

Dave L. Armstrong, Esq.
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Notre Dame College
4545 College Road
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Re: OCR Docket #15-09-6001

Dear Mr. Armstrong:

I am pleased to confirm the resolution of the proactive compliance review of Notre Dame College (the College) that the U.S. Department of Education (the Department), Office for Civil Rights (OCR), initiated on December 22, 2008. The review was conducted under Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. § 1681 *et seq.*, and its implementing regulation at 34 C.F.R. Part 106. Title IX prohibits discrimination on the basis of sex in education programs and activities operated by recipients of Federal financial assistance. As a recipient of Federal financial assistance from the Department, the College is subject to the provisions of Title IX.

Background

The College is a Catholic career-focused liberal arts college located in South Euclid, Ohio, and enrolls approximately 2,000 students. In January 2001, the College became coeducational and admitted male students for the first time. During the 2005-2006 academic year, local media reported that there were at least six sexual assaults of students on campus. In spring 2007, another agency within the Department, Federal Student Aid (FSA), conducted an investigation of the College in response to a complaint concerning an alleged violation of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (the Clery Act).

The primary focus of OCR's Title IX compliance review was the College's policies, procedures, and practices for addressing complaints regarding sexual harassment and sexual assault filed by or on behalf of College students.

Applicable Regulatory and Policy Standards

The Title IX implementing regulation, at 34 C.F.R. § 106.31 (a), provides that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance. Specific obligations are set forth at, 34 C.F.R. § 106.31(b), including a recipient's obligation to ensure that its students are not denied or limited in their ability to participate in or benefit from the recipient's programs or activities on the basis of sex.

Sexual harassment is a form of sex discrimination prohibited by Title IX. Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, such as sexual assault or acts of sexual violence. Sexual harassment of a student can deny or limit, on the basis of sex, the student's ability to participate in or to receive benefits, services, or opportunities in the school's program.

In addition to the nondiscrimination provisions, Title IX's implementing regulation also contains a requirement that recipients establish procedural requirements that are important for the prevention or correction of sex discrimination, including sexual harassment. Specifically, the Title IX regulation, at 34 C.F.R. § 106.8(a), specifically requires that each recipient of Federal financial assistance designate at least one employee to coordinate its responsibilities to comply with and carry out its responsibilities under Title IX. The recipient is further required to notify all students and employees of the name (or title), office address, and telephone number of the designated employee or employees. Additionally, the Title IX regulation, at 34 C.F.R. § 106.8(b), requires recipients to adopt and publish grievance procedures providing for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by Title IX, including sexual harassment and sexual assaults. Further, the Title IX regulation, at 34 C.F.R. § 106.9, requires recipients to notify all parties that it does not discriminate on the basis of sex in the educational programs or activities that it operates and that it is required by Title IX not to discriminate in such a manner. The notice should further state that the requirement not to discriminate in the recipient's education programs and activities extends to employees as well as students and that inquiries concerning the application of Title IX may be referred to the Title IX Coordinator or employee designated pursuant to 34 C.F.R. § 106.8(a).

To comply with these regulatory requirements, a recipient's sex discrimination grievance procedures must be responsive to complaints of sex discrimination in the recipient's education programs and activities filed by students against employees, other students, by third parties.¹ Title IX does not require a recipient to provide separate grievance procedures for sexual harassment complaints. However, a recipient's grievance procedures for handling discrimination complaints must provide effective means for preventing and responding to sexual harassment.

In evaluating whether a recipient's grievance procedures are prompt and equitable, OCR considers whether the procedures provide for: notice to students and employees of the procedure, including where complaints may be filed; application of the procedure to complaints alleging harassment carried out by employees, other students, or third parties; adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; designated and prompt timeframes for the resolution of the complaint process; notice to the parties of the outcome of the complaint; and an assurance that the college will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

Summary of OCR's Investigation to Date

OCR sets forth below a summary of the data gathered as part of the initial part of its investigation. Prior to the completion of OCR's investigation, however, the College asked OCR to voluntarily resolve this compliance review. Under OCR's procedures, a compliance review may be resolved before the conclusion of OCR's investigation if a recipient asks to resolve the review and signs a resolution agreement that addresses the review issues. The provisions of the agreement must be aligned with the issues addressed by the review and the information obtained during the investigation and must be consistent with applicable regulations. Such a request does not constitute an admission of liability on the part of the College, nor does it constitute a determination by OCR that the College has violated any of the laws that OCR enforces.

As a part of OCR's initial investigation, OCR staff obtained and reviewed the College's sexual harassment, sexual assault, and sex discrimination policies, grievance procedures, and its Student Code of Conduct. OCR determined that the College had three different grievance procedures to address sexual harassment of students, staff, or both, which contained differing information. In addition, the College's grievance procedures were not consistent in identifying the Title IX Coordinator or other employee designated the responsibility for coordinating the College's compliance with its Title IX responsibilities and in notifying all students and employees of the name or title, office address, and telephone number of the designated employee. For instance, the Title IX Coordinator was identified in the student handbook but not the faculty and staff handbooks. None of the handbooks provided the office address and telephone number of the designated employee.

¹ U.S. Department of Education, Office for Civil Rights, Revised Sexual Harassment Guidance (2001).

OCR also obtained and reviewed copies of all written complaints filed with the College alleging sexual harassment or sexual assault for the 2007-2008 and 2008-2009 school years, which consisted of eleven complaints. The complaints included, but were not limited to, student-on-student sexual harassment, and student-on-student sexual assault. Some of these incidents appeared to be alcohol related. Between 2008 and 2009, the College's records indicate that several incidents that could constitute sexual harassment, as defined by the College's sexual harassment policy in its student handbook and Title IX, appear to have been addressed solely as criminal matters, and not addressed under Title IX. For example, in one instance, a resident assistant contacted campus police to file a report regarding a potential sexual assault against a female student by a male student who would not allow the female to leave her dorm room, physically assaulted her, and would not let her go. In another case where a female student was possibly sexually assaulted by a student on campus, it is not clear if the victim was apprised of her Title IX rights. In another instance, a student reported to the classroom teacher and campus police that a male student had subjected her to unwarranted sexual advances and comments. The student advised the campus police that she did not want to pursue the matter with the local police but was willing to participate in the Judicial System process. The records provided by the College did not indicate that the matter was so addressed or ever treated as a Title IX sexual harassment complaint.

The College officials explained that the College's usual procedure for investigating complaints of sexual harassment includes interviewing witnesses, including the aggrieved person and the accused; identifying the behaviors committed; reviewing text messages, letters/e-mails, voice messages, or any other type of evidence; and informing the aggrieved person of the need to preserve the evidence. When staff is made aware of allegations of sexual misconduct or assault, they inform the person harmed of the availability of counseling, their right to file a police report with the local police, and information about local rape crisis centers. However, it is not clear that the persons harmed are also provided notice about their rights and the College's obligations under Title IX with respect to sexual harassment. The College's current sexual assault procedures do not reference Title IX.

OCR's investigation revealed that from 2007-2009, the College did not conduct any Title IX sexual harassment complaint investigations independent of the campus police investigations or the judicial review process. Rather, sexual harassment complaints appeared to have been handled solely as code of conduct violations under the College's Judicial System. Title IX does not specifically prohibit the College from using its Judicial System hearing procedures to process Title IX complaints. However, if student disciplinary procedures are used to process Title IX complaints, any process must include the factors listed above, acknowledge that it is a discrimination complaint and, as necessary, provide a remedy for the victim. As such, OCR preliminarily examined whether the Judicial System procedures provide students with a prompt and equitable resolution as required by Title IX, using the factors set forth above. Based on such review, we noted several concerns.

The Judicial System procedures state that its jurisdiction is to hear and adjudicate controversies and dispense disciplinary action regarding all violations of the Student Code of Conduct. These procedures address only student conduct and do not address sexual harassment complaints filed by students against faculty, staff, or visitors to the College. The Judicial System's procedures indicate that the objective of the student disciplinary process is to ascertain whether a student violated a specific code of conduct and provide the accused an opportunity to defend against the charge. Thus, the objective of the hearing is not to conduct an investigation to determine whether sexual harassment--a civil rights violation--occurred and the procedures do not require communication of such a finding to the parties. Moreover, the existing procedures indicate that only the accused is given the right to appeal. The timeframes provided for in the Judicial System proceedings apply to the accused and the accused's right to due process, but do not apply to the victim's right to a prompt and equitable determination as to whether sexual harassment occurred. We also note that the utilization of these procedures permit the accused to be present at all stages of the hearing, which could result in the victim of sexual harassment declining to pursue the matter to avoid facing the accused or could impact the victim's rights to confidentiality. Moreover, the procedures appear to provide only sanctions for the accused and not remedies for the victim.

Additionally, the Judicial System's procedures provide that, in some instances, the associate dean or his designee can dispose of the charges against the accused prior to the disciplinary hearing by dismissing the charges if he deems they lack merit or by issuing sanctions if the accused admits to the charges as defined under the Student Code of Conduct. In such instances, documentation did not indicate that an investigation was conducted, a finding of sexual harassment made, the aggrieved student was notified of the outcome, provided a remedy appropriate to a Title IX sexual harassment complaint, or that there was a basis from which the aggrieved could appeal. Further, the Judicial System's procedures that permit incidents to be resolved before the disciplinary hearing occurs do not appear to include safeguards to ensure that the sexual harassment complaints are addressed. Accordingly, the Judicial System's procedures do not appear to fully meet the requirements of Title IX for the prompt and equitable resolution of a sexual harassment complaint.

Finally, preliminary information obtained during the interviews conducted with the College's staff indicated that staff received little on-going training on the requirements of Title IX. Several of the witnesses interviewed advised that they had received training on sexual harassment as either a part of the annual staff review of policies and procedures or as newly hired employees.

Voluntary Resolution Agreement

On September 17, 2010, the College provided OCR with a signed agreement (Agreement) to resolve the compliance review (copy enclosed). The Agreement is the result of collaborative efforts between the College and OCR to identify measures that will assist the College with its Title IX compliance and its ongoing efforts to ensure a campus

that is free from sexual harassment that could deprive students of an equal opportunity to benefit from or participate in the College's education programs and activities.

In summary, the Agreement requires remedial measures in a few primary categories: Title IX procedural requirements; training; student-focused remedies; and reporting/implementation. For instance, the agreement requires the College to revise its Title IX grievance procedures that address complaints of sex discrimination, including sexual harassment, and its nondiscrimination notice and to effectively publish these materials; designate one or more Title IX coordinators and ensure that they, and other appropriate administrators, receive appropriate training on Title IX and how to investigate complaints of sexual harassment; and develop, an appropriate Title IX training program that will be completed annually by its administrators, professors, instructors, residential assistants, coaches, and other staff who interact with students on a regular basis.

With respect to students, the Agreement requires the College to take the following actions:

- To develop material available to students on sexual harassment and sexual violence to be distributed to students during orientation and upon receipt of complaints of sexual harassment and sexual violence. The material will contain information on what constitutes a sexual assault, what to do if they have been the victim of sexual assault, and contact information for on and off-campus resources for victims of sexual assault. In addition, the College will include information on how to file a complaint of sexual assault with the College, how to file a separate complaint of sexual harassment with the College, the name and contact information for the College's Title IX Coordinator(s) and a description of the Title IX Coordinator's role, information on how to obtain counseling and academic assistance in the event of a sexual assault, and information on what interim measures can be taken if the alleged perpetrator lives on campus and/or attends classes with the victim.
- To create and charge a campus focus group consisting of representative leaders from the student community (e.g., women's groups, athletes, residential assistants, fraternity and sorority leaders, etc.) and College officials with providing input on strategies for ensuring that students understand their rights under Title IX, how to report possible violations of Title IX, and are aware of the College's obligation to promptly and equitably respond to Title IX complaints. Additionally, the College will charge the campus focus group with providing input regarding strategies for the prevention of sexual harassment/sexual assault incidents, including outreach and educational activities. Taking into consideration the campus focus group's input, the College will offer a series of informational session(s) that the College will provide to students to ensure that they are aware of the College's prohibition against sex discrimination and sexual harassment, including sexual assault and sexual violence; can recognize such sex discrimination and sexual harassment

when they occur; and understand how and with whom to report any incidents of sex discrimination, including sexual harassment, sexual assault, and sexual violence. In addition, the sessions will cover the College's updated grievance procedures for Title IX complaints, as well as a general overview of what Title IX is, the rights it confers on students, the resources available to students who believe they have been victims of sexual harassment, sexual assault, and sexual violence, and the existence of OCR and its authority to enforce Title IX. These sessions will be provided as part of the annual student orientation for new and returning students and annual residence life orientation for students residing in campus housing.

In addition to the aforementioned provisions, the Agreement provides that at the end of each of the next three school years, the College will conduct climate checks with students on campus to assess the effectiveness of steps the College has taken pursuant to the Agreement, which may include sending a survey to each College student that contains questions about the student's knowledge of sex discrimination (including sexual harassment and sexual assault) and any experiences he or she has had with sex discrimination while attending the College, and the student's awareness of the College's Title IX policies and procedures.

The Agreement also requires the College to review its campus police records for the 2009-2010 school year and, for any complaint of sexual assault that was treated solely as a criminal matter and/or where the Title IX Coordinator was not involved, the College's Title IX Coordinator is required to review the matter to determine whether sexual harassment occurred in violation of Title IX and whether the remedies provided were effective in making the victim whole. If not, the Agreement requires the College to promptly take measures, should the victim or the perpetrator still be enrolled as a student, to ensure the sexual harassment was fully and effectively addressed.

Finally, the Agreement provides that the College will coordinate with local law enforcement to ensure that in instances where a complaint involves conduct of a criminal nature, the College will be able to meet its obligation under Title IX by, at a minimum, providing witnesses with information about their Title IX rights or resources for victims or taking such independent interim actions as may be necessary to ensure the safety of any victims and the campus community.

The Agreement contemplates that implementation of the plan will be completed by no later than June 2013.

Conclusion

In light of the foregoing, OCR finds that the issues OCR examined as part of this compliance review have been resolved. We are therefore closing this compliance review as of the date of this letter. OCR will monitor the College's implementation of the Agreement. Pursuant to the Agreement, we look forward to your first implementation report which is due in our office on November 1, 2010.

We appreciate your cooperation and that of College staff during the course of this review. If you have any questions, please contact Ms. Denise C. Vaughn, Senior Attorney, by telephone at (216) 522-7574 or by e-mail at Denise.C.Vaughn@ed.gov.

Sincerely,

Catherine D. Criswell
Director

Enclosure