



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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WASHINGTON, DC 20202-1475

REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

April 20, 2018

W. Taylor Reveley III
President
College of William & Mary
P.O. Box 8795
Williamsburg, Virginia 23187-8795

Re: OCR Complaint No. 11-14-2233
Resolution Letter

Dear President Reveley:

This letter is to advise you of the outcome of the complaint that the Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) received on March 31, 2014 against the College of William and Mary (the College) on behalf of an undergraduate student at the College (the Student). The complaint alleged that the College failed to promptly and equitably respond to the Student's report of an off-campus sexual assault, by failing to evaluate whether there was a hostile environment based on sex in the College's education programs and activities during the 2013-2014 academic year.¹

OCR enforces Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in any program or activity receiving Federal financial assistance from the Department. The laws enforced by OCR prohibit retaliation against any individual who asserts rights or privileges under these laws or who files a complaint, testifies, or participates in an OCR proceeding. Because the College receives Federal financial assistance from the Department, OCR has jurisdiction over it pursuant to Title IX.

During the course of its investigation, OCR reviewed information and documentation submitted by the Complainant and the College; conducted interviews with College personnel; and conducted an onsite visit at the College in September 2014. After carefully considering all of the

¹ By letter dated April 18, 2014, OCR informed the College that it was opening an investigation into the College's failure to promptly and equitably respond to complaints, reports and/or incidents of sexual violence, including the Student's report of sexual assault, and as a result, students, including the Student, may have been subjected to a sexually hostile environment. Therefore, OCR expanded the Complainant's individual allegation beyond the Student's report of sexual assault. OCR subsequently determined that its investigation was properly limited as stated above – that is, to the Complainant's individual allegation only. To the extent that additional data gathered during the course of OCR's investigation is directly relevant to the investigation and resolution of the allegation stated by the Complainant, OCR considered such information as described herein and will provide the College with technical assistance for any concerns identified.

information obtained during the investigation thus far, OCR identified concerns regarding the College's compliance with Title IX. However, prior to OCR completing its investigation, the College expressed a willingness to resolve the complaint and the identified compliance concerns by taking the steps set forth in the enclosed Resolution Agreement, pursuant to Section 302 of OCR's *Case Processing Manual*. The following is a discussion of the relevant legal standards and information obtained by OCR during the investigation that informed the development of the Resolution Agreement.

Allegation

In March 2014, the Complainant filed the complaint on behalf her daughter, XXXX. The Complainant alleged that XXXX male student and XXXX (the Respondent) sexually assaulted the Student on XXXX, and that the Student reported the alleged sexual assault to the College on or about XXXX. The Complainant further stated that the College investigated the Student's report, convened a hearing before the College's Sexual Misconduct Hearing Board (the Board) on XXXX, and found the Respondent not responsible for violating the College's Sexual Misconduct Policy (the Policy). The Complainant alleged that the College's response to the Student's report was deficient and constituted discrimination on the basis of her sex.

Legal Standards

Title IX prohibits discrimination on the basis of sex in education programs or activities operated by recipients of Federal financial assistance. The Title IX regulation, at 34 C.F.R. § 106.31(a), states that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity operated by a recipient of Federal financial assistance.

Sexual harassment that creates a hostile environment is a form of discrimination prohibited by Title IX. Sexual harassment is unwelcome conduct of a sexual nature, regardless of the sex of the individual. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, such as sexual assault or acts of sexual violence.² Sexual harassment of an individual creates a hostile environment if the conduct is so severe, persistent, or pervasive that it denies or limits an individual's ability to participate in or benefit from the recipient's program or activities.

OCR considers a variety of related factors to determine if a hostile environment based on sex has been created and considers the conduct in question from both an objective and a subjective perspective. Factors examined include the degree to which the misconduct affected one or more individuals' ability to participate in or benefit from the recipient's program or activities; the type, frequency, and duration of the conduct; the identity of and relationship between the alleged harasser and the subject or subjects of the harassment; the number of individuals involved; the age of the alleged harasser and the subject of the harassment; the size of the recipient; the location of the incidents and the context in which they occurred; and other incidents at the recipient.

² From this point onwards, when OCR generally refers to "sexual harassment," such references may be assumed to include sexual assault and sexual violence.

A recipient has notice of harassment based on sex if a responsible employee actually knew or, in the exercise of reasonable care, should have known about the harassment. A responsible employee would include any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate officials sexual harassment or any other misconduct by students, employees, or third parties, or an individual who a student or other party could reasonably believe has this authority or responsibility. Accordingly, a recipient needs to ensure that employees are trained so that those with authority to address harassment know how to respond appropriately, and other responsible employees know that they are obligated to report harassment to appropriate officials. Training for employees should include practical information about how to identify harassment and, as applicable, the person to whom it should be reported.

Once a recipient knows or reasonably should know of possible sexual harassment, it must take immediate and appropriate action to investigate or otherwise determine what occurred. If an investigation or other inquiry reveals that sexual harassment created a hostile environment, a recipient must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment if one has been created, prevent the harassment from recurring and, as appropriate, remedy its effects. These duties are a recipient's responsibility regardless of whether or not the student or other party who was harassed makes a complaint or otherwise asked the recipient to take action. If, upon notice, a recipient fails to take prompt and effective corrective action, the recipient's own failure has permitted the student to be subjected to a hostile environment. If so, the recipient will be required to take corrective actions to stop the harassment, prevent its recurrence, and remedy the effects on the student that could reasonably have been prevented had the recipient responded promptly and effectively.

A recipient must consider the effects of off-campus misconduct when evaluating whether there is a hostile environment on campus or in an off-campus education program or activity. This includes a review of misconduct that did not occur in the context of an education program or activity to determine whether that off-campus misconduct has an impact within the recipient's programs and activities. Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities.

In situations where reported sexual harassment may constitute a criminal act, a recipient should notify a complainant³ of the right to file a criminal complaint with local law enforcement, and should not dissuade a complainant from doing so either during or after the recipient's internal Title IX investigation. Additionally, recipients must take immediate steps to protect the complainant and allow continued access to the recipient's programs and activities.

It may be appropriate for a recipient to take interim measures during the investigation of a complaint. In fairly assessing the need for a party to receive interim measures, a recipient may not rely on fixed rules or operating assumptions that favor one party over another, nor may a recipient make such measures available only to one party. Interim measures should be individualized and appropriate based on the information gathered by the Title IX Coordinator (or

³ The term "complainant" as used throughout this document refers to an individual who is the subject of any alleged sexual harassment, including sexual assault and sexual violence. The term "respondent" refers to an individual accused of any alleged sexual harassment, including sexual assault and sexual violence.

other designated responsive employee(s)), making every effort to avoid depriving any student of her or his education, or an individual's ability to participate in or benefit from the recipient's program or activities. The measures needed by the complainant and the respondent may change over time, and the Title IX Coordinator should communicate with each party throughout the investigation to ensure that any interim measures are necessary and effective based on each party's evolving needs. The recipient also should take steps to prevent any retaliation against the complainant and/or those who provided information.

Once it decides to open an investigation that may lead to disciplinary action against the respondent, a recipient should provide written notice to the respondent of the allegations constituting a potential violation of the school's Title IX policy, including sufficient details and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved, the specific section of the code of conduct allegedly violated, the precise conduct allegedly constituting the potential violation, and the date and location of the alleged incident. Each party should receive written notice in advance of any interview or hearing with sufficient time to prepare for meaningful participation. The investigation should result in a written report summarizing the relevant exculpatory and inculpatory evidence. The investigator(s), or separate decision-maker(s), with or without a hearing, must make findings of fact and conclusions as to whether the facts support a finding of responsibility for violation of the recipient's sexual misconduct policy.

For Title IX purposes, a recipient should also provide written notice of the outcome of disciplinary proceedings to the complainant and the respondent concurrently. This notification must include any initial, interim, or final decision by the institution; any sanctions imposed by the institution; and the rationale for the result and the sanctions.⁴ The recipient should inform the complainant whether it found that the alleged conduct occurred, any individual remedies offered to the complainant or any sanctions imposed on the respondent that directly relate to the complainant, and other steps the recipient has taken to eliminate the hostile environment, if the recipient found one to exist.

There is no fixed timeframe under which a recipient must complete a Title IX investigation. OCR will evaluate a recipient's good faith effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution.

An equitable investigation of a Title IX complaint requires a trained investigator to analyze and document the available evidence to support reliable decisions, objectively evaluate the credibility of parties and witnesses, synthesize all available evidence – including both inculpatory and exculpatory evidence – and take into account the unique and complex circumstances of each case. In addition, a recipient should ensure that all designated employees have adequate training as to what conduct constitutes sexual harassment and are able to explain how the grievance procedure operates.

Any rights or opportunities that a recipient makes available to one party during the investigation should be made available to the other party on equal terms. Recipients are cautioned to avoid conflicts of interest and biases in the adjudicatory process and to prevent institutional interests

⁴ With respect to postsecondary institutions, such notice is required by the Clery Act.

from interfering with the impartiality of the adjudication. Decision-making techniques or approaches that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the adjudication proceeds objectively and impartially.

Investigation

As discussed above, the complaint alleged that the College failed to promptly and equitably respond to the Student's report of sexual assault, by failing to evaluate whether there was a hostile environment based on sex in the College's education programs and activities during the 2013-2014 academic year. To determine whether the College's response complied with Title IX, OCR reviewed documentation provided by the College concerning the Student's initial report of sexual assault and the College's response.⁵

Contemporaneous documentation confirms that on XXXX, the Student reported to the William and Mary Police Department (WMPD) that the Respondent sexually assaulted her at XXXX (the Incident). XXXX SENTENCE REDACTED XXXX In the police report, the Student stated that she and the Respondent had one class together on one day of the week.

Thereafter, the College provided documentation in the form of a "Support Services Report," dated XXXX, which included an entry, dated XXXX, indicating that the WMPD contacted College personnel, including an on-call XXXX on that day. The Support Services Report also indicated that the College's XXXX met with the Student on XXXX. On that day, the XXXX wrote a "traumatic event" letter to at least one of the Student's course professors indicating that the Student had experienced a traumatic event; that it may affect her ability to concentrate on academics; that she was receiving appropriate professional help; and that she may need consideration with respect to course absences tests, and assignments. There was no information to indicate whether the College took any additional interim remedial measures with respect to the class that the Student and the Respondent had together. Report entries dated XXXX, indicate that the XXXX may have encouraged the Student to go to a health or counseling center.

Subsequently, and based on a personal statement submitted by the Student to the XXXX, the Student indicated that she wanted the College to pursue an investigation of the Incident as of XXXX.⁶ Thereafter, according to documentation the College provided, the College initiated an investigation of the Student's report of sexual assault between XXXX; completed its investigation on or about XXXX, and held a hearing before the Board on XXXX. At the conclusion of the hearing, the Board notified the Student and the Respondent that it had found the Respondent "not responsible" for the following charges, as specified by the Policy: 1) Causing Physical Harm to Another Person; and 2) Sexual Misconduct, specifically, engaging in sexual intercourse with another student without consent. In a letter sent on XXXX, the Board notified the Dean of Students of its determination, which it reached using a preponderance of the

⁵ In addition, OCR reviewed the College's policies and procedures regarding discrimination on the basis of sex, including with respect to sexual harassment and sexual assault/violence, and conducted interviews with College personnel regarding the implementation of such policies and procedures. Finally, to the extent the issues raised therein were relevant to the Complainant's individual allegation, OCR reviewed files concerning the College's response to other student complaints/reports of sexual harassment and sexual assault/violence during the 2011-2012, 2012-2013, and 2013-2014 academic years.

⁶ XXXX SENTENCE REDACTED XXXX

evidence standard. The Dean of Students notified the Respondent and the Complainant of her agreement with the Board’s findings by letters dated XXXX and XXXX, respectively. OCR did not review any information indicating that either party sought to appeal the College’s determination.

Analysis

Based on the investigation that OCR has conducted thus far, OCR identified possible compliance concerns regarding the College’s response. OCR determined that the College responded to the Student’s report by investigating the Incident under its Title IX policies and grievance procedures.⁷ It is unclear, however, whether the College fulfilled its Title IX obligation to consider the effects of the alleged off-campus sexual assault and to evaluate whether there was a hostile environment on campus for the Student and others, or otherwise in the College’s education programs and activities, whether on or off-campus.

Specifically, OCR determined that it is unclear whether the College considered offering the Student all relevant interim remedial measures during the course of the investigation and hearing processes, as well as any final remedies after those processes had concluded. As discussed above, the Student shared in her initial report of the alleged assault that she had a class with the Respondent on one day of the week, so the College was on notice that an academic accommodation with respect to the class that the Student shared with the Respondent may have been appropriate, in addition to other measures such as counseling.⁸ Further, although OCR reviewed documentation indicating that the College issued a no-contact order to the Student as an interim remedial measure, it is unclear whether the same was issued to the Respondent; and the order was not timely, as it was issued on XXXX, nearly three months after the Student’s report on XXXX. Finally, considering that the Student notified College personnel that she was still suffering from trauma after the conclusion of the investigation and hearing processes, the College may have also considered additional supportive measures, such as ongoing counseling or other academic accommodations.⁹ Such interim remedial and other supportive measures may have appropriately supported and protected the Student or the campus community from further harassment or retaliation, or otherwise ensured the Student and others’ safety in an effort to prevent a hostile environment within the College’s education programs or activities.

⁷ During the course of its investigation, OCR reviewed the College’s Title IX policies and procedures in place during the 2013-2014 academic year, when College received and investigated the Student’s report, as well as its policies and procedures following a revision in early 2015. OCR identified a number of compliance concerns with respect to those policies and procedures, and will provide the College with technical assistance regarding its concerns. To date, OCR has not reviewed the College’s current policies and procedures to determine whether they remedy the compliance concerns OCR identified with respect to the former procedures.

⁸ However, as discussed above, OCR obtained information indicating that on XXXX, the XXXX wrote a “traumatic event” letter to at least one of the Student’s course professors explaining that the Student may need consideration with respect to course absences tests, and assignments, and that the XXXX may have encouraged the Student to seek medical assistance.

⁹ XXXX 4 SENTENCES REDACTED XXXX

Prior to OCR completing its investigation, the College expressed a willingness to resolve the complaint and the identified compliance concerns by taking the steps set forth in the enclosed Resolution Agreement, pursuant to Section 302 of OCR's *Case Processing Manual*.¹⁰

Conclusion

Pursuant to Section 302 of OCR's *Case Processing Manual*, on April 18, 2018, the College provided OCR with the enclosed signed Resolution Agreement (the Agreement), dated April 4, 2018, which, when fully implemented, will resolve the allegation raised in this complaint. The provisions of the Agreement are aligned with the allegation raised by the Complainant and the information obtained during the course of OCR's investigation, and are consistent with applicable law and regulation. OCR will monitor the College's implementation of the Agreement until the College is in compliance with the statute and regulations at issue in the case. The College understands that by signing this Agreement, it agrees to provide data and other information in a timely manner. Further, the College understands that during the monitoring of this Agreement, OCR may visit the College, interview staff and students, and request such additional reports or data as are necessary for OCR to determine whether the College has fulfilled the terms of this Agreement and is in compliance with the regulation implementing Title IX at 34 C.F.R. Part 106, which was at issue in this case. Failure to implement the Agreement could result in OCR reopening the complaint. Upon the College's satisfaction of the commitments made under the Agreement, OCR will close this complaint.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the College's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

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

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

¹⁰ During its investigation, OCR reviewed documentation concerning the College's handling of approximately 80 other student complaints of sexual harassment/assault during the 2011-2012, 2012-2013, and 2013-2014 academic years. In its review, OCR identified possible compliance concerns, including but not limited to indications that the College may have failed to provide adequate notice of its Title IX reporting and grievance procedures to the College community; College personnel may have required complainants to unnecessarily retell or recount their narratives regarding alleged sexual harassment during the investigation and hearing processes; the College may have failed to involve complainants in its informal resolution process; the College may have failed to consistently provide both complainants and respondents with written notice of the outcome regarding a complaint, and to retain documentation of such notice; and the College may have failed to inform complainants and respondents of their right to appeal a hearing decision. OCR will provide the College with technical assistance regarding its concerns.

protect personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.

We appreciate the College's cooperation in the resolution of this complaint. If you have any questions, please contact the OCR attorneys assigned to this case: Sebastian Amar, at 202-453-6023 or Sebastian.Amar@ed.gov, or Kathyne Love, at 202-453-6948 or Kathyne.Love@ed.gov.

Sincerely,

/s/

Letisha Morgan
Team Leader
District of Columbia Office
Office for Civil Rights

Enclosure

cc: Deborah Love, Esq.