



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
400 MARYLAND AVENUE, SW
WASHINGTON, DC 20202-1475

REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

July 30, 2019

Dr. Paulette R. Dillard
President
Shaw University
118 E. South Street
Raleigh, NC 27601

Re: OCR Complaint No. 11-18-2310
Letter of Findings

Dear Dr. Dillard:

The Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) has completed its investigation of the complaint we received on July 31, 2018 against Shaw University (the University). The Complainant alleged that the University discriminated against him on the basis of his sex (male). Specifically, the complaint alleged that during the 2017-2018 academic year, the University failed to promptly and equitably respond to a report of sexual misconduct filed against the Complainant, in his capacity as an employee, by a student (the Student).

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. Because the University receives Federal financial assistance from the Department, OCR has jurisdiction over it pursuant to Title IX.

In reaching a determination, OCR reviewed documents provided by the Complainant and the University, and interviewed the Complainant and University staff, specifically the Title IX Officer.¹ After carefully considering all of the information obtained during the investigation, OCR determined that there was sufficient evidence of a violation of Title IX, which the University agreed to resolve through the enclosed Resolution Agreement, pursuant to Section 303(b) of OCR's *Case Processing Manual*. OCR's findings and conclusions are discussed below.

Facts

The University's Title IX Policies and Procedures and Practices

The University informed OCR that the Title IX Officer is the employee designated to coordinate its efforts to comply with and carry out its responsibilities under Title IX, including the

¹ The Title IX Officer also serves as the Director of Human Resources.

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

investigation and resolution of any Title IX complaint. The University’s Title IX Policy Statement (the Policy), which includes some of its Title IX policies and grievance procedures, is available on the University’s website.² The Policy defines sexual harassment as “unwelcome behavior of a sexual nature that relates to the gender or sexual identity of an individual and that has the purpose or effect of creating an intimidating, offensive, or hostile environment for study.” The Policy states that it “applies to all interactions between students and Shaw University faculty members and other faculty staff, and administrative personnel, and other students.” Pursuant to the Policy, the University will conduct an investigation into an allegation, after which a determination is made whether there is sufficient cause to proceed. If so, the University proceeds with an informal resolution conference, and if necessary, a formal hearing.

Although the Policy stipulates that it applies to *all* interactions between students and University faculty members, the Title IX Officer clarified that, in practice, the procedural provisions contained therein are applicable to students only. Specifically, the Title IX Officer stated that the Policy governs complaints in which the student is the reporting party, including student versus student incidents. The Title IX Officer distinguished incidents where a student is a reporting party and an employee is the responding party, as “hybrid situations,” as is the case in the instant OCR complaint. In such situations, the Title IX Officer stated that provisions of the Policy would apply to the student while the University’s Employment Handbook for Staff and Faculty (the Employee Handbook) would govern its response with respect to employees. However, the Title IX Officer acknowledged to OCR that he does not direct employee respondents to what policies and procedures apply to such investigations.

Information Obtained During the Investigation

The Complainant alleged that during the 2017-2018 academic year, the University failed to promptly and equitably respond to the Student’s report of sexual misconduct filed against him, including when it did not provide him with any written or specific allegations against him, or an opportunity to present a defense or to offer any witnesses.³

The University’s Investigation

In the evening of XXXXX, the Title IX Officer became aware of a report of sexual harassment after the XXXXX, who in turn emailed the Title IX Officer. In his email, the XXXXX stated that the Student told her that earlier that day, the Complainant asked the Student to go to his office, began to tell her how he wanted to express feelings for her, and said “I realize you’re a student but I just thought you were feeling me like I was feeling you.”

On XXXXX, the Title IX Officer initiated a response to the Student’s report of sexual harassment; he contacted the Student and asked that she complete a complaint form, which the Student subsequently submitted on XXXXX. In the complaint form, the Student stated that she and the Complainant XXXXX, and that on Monday, XXXXX, the Complainant “harassed me in the office, with sexual innuendos, and expressed his feelings of wanting to be in a relationship with me.” The

² See <http://www.shawu.edu/Title-IX/>.

³ XXXXX.

Student also indicated that her roommate (the Roommate) could “attest to inappropriate phone calls and was also harassed about my status.”

Thereafter, the Title IX Officer interviewed the Student on XXXXX. According to the University’s Investigative Report, dated XXXXX, the Student reported that the Complainant had sexually harassed her “several times before, but this was the first time he was verbal about it.” The Student described an incident wherein the Complainant allegedly subjected her to unwanted sexual touching by placing his hands on her hips as she bent down XXXXX. She also stated that the Complainant called her during evenings “between 8 and 9 pm just to talk”; that she would hang up when he wouldn’t specify why he was calling; and when she subsequently saw him, he told her not to hang up on him.⁴ The Student also provided the Title IX Officer with screenshots of text messages between her and the Complainant, as well as screenshots of text messages she sent to the Roommate regarding the Complainant’s alleged sexually harassing conduct.

The Title IX Officer next interviewed the Roommate, who stated that the Student complained to her about the Complainant “for a while and that [the Student] was tired of dealing with him.” The Roommate reported that she was nearby when the Complainant called the Student, and that she was aware that the Complainant had “tried to grab” the Student.⁵

Later that afternoon on XXXXX, the Title IX Officer emailed the Complainant asking, “can you please come see me at my office today,” but he did not identify the purpose of the proposed meeting. The Complainant informed OCR that when he met with the Title IX Officer later that afternoon, they began by discussing the XXXXX, something they had spoken about earlier in the day. Eventually, during the course of the meeting, the Title IX Officer informed the Complainant that he was responsible for investigating Title IX complaints in addition to his human resources responsibilities. The Title IX Officer explained to the Complainant that a complaint was made that he was “bothering” a student, and that he needed to ask him some questions. The Title IX Officer subsequently identified the Student but only after the Complainant asked. The Title IX Officer reported to OCR that he did not give the Complainant a copy of the Student’s complaint because he “keep[s] some of that confidential for investigatory purposes”; he maintained that the Complainant indicated that he understood the Student’s allegations through the course of his questioning. However, the Complainant explained that even through the course of questioning, he was unclear about the Student’s allegations.

The Investigative Report indicated that the Complainant explained to the Title IX Officer that he knows the Student because she XXXXX. Regarding his relationship with the Student, the Complainant explained that it was XXXXX, but “there is nothing romantic between them XXXXX.” The Investigative Report also indicated that the Complainant admitted that he periodically contacted the Student to see how she was doing. The Title IX Officer also asked whether the Complainant had ever had physical contact with the Student, but he did not describe the Student’s specific allegation in this regard. The Complainant responded that he had not

⁴ In a subsequent email to the Student on the same day, the Title IX Officer asked the Student how she obtained the Complainant’s telephone number. The Student responded that XXXXX at the beginning of the fall semester, the Complainant “asked to see my phone,” put his number in her phone, and texted himself to get her phone number.

⁵ The Roommate also XXXXX reported that once the Complainant found out that she and the Student were roommates, the Complainant asked her questions such as why the Student doesn’t like him and why the Student is mean.

inappropriately, or even accidentally, touched the Student; he noted that he and the Student were in the XXXXX, and he had not noticed any concerns.

The Complainant told OCR that he described to the Title IX Officer that on XXXXX, the Student came into XXXXX around 6 p.m. “after the doors were locked – or at least shut, and he thought he heard them being unlocked when she came in – and it made him uncomfortable that she could just come in like that.” The Complainant indicated that he went to a colleague’s (Colleague 1) area, spoke to her, and then she, and two additional colleagues (Colleague 2 and Colleague 3) all came XXXXX while the Student was sitting at a table XXXXX. The Complainant told OCR that he sought out his colleagues because he did not want to be alone with a female student. The Title IX Officer then asked if the Complainant had talked to the Student about desiring to be in a relationship with her, and the Complainant denied saying that and explained that “it was just small talk, like how is it going – nothing romantic.”

Regarding the Complainant’s concern that he was not provided with the opportunity to provide witnesses and evidence, the Complainant told OCR that he would have liked Colleague 1, Colleague 2, and Colleague 3 to be interviewed. The Title IX Officer stated that he did not interview these individuals, because the Complainant did not provide or request that they be interviewed as witnesses; they came up in the context of a nonresponsive answer to a question he had posed; and he did not believe that they would have information relevant to the investigation. The Title IX Officer acknowledged that he did not specifically ask the Complainant if he had any witnesses, but he explained to OCR that he told the Complainant to provide any information to refute the Student’s allegations.

Additionally, the Complainant informed OCR that he offered to provide his text messages with the Student during both the initial interview and the termination meeting, as discussed below, and was told that they weren’t needed. He provided OCR with copies of his text messages.⁶ The Title IX Officer denied the Complainant’s assertions. He stated that he asked the Complainant whether he had any text messages, that the Complainant opened his phone to look but did not provide any, and that the Complainant did not provide any during the termination meeting.

The Complainant explained to OCR that at the end of the meeting with the Title IX Officer on XXXXX, he was under the impression that the investigation was just beginning, as the Title IX Officer said that the Student’s complaint was something he had to look into and investigate, and that he would follow up with the Complainant. Furthermore, the Complainant told OCR that the Title IX Officer never explicitly said he was conducting a Title IX investigation or that he was alleged to have violated the Policy or any other policy or code.

The University’s Investigation Determination and The Complainant’s Employment Termination

On XXXXX, the Title IX Officer left the Complainant a voicemail to come to his office indicating that the investigation was complete. They met on XXXXX, and the Complainant stated that the Title IX Officer began the meeting by explaining that the Complainant was found to have violated the Policy; that the recommendation for the Policy violation was termination; and as a courtesy, the President of the University was allowing him to resign first. The Title IX Officer informed the

⁶ They include the text messages the Student provided to the Title IX Officer, plus additional communications.

Complainant that the Associate VP in conjunction with the Vice President (VP) determined that the Complainant would be terminated.⁷

In explaining how he reached his determination, the Title IX Officer told OCR that he drew an overall conclusion regarding the allegations, rather than a conclusion for each alleged incident described in the Student's complaint (i.e., physical contact, texting, etc.). He applied a preponderance of the evidence standard, finding that it was more likely than not that what the Student alleged took place, and concluded that she was subjected to a hostile environment on the basis of her sex.

The Complainant was ultimately involuntarily separated from the University for Title IX Sexual Harassment in violation of the Policy, and that the Complainant had created a "hostile educational XXXXX" for the Student. In a subsequent letter dated XXXXX, the Title IX Officer (in his dual capacity as Director of Human Resources) sent the Complainant a letter confirming that the Complainant had been placed on paid suspension as of XXXXX, pending the outcome of the Title IX investigation; that "the discoveries made during the investigation have irreparably damaged the University's level of trust and confidence in you necessary for continued employment"; and that, "[a]s a result, a decision has been made to end your employment effective immediately."⁸ The Title IX Officer informed the Complainant and the Student of the outcome of the investigation in person – the Complainant during the meeting on XXXXX, and the Student the following week.

Legal Standards

Title IX prohibits discrimination on the basis of sex. Sexual harassment that creates a hostile environment is a form of sex discrimination. The Title IX regulation, at 34 C.F.R. § 106.8(b), requires that a recipient adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints of alleged Title IX violations. OCR has identified a number of elements in evaluating whether a recipient's grievance procedures are prompt and equitable, including whether the recipient: (i) provides notice of the recipient's grievance procedures, including how to file a complaint, to students and employees; (ii) applies the grievance procedures to complaints filed by students or on their behalf alleging sexual misconduct carried out by employees, other students, or third parties; (iii) ensures an adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; (iv) designates and follows a reasonably prompt time frame for major stages of the complaint process; (v) notifies the parties of the outcome of the complaint; and (vi) provides assurance that the recipient will take steps to prevent recurrence of sexual misconduct and to remedy its discriminatory effects, as appropriate.

Analysis

⁷ The President of the University approved the termination of employment.

⁸ The Complainant said that at various points throughout the meeting, the Title IX Officer brought up his work performance and that things weren't working out at the University. OCR notes that the University did not provide OCR with any information or documentation indicating that the Complainant was terminated from his position for any work-related reasons other than the Student's complaint.

Based on the foregoing, OCR determined that the University responded promptly to the Student's complaint of sexual harassment against the Complainant. Indeed, the University completed its investigation within three days of receiving the complaint and terminated the Complainant's employment a day later. However, OCR determined that the University did not provide an equitable process to the Complainant.

As a threshold matter, the Complainant did not receive notice of the specific allegations or incidents raised in the Student's complaint, or even that a Title IX investigation had been launched against him. Rather, the Title IX Officer assumed that the Complainant was made aware of the allegations made against him through the course of questioning during a meeting that opened by discussing other matters, namely XXXXX.⁹ Notably, the Title IX Officer's Investigative Report states that the Complainant was "unaware of why I had called him in to speak to him." Although the Complainant recalls questions about physical contact, and calling and texting the Student, he insists that to date, he is unaware of what the Student specifically alleged he had done to sexually harass her.

The Title IX Officer admits he did not specifically ask if the Complainant had any witnesses. The Complainant explains that he identified three colleagues who were present for interactions with the Student on XXXXX, the last time he saw the Student. The Title IX Officer says he deemed these potential witnesses irrelevant. Had the Title IX Officer shared with the Complainant more information about the specific allegations, the Complainant might have explained the relevance of his colleagues as witnesses, or the Complainant might have provided additional witnesses to consider.

Further, the Title IX Officer's investigatory report reflects that he interviewed the Student's witness – the Roommate, and reviewed text messages offered by the Student, but the report does not reflect consideration of any evidence offered by Complainant apart from the one discussion. Although the Title IX Officer explained to OCR that he requested evidence, which the Complainant did not provide, this is not noted in the report. In contrast, according to the Complainant, he tried to provide text messages to the Title IX Officer, but his offer was refused; however, the Complainant readily provided such messages to OCR.

Lastly, OCR also determined that the University did not provide sufficient notice to the Complainant of what policies and procedures applied to the investigation of the Student's complaint. Specifically, it was unclear which grievance procedure the University applied in this investigation or any other involving a student complainant and an employee respondent – the Policy or another policy or code contained within the Employee Handbook.¹⁰ Although the Policy is available on the University's website, and states that it "applies to all interactions between students and Shaw University faculty members and other faculty, staff, and administrative personnel, and other students," the Title IX Officer told OCR that only certain provisions of the Policy apply to employee respondents and that the Employee Handbook also applies to employee

⁹ For example, as discussed above, the Title IX Officer never explicitly told the Complainant that the Student alleged he had touched her, but he considered that it was "implied" during the course of the conversation.

¹⁰ Moreover, although this was not an issue that OCR investigated, OCR has concerns that the University's grievance procedures, as written, in both the Policy and the Employee Handbook, fail to provide for a prompt and equitable resolution of Title IX complaints. OCR will provide the University with Technical Assistance in this regard.

respondents. However, the Policy does not clarify which provisions apply only to students, and the Employee Handbook is similarly devoid of clarity on how an employee respondent is to be treated in a Title IX investigation. Importantly, given the steps outlined in the Policy that are to occur subsequent to an investigation, the Complainant reasonably might have believed that his one and only meeting with the Title IX Officer was simply the start of a Title IX process that would afford him further opportunities to defend himself.

Accordingly, OCR determined that the University violated Title IX when it failed to provide an equitable response to the Student's complaint of sexual harassment, as required by the regulation implementing Title IX, at 34 C.F.R. § 106.8(b).

Conclusion

On July 25, 2019, the University agreed to implement the enclosed Resolution Agreement (the Agreement), which commits the University to take specific steps to address the identified areas of noncompliance. Under Section 304 of OCR's *Case Processing Manual*, a complaint will be considered resolved and the University deemed compliant when the University enters into and fulfills the terms of a resolution agreement. OCR will monitor closely the University's implementation of the Agreement to ensure that the commitments made are implemented timely and effectively. OCR may conduct visits and may request information as necessary to determine whether the University has fulfilled the terms of the Agreement. If the University fails to implement the Agreement, OCR may initiate proceedings to enforce the specific terms and obligations of the Agreement. Before initiating such proceedings, OCR will give the University written notice of the alleged breach and sixty (60) calendar days to cure the alleged breach.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the University's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. 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 University 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 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 University's cooperation in the resolution of this complaint. If you have any questions regarding this letter, please contact the OCR attorneys assigned to this complaint: Shana

Heller at 202-453-6599 or Shana.Heller@ed.gov; or Erika Westry at 202-453-7025 or Erika.Westry@ed.gov.

Sincerely,

Letisha Morgan-Cosic
Team Leader, Team II
Office for Civil Rights
District of Columbia Office

Enclosure

cc: Kerry Shad, Esq., Counsel for the University, at kshad@smithlaw.com