriate “preponderance of the evidence standard” to evaluate complaints under each policy.

OCR’s findings regarding each of VMI’s policies are set forth more fully below.

The Sexual Harassment Policy

VMI’s “Sexual Harassment Policy” applies to all cadets, faculty, employees, and visitors; the policy defines sexual harassment and sets forth a process for reporting alleged sexual harassment. The policy prohibits retaliation against a complainant for making a complaint about or cooperating in an investigation of alleged sexual harassment. In addition, the policy states that “confidentiality of the reporting party will be observed to every extent possible without interfering with the ability to investigate or take corrective action.”

While the policy applies on campus as well as to VMI cadets and employees at VMI-sponsored activities, it does not indicate that it covers off-campus acts of sexual harassment that have effects on campus that may contribute to a sexually hostile environment, as required by Title IX.

OCR found that the policy does not designate reasonably prompt timeframes for major stages of the complaint process. The policy states that reports of sexual harassment should be made “promptly” and “as quickly as possible” to “allow for effective and equitable investigation of and response to alleged violations,” all reports should be forwarded to the Title IX coordinator “as soon as possible,” and the reporting individual will be contacted “as immediately as possible” for an interview with a member of the Title IX coordinator’s staff. However, there is no statement concerning how long an investigation will generally take or when the parties will receive notification of the outcome.

VMI publishes this policy online, includes it as an appendix to its Administrative and Professional Faculty Handbook (Nov. 2011, App. B) and references it in the cadet regulations, the Blue Book. Through required staff and cadet trainings and policy postings in various materials and places around campus, such as in the barracks, OCR finds that VMI provides adequate notice of this policy.

VMI also provides adequate notification concerning how and where sexual harassment complaints may be filed. The policy states that reports can be made orally or in writing, although complainants are encouraged to make written statements. The policy directs cadets to report violations to the Title IX coordinator or a member of his staff, the Cadet Equity Association (CEA) reporting contact⁸, one of 17 faculty or staff reporting contacts, listed by name in the policy; or the Superintendent or certain other senior officials. The list of reporting contacts for employees is the same, with the exclusion of the CEA and with the addition of the employee’s immediate supervisor. Reports of sexual harassment are to be forwarded to the Title IX coordinator “as soon as possible after they are received.”

⁸ According to a student handbook, the CEA, a student committee, “is tasked with training the Corps and conducting investigations in situations related to gender, racial, religious, ethnic, and other types of discrimination.” The CEA has representative associated with each company of cadets.

Although the policy states that one of its purposes is “to set forth procedures by which allegations of sexual harassment shall be filed, investigated and adjudicated,” there is little information in the policy about investigations and adjudications. The policy indicates that all reports of sexual harassment are to be forwarded to the Title IX coordinator for investigation and resolution. Although the policy states that the Title IX coordinator is responsible for the investigation of all cadet⁹ and staff reports of sexual harassment and that the Title IX coordinator “shall determine the correct disposition of any report,” other policies (and VMI practice) indicate that the CEA also investigates some sexual harassment allegations that do not meet the definition of hostile environment. The Title IX coordinator informed OCR that he defined “hostile environment” as “conduct that was sufficiently minor with an effect that was also sufficiently minor, such as if there was not much impact and cadets said it was not offensive or harassing.” This definition of hostile environment is incorrect and may result in the misclassification of complaints. In addition, it is unclear how the Title IX coordinator determines, prior to an investigation, whether an incident described in a complaint has created a hostile environment.

The Title IX coordinator informed OCR that his first focus in an investigation is the needs of the complainant, such as whether the individual requires medical attention or counseling. He reported that if he receives a verbal complaint from a complainant, he typically gives the individual an opportunity to put the complaint in writing. He then gathers information about the allegation by talking to witnesses. He stated that he prefers to ensure that two people from his staff are present for interviews of the complainant and the accused or for other key witnesses in matters that include sexual assault, although if the matter involves a “low level” concern then the CEA might investigate or one of his staff might interview witnesses. He said that if the CEA receives a complaint they will consult with him to make an assessment of the seriousness.

Notwithstanding the policy’s requirement that all reports of sexual harassment are to be forwarded to the Title IX coordinator as soon as possible and the policy’s clear statement that the Title IX coordinator is responsible for the investigation and disposition of those complaints, OCR finds that VMI did not consistently comply with these provisions.

There is no provision in the policy stating VMI’s independent Title IX obligation to investigate a report of sexual harassment that also is under investigation by local law enforcement agencies. Although a school may need to delay temporarily the fact-finding portion of a Title IX investigation while a local law enforcement agency is gathering evidence, once notified that the agency has completed its gathering of evidence (not the ultimate outcome of the investigation or the filing of any charges), the school must promptly resume and complete its fact-finding for the Title IX investigation.

The policy does not state that VMI will take interim steps to ensure the safety of the complainant while its investigation is in process (e.g., no contact order; change academic or living situations as appropriate with minimum burden on the complainant; counseling; health and mental services; escort services; academic support; retake a course or withdraw without penalty). The policy also does not indicate that it covers off-campus acts of sexual

⁹ See discussion of the CEA and its role in investigating sexual harassment complaints by cadets under “Sex Discrimination Complaint Procedures for Cadets,” *infra*.

harassment that have effects on campus that may contribute to a sexually hostile environment.

The policy states that sanctions for cadets for sexual harassment will be determined by the Commandant in accordance with regulations and policies and, where necessary, in consultation with the Superintendent, and also addresses sanctions for VMI employees. Although the policy contains a component on sexual harassment education and awareness, it lacks an assurance that VMI will take steps to prevent recurrence of harassment and to correct any discriminatory effects of the harassment on the complainant and others.

In light of the foregoing, OCR finds that VMI's Sexual Harassment Policy does not comply with the requirements of Title IX.

The Sexual Assault Policy

VMI's "Sexual Assault Policy" applies to conduct by cadets, faculty, employees, and visitors. This policy outlines procedures and services for persons who have been sexually assaulted and includes a process for complainants to report a sexual assault. The policy includes a definition of sexual assault. The policy prohibits retaliation for complaining about or cooperating in an investigation of alleged sexual assault. In addition, it provides that the reporting party's confidentiality will be observed to the extent possible without compromising the ability to investigate and respond as necessary. The Title IX coordinator indicated his approach to investigating sexual assault complaints is the same as his approach to investigating sexual harassment complaints, as described in the previous section. VMI publishes this policy online and has conducted multiple staff and cadet trainings annually on sexual assault issues and procedures. VMI provides adequate notice and adequately notifies individuals concerning where to report a sexual assault.

The policy states that there is "no time limit for filing a complaint of sexual assault," but emphasizes that complainants "should report immediately to maximize VMI's ability to respond [because] failure to report promptly could result in the loss of relevant evidence and impair VMI's ability to adequately respond to the allegations." The policy also states that the reporting individual will be contacted "as immediately as possible" by the Title IX coordinator or a member of the Title IX coordinator's staff, who are designated officials for receiving complaints, and that the investigation should be completed in 30-60 days. The time frame for investigation is reasonably prompt; however, the policy does not designate reasonably prompt timeframes for other major stages of the complaint process, such as the time for VMI officials who receive sexual assault reports to notify the Title IX coordinator or when the parties will be apprised of the outcome of the investigation. VMI's sexual assault policy must specify reasonably prompt timeframes for the major stages of the complaint process in order to comply with the Title IX regulatory requirement that grievance procedures provide for prompt complaint resolution.¹⁰

The policy provides sexual assault complainants or other reporting individuals with the option of being assisted by VMI authorities in notifying law enforcement authorities. In addition, the policy references a Sexual Assault Response Protocol for VMI officials receiving sexual

¹⁰ The policy also contains recommended safety and care procedures for sexual assault victims, including "promptly" going to a medical facility, as evidence may not be usable if collected after 96 hours.

assault reports to follow to assist the complainant in getting immediate care and preserving evidence. However, there is no provision in the policy stating VMI's independent Title IX obligation to investigate a report of sexual violence that is also under investigation by local law enforcement agencies.

The policy references sanctions processes and sexual assault and violence education and awareness, but it lacks an assurance that VMI will take steps to prevent recurrence of harassment and to correct any discriminatory effects of the harassment on the complainant and others.

Accordingly, OCR finds that VMI's Sexual Assault Policy does not comply with the requirements of Title IX.

Sex Discrimination Complaint Procedures for Employees

VMI's "Employee Discrimination Policy" applies to employees, faculty, and visitors. This policy includes a process for those individuals to report alleged discrimination, including on the basis of sex.¹¹ The policy prohibits retaliation for making a report of discrimination or cooperating in a discrimination investigation. In addition, the policy provides that the confidentiality of complainant will be observed to every extent possible without interfering with the ability to investigate or take corrective action.

The policy does not designate reasonably prompt timeframes for the major stages of the complaint process. VMI publishes this policy online on both the Human Resources and Title IX coordinator web pages and has conducted staff trainings on discrimination issues and procedures. The policy is not included as an appendix to its Administrative and Professional Faculty Handbook, although a link to the Sexual Harassment Policy is in this handbook. OCR finds that VMI provides notice of this policy and also notifies employees concerning where to report sex discrimination in compliance with the requirements of Title IX.

The policy specifies that the Title IX coordinator "is responsible for the investigation and resolution of all reports of discrimination and shall determine the correct disposition of any report of [such] behavior" and "will conduct a thorough investigation of the alleged conduct and make recommendations based upon the findings." However, the policy does not delineate complaint investigation procedures that provide for equitable resolution of sex discrimination complaints. The "process" listed states only that reports may be made orally or in writing; all reports of discrimination under the policy will be forwarded to the Title IX coordinator; the reporting individual will be contacted for an interview; and the reporting individual is encouraged to make detailed written statements of fact. The policy does not indicate whether parties to a complaint have the opportunity to present witnesses and, if so, whether those opportunities are equal for both parties. The policy does not speak to notification of the outcome of an investigation.

To the extent this policy could be used to resolve a complaint of sexual harassment, OCR finds that it does not meet the Title IX regulatory requirement that grievance procedures

¹¹ The policy addresses discrimination on the basis of sex, race, color, age, veteran status, national origin, disability or genetic information. It prohibits "inequitable treatment" on any of these bases, including harassment.

provide for equitable resolution of complaints because it does not provide for written notice of the outcome of the investigation.

Accordingly, OCR finds that VMI's sex discrimination complaint procedures for employees do not comply with the requirements of Title IX.

Sex Discrimination Complaint Procedures for Cadets

According to VMI's White Book, which contains cadet governance procedures, the CEA receives reports of sexual harassment and discrimination incidents, and cadets serving on the CEA investigate these matters "when appropriate." The CEA web page states that sexual harassment complaints, "depending on their magnitude, will be handled through the appropriate agency."¹² CEA investigative reports and interviews established that CEA cadets investigate cadet complaints about violations of the cadet conduct rules, which include prohibitions against improper treatment of a cadet based on gender, as well as certain sexual harassment complaints. (VMI's process for determining whether sexual harassment complaints are investigated by the CEA or the Title IX coordinator, and questions regarding that process, are discussed in the next section.)

The Cadet Government Procedures specify that complaints of sexual assault are referred to the Title IX coordinator for investigation and adjudication, and the Title IX coordinator's statement that the CEA only investigates low-level sexual harassment indicates that the CEA is not involved in any aspect of sexual violence investigations. However, as noted above, the Title IX coordinator uses an incorrect definition of hostile environment in order to determine how to classify complaints for investigation by the CEA and makes the classification determinations prior to conducting an investigation, which could result in a sexual assault cases being misclassified as "low-level." OCR cautions VMI that cadets should not be permitted to serve on hearing boards involving complaints of sexual violence; VMI should ensure that the CEA's involvement with sexual assault complaints is limited to their receipt and immediate referral to the Title IX coordinator.

The CEA's Investigation Standard Procedures do not designate reasonably prompt timeframes for major stages of the complaint process. The only timeframe stated is for determining if the CEA is the appropriate entity to investigate an allegation: "immediately after being presented a case for possible investigation by other than the Commandant," the CEA must "expeditiously (generally in less than 24 hours)" inform the Cadet Government Advisor (CGA). The procedures reference that the CEA will make a recommendation for disposition "[o]nce the CEA has completed its investigation," but do not state a timeframe within which the investigation must be completed. Therefore, the CEA's Investigation Standard Procedures do not meet the Title IX regulatory requirement that grievance procedures provide for prompt resolution of complaints.

VMI makes its cadet policies available to cadets in its printed cadet regulations (the Blue Book) and governance procedures (the White Book). In addition, a summary of the self-governance system and behavioral guidelines is posted in all cadet barracks. VMI conducts

¹² The web page also has links to the sexual harassment and sexual assault policies discussed above.

cadet trainings on sexual harassment and sexual violence and provides adequate notice to cadets of the applicable sex discrimination complaint procedures.

The Investigation Standard Procedures provide an investigative process for the CEA cadet investigators, who are trained on investigations and the relevant subject matter. The CEA informs its VMI administrator advisors of all investigations and consults them as deemed necessary, including reports to the CGA at least weekly. There are standard forms and designated formats for advisement of rights, interviews, and witness statements. While there are confidentiality provisions, there is no protection from retaliation included in these procedures. There is a list of “Considerations of the Accused” that addresses opportunities to present witnesses and other evidence, but no statement concerning the complainant’s rights. After investigation by cadet investigators, the CEA determines if the case goes to a hearing before another cadet entity, the Executive Committee, which makes a finding and imposes a penalty. CEA investigative files showed that records and reports of investigations—including on sex discrimination and sexual harassment allegations—are maintained and that the complainants sometimes received a letter once the investigative process was completed. However, the procedures do not require that parties receive a written outcome. There also is no provision for the CEA to consider interim steps to ensure the safety of the complainant during the investigation of any sexual harassment allegations. Furthermore, while the Preliminary Hearing Procedures allow the CEA to suggest penalties for the offender, the procedures do not contain an assurance that VMI will take steps to prevent recurrence of any discrimination and to correct its effects on the complainant and others, if appropriate.

Accordingly, OCR finds that the sex discrimination complaint procedures for cadets do not comply with the requirements of Title IX.

How VMI determines who investigates complaints of peer sexual harassment

Because OCR found that the CEA investigates some complaints of peer sexual harassment and that the Title IX coordinator and his designated staff investigate others, OCR analyzed how the responsible investigator is determined. OCR finds that VMI does not articulate a clear policy on this issue.¹³

As noted above, the Sexual Harassment Policy states that cadets may report violations of that policy to the Title IX coordinator or a member of his staff, members of the CEA, a number of identified staff and faculty contacts, or the Superintendent or certain other senior officials. Reports of sexual harassment are to be forwarded to the Title IX coordinator “as soon as possible after they are received.” The Title IX coordinator stated that the CEA receives most cadet complaints.

According to VMI’s 2012-13 White Book, the CEA investigates cases involving sexual harassment, while “situations involving sexual assault will be referred to the Inspector General [Title IX coordinator].” In contrast, however, the Sexual Harassment Policy states, “The Inspector General [Title IX coordinator] is responsible for the investigation and resolution of all reports by cadets, faculty and administrative staff of alleged sexual

¹³ As described above, VMI policies and practices appear to be clear to the effect that the CEA has no role in investigating sexual assault complaints or any complaints involving VMI employees.

harassment in violation of Title IX....” The Sexual Harassment Policy states that reports of sexual harassment are to be forwarded to the Title IX coordinator “as soon as possible after they are received.”

According to the Title IX coordinator, the CEA consults with him when it receives a complaint of sexual harassment. He states he allows the CEA to investigate the complaint if it alleges sexual harassment at a low level, that is, harassment that is not likely to rise to the level of a hostile environment, while he investigates more serious cases. The CEA’s process provides for consultation with the Title IX coordinator. According to VMI, the CEA, upon being presented with a case for possible investigation, informs the CGA, a VMI employee, who in turn informs the Commandant and, “if necessary, the Inspector General [Title IX coordinator] to determine appropriate jurisdiction.” The CEA needs to receive approval to proceed with a case from the CGA, the Title IX coordinator or the Commandant. The CEA’s “Investigation Standard Procedures” also state:

Once a CEA case is believed to involve elements of sexual misconduct, potential criminal activity, or a VMI Honor Code violation, the CEA investigation will immediately stop and the Cadet Government Advisor will be informed. The VMI Inspector General [Title IX coordinator], the Commandant, legal authorities, and an Honor Court Prosecutor will be consulted based upon the situation encountered. Thereafter, the CEA investigation may or may not proceed or may be modified in scope.

CEA members stated to OCR that the initial CEA contact might take a statement from the complaining cadet; the CEA Vice President for Investigation would then make an assessment of the complaint and contact the CGA to decide how to proceed. OCR notes that there needs to be a clearer method for determining which complaints go to the CEA and which go to the Title IX coordinator; among other things, it is unclear how the CGA determines what complaints he brings to the Title IX coordinator’s attention and how the Title IX coordinator determines, prior to an investigation, whether an allegation may raise the possibility of the creation of a hostile environment. OCR also notes that the standard the Title IX coordinator uses for this decision, as he articulated it during an OCR interview, does not conform to the legal definition of a hostile environment.

Conclusion

In light of the foregoing, OCR finds that VMI’s Sexual Harassment Policy, Sexual Assault Policy, sex discrimination complaint procedures for employees, sex discrimination complaint procedures for cadets do not comply with Title IX’s requirements that grievance procedures provide for prompt and equitable resolution of student and employee complaints.

Hostile Environment

Allegation 2: VMI permits an environment hostile to female cadets both in the barracks and in the classroom.

OCR reviewed over 25 investigative files for complaints of sexual harassment and sexual assault that were filed against students or staff at VMI between the academic years of 2007-08 and 2012-13. The complaints alleged incidents that occurred both in academic settings

and non-academic settings, including VMI's barracks and other off-campus settings. In the course of its review, OCR found that VMI did not comply with the requirements of Title IX in its investigation of six of these complaints, including failure to take interim measures as necessary to protect complainants, failure to take steps to eliminate a hostile environment and to prevent its recurrence, failure to address the effects of sexual assault on the cadet community, failure to conduct prompt and thorough investigations, failure to follow VMI's policies regarding sexual harassment and sexual assault, and failure to provide written notice of the outcome of investigations. OCR's findings regarding each of the six complaints are set forth below.

Complaint 1 (Academic Year 2009-10)

OCR reviewed a complaint that a female cadet had been sexually assaulted by a VMI alumnus, who had kissed her against her will, pulled her to a secluded area of VMI, and pushed her to the ground before she was able to run away from him. The cadet reported the assault to a designated member of the Title IX coordinator's staff, who obtained witness statements and text messages from the complainant's cell phone and substantiated the allegation. The Title IX coordinator's staff member asked a professor who was a friend of the alumnus to tell the alumnus that he was not to have contact with the complainant; the Title IX coordinator's staff member did not contact the perpetrator directly. Even though VMI's ability to take direct action against the alleged perpetrator was limited, VMI should have taken steps to conduct an appropriate investigation and to provide other appropriate remedies for the complainant, none of which were offered. In addition, VMI did not provide written notice of the outcome of its investigation to the cadet.

Complaint 2 (Academic Year 2010-11)

OCR reviewed a complaint that a VMI administrator had sexually assaulted a female cadet. The cadet verbally reported the incident to another administrator (who was a responsible employee under Title IX) within hours of the alleged incident, although she did not file a written report; several days later, that administrator informed the Commandant about the alleged incident. VMI stated that it encouraged the cadet to make a written statement; however, the cadet informed OCR that VMI did not offer to take a written statement from her. VMI informed OCR that it advised the cadet that she could report the incident to the police; however, the cadet stated to OCR that some VMI employees discouraged her from contacting the police, saying that she would be ostracized if she did. VMI helped the cadet obtain private counseling and paid for it. Approximately a week after the incident, the Commandant was directed by the Superintendent's Chief of Staff to talk with the cadet, sort through the information, and then talk to the accused administrator. The Commandant conducted a telephone call with the accused administrator a week after the incident, during which the accused administrator denied the allegation. VMI determined that it could not validate the female cadet's allegations, but it directed the accused administrator to stay away from the female cadet. The cadet was informed of this outcome verbally.

Pursuant to VMI's sexual harassment policy, the Commandant was required to report the alleged assault to the Title IX coordinator; however, the Title IX coordinator was not notified at any point in this investigation. The policy also specifies that the Title IX coordinator is responsible for the investigation and resolution of all cadet and staff reports of sexual assault,

and he “shall determine the correct disposition of any report.” The policy does not authorize the Commandant to conduct Title IX investigations.

VMI's barracks are composed of several connected buildings. VMI allowed the cadet to change her room to an area in the barracks where the accused administrator did not have direct oversight and directed the accused administrator not to have contact with her. Nevertheless, the cadet continued to feel threatened because the accused administrator continued to have duties in the barracks. The cadet informed OCR that she tried to avoid the accused administrator “at all costs” and therefore attempted to spend as much time as possible in other areas of campus, such as the library, where she was less likely to encounter him. The cadet reported that she suffered for months from debilitating stress and anxiety because of the assault.

Eight months after the assault, the cadet raised the assault with a confidential VMI employee, who insisted that the Title IX coordinator be notified. The Title IX coordinator met with the cadet, who then filed a written statement; the Title IX coordinator then initiated another investigation of the assault. The Title IX coordinator analyzed the credibility of statements by the cadet and the accused administrator as well as statements by individuals who had met with the cadet at various points, and found that the allegation of sexual assault was substantiated and recommended the accused administrator be fired and that counselling for the female cadet continue. As per VMI practice, the Title IX coordinator forwarded his findings and recommended sanctions to VMI's Superintendent. The Superintendent found that the accused administrator had engaged in inappropriate and unprofessional conduct, including improper physical contact, and terminated him on this basis. However, the Superintendent did not find that the accused administrator had committed sexual assault.

OCR finds that VMI's investigation of this incident did not comply with Title IX. VMI administrators received and investigated the original complaint without notifying the Title IX coordinator, as required by VMI's sexual harassment policy. VMI did not take appropriate steps to investigate or otherwise determine what occurred; it did not obtain complete descriptions of the accused administrator's or the female cadet's versions of the incident. VMI also failed to interview a witness in whom the female cadet had confided in the night of the incident who had been identified to VMI. The Title IX coordinator's investigation was not conducted until eight months after the assault occurred, an unacceptably long period of time that violates the requirement of the Title IX regulations that a recipient must take immediate and appropriate steps to investigate a complaint. The cadet was subjected to a sexually hostile environment that was created by the assault and that persisted due to VMI's failure to take prompt and effective steps to end the harassment, eliminate the hostile environment, prevent its recurrence and remedy its effects. Finally, after the Title IX coordinator concluded his investigation, the Superintendent rejected the factual determination of the Title IX coordinator that sexual assault had occurred, which conflicted with VMI's policy that the Title IX coordinator is responsible for the investigation and resolution of all cadet and staff reports of sexual harassment and that he “shall determine the correct disposition of any report.”

Complaint 3 (Academic Year 2010-11)

OCR reviewed a complaint that a male cadet sexually assaulted a female cadet when they were alone in a VMI facility. While the female cadet refused to file a written statement, a VMI

staff member (who was a responsible employee under Title IX) received a written statement from another cadet to whom the female cadet had recounted the incident. The staff member spoke with an administrator, who advised him to ask the female cadet if she needed counseling or wanted to contact VMI police. The staff member located the female cadet, who recounted the same story that had been in the written statement provided by the reporting. The staff member asked if she wanted counseling or to talk with the police, but she declined. The administrator informed the Title IX coordinator of the complaint on the same evening that it was reported to him.

The Title IX coordinator met with the cadet the next day and requested that she file a formal statement. The cadet refused and instead signed a memorandum stating that she chose not to make a statement and did not want an investigation of the incident. There is no indication that VMI determined whether or not it could honor the cadet's request while still providing a safe and nondiscriminatory environment for the cadet community. VMI suspended the male cadet for one year for violations of other misconduct rules rather than for violation of Title IX.

Complaint 4 (Academic Year 2012-13)

OCR reviewed a complaint that a male cadet in a leadership role repeatedly made sexual comments to and about female first-year cadets. At the beginning of the school year, an upper-class cadet reported the inappropriate language to the CEA,¹⁴ which then gathered witness statements indicating that the male cadet had made comments, including asking male and female cadets, one by one, while they were standing at attention together, if the female cadets were sleeping with the male cadets (using obscene language) and to rate the appearance of the four female cadets; referencing the "rack size" and "hotness" of the female cadets; calling wire hangers their "abortion tools" while handing them out to the female cadets; and telling female cadets that their room "smelled like a bloody tampon." Some of the female cadets reported that they found these comments offensive. One female cadet resigned later that semester, in part, according to a letter her mother wrote to VMI, because of this sexual harassment. This conduct subjected these cadets to a sexually hostile environment that was sufficiently serious as to deny or limit their ability to participate in VMI's program.

The CEA determined that the male cadet had used abusive or profane language, engaged in conduct unbecoming a cadet, and threatened another by word or gesture. He was counseled that he had displayed poor judgment in making unprofessional and malicious comments and was assigned discipline by the General Committee, including six weeks of confinement to barracks, 30 hours of supervised marching with a rifle, and a two-week removal from supervisory duties. The Title IX coordinator informed OCR that he had been notified of the report at the time and he knew the CEA had conducted an investigation, but he stated that he did not become involved in the investigation.

When VMI received the letter from the mother of the cadet who resigned, the Title IX coordinator reviewed the CEA's investigation of the male cadet's inappropriate comments

¹⁴ As discussed more fully in our analysis of VMI's policies and procedures related to sexual harassment, the CEA has the authority to investigate complaints of discrimination or harassment, including sexual discrimination and harassment. Depending on the "magnitude" of the claim, the investigation may be referred to the IG or another appropriate body.

and conducted further investigation. The cadet who resigned also wrote a statement to VMI confirming her mother's comments. While the Title IX coordinator found that the male cadet's statements were substantiated, he recommended no further disciplinary action. The Title IX coordinator determined the comments were sexual in nature and inappropriate, but were not "severe, pervasive or objectively offensive." He also stated that he considered the accused cadet's sincere remorse and generally good conduct as a leader in deciding that the punishment imposed by the CEA was adequate.

The file includes no information regarding whether the accused and the complainant received written notice of the outcome of the investigation. Furthermore, the CEA's record of its decision does not indicate what its determination was regarding sexual harassment, instead using terms such as "abusive or profane language," "conduct unbecoming a cadet," and "threatening another by word or gesture." Finally, there is no evidence that VMI considered any steps other than the discipline it imposed on the male cadet, such as a broader communication to the corps of cadets, in order to prevent the recurrence of such harassment and address its effects on the community. Thus, VMI did not take steps to eliminate the hostile environment caused by this incident.

Complaint 5 (Academic Year 2012-13)

OCR reviewed a complaint in which a male cadet entered the room of a female cadet without permission and kissed her. She told him to leave, which he did. He later returned, however, and fondled her while she was in her bed. After he left, the female cadet and her roommate requested permission to lock their door for the rest of the night, but the Officer in Charge denied this request and instead stated that he would watch their room carefully. The Title IX coordinator investigated this complaint, substantiated the allegations, and found that the conduct was a violation of VMI's sexual harassment and sexual assault policies, and, five days after the event, dismissed the male cadet. The female cadet was also allowed to lock her door after the night of the assault and was provided counseling. After the investigation, the Title IX coordinator instructed barrack staff to allow cadets to lock their doors on request. VMI provided additional training for barracks staff on how they should respond to requests to lock doors and for cadets on sexual assault prevention.

Despite the fear that the cadet expressed to the Officer in Charge and the risk to which this incident exposed her, VMI failed to respond appropriately to her immediate need by denying her permission to lock her door on the night the assault occurred as an interim safety measure.

Complaint 6 (Academic Year 2012-13)

OCR reviewed a complaint that alleged multiple incidents in which two male cadets inappropriately touched another male cadet in the showers by snapping a towel at his buttocks and pushing him against the wall and making full body contact while the complaining cadet was nude. The complaining cadet also alleged that male students "fingered" his "rear area" while he was clothed on multiple occasions, such as during physical training. The file indicates that the CEA initiated an investigation of the complaint promptly. The investigation collected statements from 13 cadets, some of whom indicated that the accused cadets had touched the buttocks of the complaining male cadet and others as well.

The CEA determined that the appropriate penalty was a reprimand stating that the accused cadets were reported to have “attempted to digitally penetrate [the] rectum [of the complaining cadet],” that the behavior was “disturbing, unnecessary, demoralizing, and traumatizing, and will not be tolerated,” and that the allegations “constitute sexual harassment and it is illegal under the law.” It informed the perpetrators that future incidents would be handled more severely. The IG approved this sanction.

There is no evidence that a written determination notice was given to the complaining cadet. Further, there is no evidence that VMI considered whether it needed to take further action to address the effects of this harassment on the broader cadet community. The complaining cadet resigned from VMI at the end of the academic year.

Conclusion

The shortcomings in VMI’s responses to the incidents summarized above relate to obligations such as providing interim measures as necessary, executing effective investigative procedures, properly determining whether an incident raises a Title IX violation, conducting a prompt investigation, interviewing all relevant witnesses, and notifying complainants of the outcome of complaints in writing.

Accordingly, OCR has determined that VMI failed to respond in a prompt and equitable manner to complaints of sexual harassment and sexual assault of which it had notice and that this failure permitted a sexually hostile environment to exist for cadets that was sufficiently serious as to deny or limit their ability to participate in VMI’s program.

The Marriage and Parenthood Policy

Allegation 3: VMI’s marriage and parenthood policy discriminates against female cadets.

The Title IX regulation prohibits discrimination against a student based on pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery from any of these conditions. The Title IX regulation also prohibits a school from applying any rule related to a student’s parental, family, or marital status that treats students differently based on their sex. Under Title IX, it is illegal for schools to exclude a pregnant student from participating in any part of an educational program. Any special services provided to students who have temporary medical conditions must also be provided to a pregnant student. That is, schools cannot treat a pregnant student differently from other students being cared for by a doctor, even when a student is in the later stages of pregnancy; schools should not presume that a pregnant student is unable to attend school or participate in school activities.

In 2002, VMI’s Board of Visitors adopted a resolution prohibiting cadet parenthood. The 2002 “marriage and parenthood policy” provided that any cadet who married or became a parent was expected to resign voluntarily or else VMI would separate the cadet from VMI at the end of the semester for failure of eligibility. The policy defined the responsibilities of parenthood as beginning upon a cadet’s learning that a child has been conceived as a result of his or her conduct. VMI’s policy excluded pregnant cadets from VMI’s program on the basis of pregnancy because the policy tied the requirement to resign or face separation to

parenthood, which was determined upon the conception of a child. The parenthood policy also required male cadets to resign or face separation from VMI upon the cadet's learning that a child had been conceived through his conduct.

OCR determined that VMI's marriage and parenthood policy violated the Title IX regulation prohibiting discrimination on the basis of pregnancy, 34 C.F.R. § 106.40(b), because it rendered pregnant cadets ineligible to participate in VMI's program. OCR informed VMI that cadet pregnancy must be treated like any other temporary medical condition. In addition, OCR advised VMI that any parenthood policy should not require cadets to permanently relinquish their parental rights in order to continue their education and urged VMI to adopt a policy that enables cadets to meet their duties of time commitment, attention and loyalty to VMI without forcing them to take such a measure.

In response, OCR negotiated revisions to the 2002 policy and in January 2014, VMI's Board of Visitors revised the policy consistent with OCR's recommendations. VMI's revised marriage and parenthood policy, which became effective in April 2014, states that pregnant cadets are permitted to remain enrolled and to participate in the VMI program as long as they are able to perform cadet duties and meet cadet standards, and that if it is determined that a pregnant cadet cannot participate safely in VMI's program, she will be granted leave in the same way as for cadets with other temporary medical conditions. In addition, the revised policy no longer requires a cadet who becomes a parent to face certain exclusion from VMI; the revised policy permits a cadet who becomes a parent to remain at VMI so long as the cadet has made arrangements for the child's custody, care, and support. Finally, to ensure that the marriage and parenthood policy is vigorously and consistently enforced, VMI's implementation procedures should take into account the fact that maternity can be readily ascertained, while paternity cannot. This necessitates the implementation of strong and effective measures for identifying when a male cadet becomes a parent.

VMI's adoption of the revised marriage and parenthood policy in April 2014 brings VMI into compliance with Title IX regarding this allegation.

The Tenure, Promotion and Sabbatical Processes

Allegation 4: VMI's tenure/promotion and sabbatical processes discriminate against female faculty.

Appendix B of VMI's May 2013 Faculty Handbook,¹⁵ entitled "Regulations on Academic Freedom and Tenure," describes the process for awarding tenure, consideration for which typically occurs at the end of the sixth year of a probationary period. A grant of tenure confers permanent employment at VMI, subject to termination for adequate cause. The Faculty Handbook also contains VMI's promotion policy. Tenure and promotion are granted by the Superintendent after a multi-stage process that includes review by a candidate's department and an institute-wide tenure and promotion committee.

¹⁵ <http://www.vmi.edu/Content.aspx?id=10067>

OCR analyzed the data from tenure and promotion decisions made from 2006 to 2013. OCR also examined the files of the four males and two females who were denied tenure during this time. OCR also reviewed VMI's decisions to grant or deny requests for faculty development leaves in 2009 and 2010.

Tenure and Promotion

VMI's tenure and promotion policy is facially neutral. OCR found that, in practice, as reflected in documentation of tenure decisions received from VMI and interview responses by the Dean, the Dean reviews the decision of the otherwise independent Tenure Committee and forwards his own recommendation to the Superintendent, along with the Committee's recommendation and report. The evidence shows that the Dean's involvement in making tenure and promotion recommendations is applied to both male and female applicants. In some cases where the Tenure Committee's recommendations were not unanimous, the Dean recommended that the Superintendent reject the Committee's recommendation. In each of those cases, the Superintendent followed the Dean's recommendation. The Dean's involvement in and discretion to make recommendations for tenure and promotion decisions, is not articulated in VMI's policy.

In one case involving the denial of tenure to a female faculty member, the Dean recommended against granting tenure, despite the fact that the Tenure Committee had unanimously recommended that it be granted; OCR noticed this was the only case in which the Dean made a recommendation contrary to a unanimous recommendation from the Tenure Committee. This raised concerns, in light of the lack of official role for the Dean in the process and what the Dean could consider. Prior to the completion of OCR's investigation of this allegation, OCR noted the inconsistency in VMI's tenure and promotion policy and its practice. VMI has agreed to clarify that the Tenure Committee is required to send its recommendations to the Dean, who will then make a recommendation to the Superintendent to grant or deny tenure. The revised procedures to resolve this inconsistency have been submitted to OCR for review and approval.

Faculty Development Leave

Proposals for faculty development leave are reviewed by an interdisciplinary committee of fourteen faculty members representing all major academic divisions, and the proposals are judged based on their potential for significant scholarly achievement and value toward improvement of teaching ability. Proposals are rated on a scale of 1 (weak) to 5 (strong). The Faculty Development Committee makes recommendations to the Superintendent through the Dean.

OCR reviewed the proposals for faculty development leave and determined that VMI had legitimate, non-discriminatory reasons for not granting leave to the proposals submitted by female faculty members. Accordingly, OCR determined that there was insufficient evidence to support a finding of discrimination based on sex with regard to the awarding of faculty development leaves.

Conclusion

OCR determined that VMI is in violation of Title IX. VMI did not consistently provide a prompt and equitable response to complaints of sexual harassment or sexual assault that created a sexually hostile environment that was sufficiently serious to deny or limit cadets' ability to participate in or benefit from VMI's program. VMI failed to take immediate action to eliminate the harassment, prevent its recurrence and address its effects. OCR also determined that VMI's current policies and procedures do not comply with the applicable Title IX requirements.

OCR's investigation also found that VMI's policy regarding cadet marriage and parenthood required pregnant cadets to resign or be separated from the school, in violation of the Title IX regulation that prohibits excluding a student on the basis of pregnancy. As stated above, during the course of OCR's investigation, OCR worked with VMI to revise its parenthood policy to comply with Title IX. Additionally, prior to the completion of OCR's investigation, VMI agreed to modify its written policies related to the grant of tenure and promotion. The revised policy became effective in April 2014.

On April 30, 2014, VMI agreed to implement the enclosed Voluntary Resolution Agreement (Agreement), which commits the VMI to take specific steps to address the identified areas of noncompliance. When fully implemented, the Agreement entered into by VMI will resolve the issues of noncompliance.

The Agreement commits VMI to continue implementing the steps it has already taken to address sexual harassment and sexual assault on campus and to take additional measures to ensure VMI's compliance with Title IX. Under the Agreement, VMI will address sexual assault in a comprehensive manner that requires clear notice of its commitment and the applicable processes for responding in a prompt and equitable manner, but also requires VMI to assess the effectiveness of the steps it takes and, with OCR review and approval, take additional steps that may be necessary to ensure that students are not subjected to a sexually hostile environment. The Agreement:

- Requires VMI to revise its Title IX grievance policies and procedures to provide for prompt and effective responses to alleged sexual harassment and to ensure consistency among its various Title IX policies and procedures so that students and employees receive clear notice of the applicable policies and procedures.
- Requires VMI to continue to provide training to ensure that all members of the VMI community – including cadets, faculty, administrators and other staff – are trained regularly on issues related to sexual harassment and on the requirements of Title IX. The Agreement places particular emphasis on training for staff and cadets involved in investigating and responding to complaints of sexual harassment.
- Requires VMI to enhance its outreach to and feedback from cadets, including by conducting an annual climate check or series of climate checks with students on campus to assess the effectiveness of steps taken by VMI towards providing a campus free of sexual misconduct.

- Requires VMI to conduct an annual assessment of climate for cadets, faculty and staff with regard to gender discrimination, sexual misconduct and Title IX, and of the effectiveness of its efforts to prevent and address sexual harassment and promote a non-discriminatory climate.
- Requires VMI to consult with cadets, faculty, and administrators in using the information gained from these annual assessments, from analysis of resolved complaints, and from information from survivors to identify future steps to continue to provide a safe educational environment in compliance with Title IX.
- Requires VMI to submit to OCR documentation of all sexual harassment complaints filed during the 2014-15 academic year for review of compliance with Title IX.
- Requires VMI to revise its tenure and promotion policies to clarify the role of the Dean of the Faculty in its voluntarily revised tenure and promotion policies and to clarify the sources of information upon which the Dean may base a recommendation concerning candidates for tenure and promotion.

Under Section 303(b) of OCR's *Case Processing Manual*, a complaint will be considered resolved and the recipient deemed compliant if the recipient enters into an agreement that, fully performed, will remedy the identified areas of noncompliance (pursuant to Section 303(b)). OCR will closely monitor VMI's implementation of the Agreement to ensure that the commitments made are implemented timely and effectively. OCR may conduct additional visits and may request additional information as necessary to determine whether VMI has fulfilled the terms of the Agreement and is in compliance with Title IX with regard to the issues raised. As stated in the Agreement entered into by VMI on April 30, 2014, if VMI fails to implement the Agreement, OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of the Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10), or judicial proceedings to enforce the Agreement, OCR shall give VMI written notice of the alleged breach and a minimum of sixty (60) calendar days to cure the alleged breach.

Based on the commitments VMI has made in the Agreement and in the revised marriage and parenthood policy, OCR has determined that it is appropriate to consider this complaint resolved. This letter of findings sets forth OCR's determination in an individual OCR complaint and should not be construed to cover any other issue regarding VMI's compliance. 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.

It is unlawful to harass, coerce, intimidate or discriminate against any individual who has filed a complaint, assisted in a compliance review, or participated in actions to secure protected rights.

We appreciate the cooperation that VMI and the Office of the Attorney General of the Commonwealth of Virginia extended to OCR throughout this investigation. If you have any questions, please contact Rachel Glickman, Team Leader, at (202) 453-5914 or via email at Rachel.glickman@ed.gov.

Sincerely,

/s/

Alice B. Wender
Regional Office Director

Enclosure (as stated)

cc: M. Elizabeth Griffin, Assistant Attorney General, Education Section