



U.S. DEPARTMENT OF EDUCATION
P.O. BOX 14620
WASHINGTON, DC 20044-4620
e-mail: OCR_DC@ed.gov

OFFICE FOR CIVIL RIGHTS
SOUTHERN DIVISION

DISTRICT OF COLUMBIA OFFICE
District of Columbia, Virginia, North Carolina

March 26, 2004

Stephen W. Vescovo, Esq.
Thomason, Hendrix, Harvey, Johnson & Mitchell
2900 One Commerce Square
Memphis, Tennessee 38103

RE: OCR Complaint #04-03-2043

Dear Mr. Vescovo:

This letter is to advise you of the determination reached in the above-referenced complaint that (b)(7)(C) (Complainant), a student at Christian Brothers University, filed with the District of Columbia Office of the Office for Civil Rights (OCR), U.S. Department of Education (Department), against the Christian Brothers University (the University). The Complainant alleged that the University discriminated against her based on her gender when the University failed to conduct an appropriate investigation of the Complainant's sexual harassment complaint. Specifically, the Complainant alleged that the University did not properly follow its procedures, pursuant to its sexual harassment and complaint policies. Additionally, the Complainant alleged that the University failed to address her claims and concerns of a hostile environment on campus.

OCR is responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX), 42 U.S.C. § 1681 *et seq.*, and its implementing regulation, 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex by recipients of Federal financial assistance. The Title IX regulation at 34 C.F.R. § 106.31(a) provides that no person shall, on the basis of sex, be subjected to discrimination under any academic or other education program or activity offered by a recipient. The University is a recipient of Federal financial assistance from the Department and therefore must comply with Title IX and its implementing regulations.

In the process of investigating the allegations set forth above, OCR reviewed and analyzed documents submitted by the University and Complainant. OCR also conducted an onsite visit during which the Complainant, numerous administration officials, and witnesses were interviewed. The investigation focused on the three questions of:

- 1) **Whether the University's sexual harassment policies and procedures meet the requirements of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, and its implementing regulation at 34 C.F.R. 106.8(b),**

- 2) **Whether the University conducted an investigation of the Complainant's allegation of sexual harassment pursuant to its complaint procedures in accordance with Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, et seq., and its implementing regulation at 34 C.F.R. 106.8(b) and,**
- 3) **Whether the University addressed the Complainant's allegation of sexual harassment of which it was previously made aware in accordance with Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, et seq., and its implementing regulation found at 34 C.F.R. 106.31.**

The record indicates the following with respect to the issues contained in this complaint:

- 1) **Whether the University's sexual harassment policies and procedures meet the requirements of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, et seq., and its implementing regulation at 34 C.F.R. 106.8(b).¹**

The Complainant's initial allegation in her complaint with OCR involved sexual harassment and Section 106.8(b), the requirement of dissemination of a complaint procedure. However, consistent with our regulatory authority, OCR reviewed the University's compliance with the policy and procedural requirements in Sections 106.8 and 106.9 regarding sex discrimination generally. Section 106.8(b) requires that a recipient shall adopt and publish complaint procedures providing for prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by the Title IX regulations. The University's harassment complaint procedures relevant to this complaint, entitled "Disciplinary Policies and Procedures," are published in the Student Handbook.² The handbook in effect at the time of the incident was the 2002-2003 edition; according to the University, the disciplinary procedures in that edition were under revision at the time of the investigation and hearing at issue in this complaint. From the record, it is unclear if the procedures being followed were the 2001-2002 or the 2002-2003 procedures, although they were similar in most respects. The University subsequently significantly revised the Handbook for the 2003-2004 academic year.

OCR also reviewed the University's compliance with the related requirements in Section 106.8, particularly because the Complainant's second allegation with OCR relates to these requirements. Section 106.8(a) requires that a recipient designate and notify students and employees of at least one employee who will coordinate its efforts to comply with and carry out its responsibilities under the regulations. The regulation further requires that the recipient notify its students and employees of the name, address and telephone number of this individual. The Handbook is not clear whether the University has a Title IX Coordinator.

¹ The policy is contained in the Student Handbook, entitled "The Compass." OCR considered three different versions of the Student Handbook, the 2001-2002 and 2002-2003 versions of the handbook, which were very similar, and the 2003-2004 version that marked a significant revision. All three versions will be cited where appropriate with the version noted.

² These are not to be confused with Section 7.I of the 2003-2004 Handbook, which provide for "Grievance Procedures." Section 7.J specifically provides that allegations of harassment are to be processed under the Discipline Procedures at Section 7.D.

In addition, Section 106.9 requires a recipient to provide notification of its policy of nondiscrimination on the basis of sex under Title IX and publish and distribute such policy. Considering this regulation, OCR reviewed the University's policy. Section 7.J³ of the 2003-2004 Handbook states that the University is committed to the principle that all students shall be free from discrimination based on, among other things, sex, and includes a specific reference to sexual harassment⁴; Section 7.B.5 specifically deals with harassment and discrimination committed by students. However, these policies are not effectively distributed to all students each year. While the Handbook is available on the University's website, it is hard to locate.⁵ Thus, it is difficult for students to locate or know of the policy and related procedures and how to initiate a complaint under the Code of Conduct, and of any changes to the Code of Conduct.

OCR's review of the procedures in effect at the time of the incident and the subsequent revised versions (in both 2002-2003 and 2003-2004) indicate that the University did not and still does not have adequate complaint procedures in place.⁶ The procedures do not, as written, provide for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment and assault.⁷ The 2002-2003 Handbook contained two provisions dealing with harassment based on, among other things, sex, specifically, Sections 7.A.1.a and 8.E. While Section 7.A.1.a is part of the Student Code of Conduct, such that the disciplinary provisions in Section 7.B would serve as the complaint procedures, Section 8.E does not contain a clear and detailed explanation of the complaint process (e.g., a cross reference to Section 7.B for complaints brought against students and an explanation of or cross reference to the procedures to be used for complaints brought by students against University personnel). The 2003-2004 Handbook combines harassment and discrimination procedures in one section, Section 7.J, thereby making clear that the disciplinary procedures in Section 7.D will apply to complaints brought against another student; however, there is still no explanation of or cross reference to the procedures to be used for complaints brought by students against University personnel. Moreover, Section 7, the Student Code of Conduct, does not appear to be an appropriate place to inform students of the prohibition of harassment of students by University personnel, as the Student Code of Conduct does not apply to them; for similar reasons, it would also not provide

³ Note that Section 7.J of the 2003-2004 handbook, setting out the policy on harassment, including sexual harassment, cross-references itself. It states: "The University has the right to discipline students who engage in the sexual harassment of other students. A copy of the University policy on sexual harassment may be found later in this section." There is no further discussion of sexual harassment later in the section.

⁴ There does not appear to have been a similar provision in the 2002-2003 Handbook.

⁵ The link to the Handbook is neither on the main webpage nor the "Current Students" webpage one level down, or even on a link from that webpage. Rather, the Handbook is found by clicking on Administration from the main webpage, then Student Life, and then the link to the Handbook is located. Moreover, typing in "Compass" or "Handbook" on the University search engine only brings up the 2001-2002 and 2002-2003 versions -- even though there is a 2003-2004 version.

⁶ While not the subject of this complaint, we note that the Handbook, on page 27, states that grievance procedures for use in complaining of discrimination based on disability can be obtained from the Office of the Dean of Students or downloaded from <http://www.cbu.edu/studentlife/disability>. However, that link does not contain the procedures.

⁷ There is also a separate provision in the 2001-2002 and 2002-2003 Handbooks at Sections 7.O and 8.O respectively, and in the 2003-2004 Handbook at Section 7.K which deals with sexual assault. While Section 7.J of the 2003-2004 Handbook, dealing with harassment and discrimination, mentions assault as a general form of discrimination, Section 7.K does not contain a cross-reference to Section 7.J. Sexual assault can be a form of sexual harassment.

effective notice to University personnel of the prohibition against harassment of them by other personnel.

As to allegations of harassment brought against students, the complaint procedures in Section 7.B of the 2001-2002 and 2002-2003 Handbooks and Section 7.D of the 2003-2004 Handbook do not delineate timeframes for the major stages of the process and do not contain record keeping requirements⁸ or parameters for conducting investigations. There are no requirements for confidentiality and no provision for notice of the outcome of the process. The focus of the entire process seems more on the accused than the accuser,⁹ e.g., there is a Statement of Rights for the Accused but none for the accuser in any of the three student handbooks examined. There is nothing in writing to inform an accuser of his or her right to request a disciplinary committee hearing should the Office of Student Life reject his/her complaint or the allegations be dismissed by the Discipline Officer. Additionally, there is nothing in writing to reflect the role of the Security Office in investigating a complaint, or how that investigation relates to the Dean of Student Life's actions or to the Discipline Committee process. While the Discipline Procedures provide for an appeal of the outcome by the accused, they do not provide an appeal mechanism for the student bringing the accusations.

Finally, it is not clear what role the President of the University has in the process, generally and in this case. In the 2001-2002 and 2002-2003 Student Handbooks, the appeal was performed by the President of the University. Under the current procedure, the 2003-2004 Handbook, the appeal is to the Associate Vice-President for Student Life. The procedures do not indicate whether the role of the President or, currently, the Associate Vice President for Student Life in the appeals process is one of fact finding and/or reviewing the previous proceedings. If the appeal is to include a review of the previous proceedings, the procedures should indicate that the President or Associate Vice President for Student Life should be provided not only with the proceedings of the Committee hearing, but also the information obtained through the investigations by Security and Student Life. If the appeal is to be one of fact finding, then the Vice President should be trained in investigative techniques.

The inadequacy of the procedures is demonstrated by their application in this case. For example, the record of the investigation conducted by the University is incomplete. While there are notes of the interviews conducted by Security, there are no records of the interviews by the Dean of Student Life. The current procedures reflect some improvements. For example, they provide that the accuser of an alleged incident of student misconduct should expect to be asked to participate in the judicial process involving the accused. According to the procedures, the participation of the accuser generally includes making a timely report of the incident, filing a written complaint with the Office of Student Life, discussing the incident with the office, and providing testimony in the presence of the accused. However, under the procedures in place at the time of the incident, the role of the accuser was not specified. From interviews and a review of the hearing transcript and tape, it was clear that the Complainant was expected to prosecute

⁸ OCR notes that the grievance procedure at Section 7.I of the 2003-2004 Handbook contains recordkeeping requirements.

⁹ This is why many universities choose to have separate procedures for allegations of discrimination and harassment, perhaps eventually leading into the disciplinary procedures, rather than try to make them fit entirely within the disciplinary process.

her own case. The relationship between the actions taken by the Dean of Student Life (presumably under Section 8.E of the 2002-2003 Handbook) and the disciplinary procedures in Section 7.B was not clear. There was apparently no consideration given to the investigations by Security or Student Life, the Student Faculty Committee didn't identify any witnesses to interview on its own initiative, and the questions by the Committee members were rather limited. The process continues to essentially be a *judicial* one, rather than focusing on protection of the Complainant's rights under Title IX.¹⁰

The record keeping for the Student Faculty Disciplinary Committee is also sparse. The tape recording of the event is garbled and difficult to follow. The notes kept by the Chairman were not complete, and there was no hearing file compiled or retained. These problems were compounded by the obvious lack of training for the Chair of the Committee and the Committee members on issues regarding sexual harassment and assault. (For more on this, see discussion of the remaining allegations.) Another problem from the lack of a disciplinary record and weakness with the University's procedures was the inconsistent reports as to whether the Committee Chair is a voting member.

As to the role of the President, in an interview with OCR, he stated that he listened to the tape of the Committee hearing, but then decided that he could not – and did not want to – attempt to reconstruct what happened during the investigation and the hearing. This was compounded by the apparent lack of a hearing file. Thus, the University President seemed to base his decision on the limited information he gathered himself.

OCR has identified a number of concerns from the information obtained from the record. However, as will be explained below, the University has agreed to revise its policies and procedures to address these concerns.

2) Whether the University conducted an investigation of the Complainant's sexual harassment allegation pursuant to its complaint procedures in accordance with Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, et seq., and its implementing regulation at 34 C.F.R. Part 106.8(b) and,

3) Whether the University addressed allegations of sexual harassment of which it was previously made aware in accordance with Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, et seq., and its implementing regulation found at 34 C.F.R. 106.31.

¹⁰ See n.9, above. Indeed, it does not appear from the current procedures that Security or Student Life will conduct any sort of investigation of the complaint. The practice of relying on a student accuser to present his or her case in a judicial context has been found by OCR to place too great a burden on an accuser, absent procedures to ensure that the university takes an active role in determining whether or not harassment has occurred. Where a university does conduct an investigation, OCR has noted the importance of developing an investigative file containing all information and relevant documentation gathered by the investigator and making the file available to the discipline or hearing committee and the parties. The file could include an investigative report providing the investigator's findings and conclusions, or simply provide the evidence with no determinations or recommendations.

Stephen W. Vescovo, Esq.
Page 6 of 10

Whether the University conducted its investigation in accordance with its own complaint procedures, while relevant to our investigation, is not determinative to the outcome of this OCR investigation. Rather, our primary concern is whether, in applying its procedures and in taking any other measures, the University responded to the Complainant consistent with the requirements of Title IX and its implementing regulations.

The Title IX regulation at 34 C.F.R. Section 106.31 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 academic, extracurricular, research, occupational training, or other education program or activity. When individuals who are participating in a program or activity operated or sponsored by an educational institution are subjected to sexual harassment, they are receiving treatment that is different from others. The standards applicable to a case of peer harassment, such as this one, are: a) whether the Student alleged that she was subjected to unwelcome conduct of a sexual nature, b) whether the University had notice of the alleged conduct, and c) whether the University responded immediately and appropriately. As the Complainant utilized the University's complaint procedures, OCR's inquiry also includes whether the University applied its procedures promptly and equitably, as required by the Title IX regulations.

The Student initially raised her concerns with the Director of Security, who did what can best be characterized as a preliminary investigation. The Director only interviewed the Complainant and the student she accused of harassment (the Classmate). The Director asked the Classmate to prepare a statement, but not the Complainant. Because the Classmate denied assaulting the Complainant, the Director of Security concluded that the allegations could not be substantiated. He did not consider evidence that would bear on the parties' credibility, such as information that could be provided by anyone else involved with the matter after the incident. The Director of Security did not prepare a written report summarizing or documenting his investigation, and did not develop an investigative file. There is no indication that the Director of Security had received training on sexual harassment.

The Complainant, unsatisfied with the outcome of this investigation, pressed the matter with Student Life. Again, the University's complaint procedures applicable to complaints of sexual harassment, entitled "Disciplinary Policies and Procedures," are published in the student handbook known as the Compass Student Handbook. According to the University, the 2002-2003 procedures were under revision at the time of the incident at issue in this complaint (the beginning of the 2002-2003 academic year). The shifting status of the procedures appears to have contributed to some of the problems in handling the Complainant's complaint. In any event, the procedures that were in place when the incident occurred were similar to the ones listed below. The University endorsed these procedures as its official policy for handling student complaints by listing them in the Handbook.

- “Initial Disciplinary Action” – This requires that the Student Life staff investigate the complaint. If the allegation is determined to have no merit, the investigation will cease and no record of the complaint will go into the student’s disciplinary file. If there is a determination that the complaint has merit, an official notification of charges will be issued to the accused. The accused then has five days to schedule an initial disciplinary conference.”
- “Initial Disciplinary Conference” – The Student Life staff reviews the statement of charges and all other information available regarding the incident and options available for resolving the case. Student Life may then postpone the conference to conduct further investigation. Next, Student Life may concur with the alleged violator that he or she is not responsible for the charges. A third option is that the student may refuse to accept responsibility for the charges and the Student Life staff may conclude that the allegations merit further review. It is then referred to a formal disciplinary conference.
- “Formal Disciplinary Conference” – A formal disciplinary conference will be held within seven days of the initial conference. It is held with the Student Faculty Disciplinary Committee. This committee may impose sanctions upon a student it finds violated the Code of Student Conduct.

In accordance with the University procedure, the Complainant went to the Dean of Student Life within 24 hours of the alleged assault to initiate the “Initial Disciplinary Action.” In the “Initial Disciplinary Action” stage, the Dean met with both the Complainant and the Classmate. OCR’s investigation, including an interview with the Dean, disclosed that she was not familiar with the University’s procedures or her role in them. For example, she gave conflicting statements as to whether a written complaint is required to initiate an investigation and/or to initiate a disciplinary committee hearing. She did not take notes of her interviews, did not keep a record of the investigation/investigative file, and did not prepare an investigative report. Her investigation focused on physical evidence, or the lack thereof, and she did not interview anyone who might have been able to help assess the relative credibility of the parties. It was clear that the Dean lacked adequate training in sexual harassment and in how to conduct an investigation.

Based on this investigation in the “Initial Disciplinary Action” stage, the Dean determined that no harassment had taken place. Although the University’s procedures only provide for a formal disciplinary conference when Student Life finds evidence of an infraction, the Complainant was offered an opportunity to request a formal disciplinary conference.¹¹ While the initial charges filed were not the charges requested by the Complainant for the hearing, the University promptly amended the charges.

After the hearing, the Committee made a decision in the Classmate’s favor. However, OCR has determined that they did not have a sufficient basis for this conclusion nor were adequate procedures followed to provide the Complainant with the due process protections inherent in the Title IX regulatory requirements. According to OCR’s interviews with members of the Committee, the hearing was conducted with little or no training provided to the Chair or the

¹¹ The Dean of Student Life informed us that, if she determines that there is no evidence of an infraction, as in this case, she tells the accuser that he or she can request a disciplinary hearing. There is no indication in the University’s procedures that she is to do so, nor that a hearing is even possible in such a situation. The University’s procedures will have to be revised in this regard.

members as to issues regarding harassment and assault. The Committee members were unprepared for the hearing in other ways. The faculty members didn't appear to be informed of the nature of the hearing and identities of the parties until the date of the hearing. The student members of the Committee who were interviewed indicated they did not have any substantive training.

In making its decision in the Classmate's favor, the Committee members relied in large part on the lack of physical evidence. They did not consider the significance of the Complainant's or the Classmate's contemporaneous reports to third parties on their credibility. One consequence of not providing the Committee members with the results of the earlier investigations by Security and Student Life is that they were not in a position to use the earlier statements by the parties in evaluating the testimony. The Committee members provided conflicting accounts of the Complainant's demeanor and relied on their impressions of her demeanor, without training as to how to interpret or understand the significance thereof. The Committee members did not take an active role, but rather seemed to leave it to the Complainant to make her case. The Committee members did not identify any witnesses to interview and were generally unaware of what had happened during the investigation.

The University's procedures do not allow character witnesses, yet one of the Classmate's witnesses could only be considered a character witness since he was not involved in the incident. It was clear from our interviews that the Committee members relied greatly on the Complainant's desire for the Student to be educated about issues regarding sexual harassment and have his punishment limited to community service rather than something harsher in concluding that she had not been harassed, when they had not been trained as to how to interpret its significance.

The Complainant also alleged that she reported other incidents of non-sexual harassment yet nothing was done by the University, specifically, alleged actions by the Classmate and some of his teammates that were in the nature of retaliation for her original complaint. The OCR investigation revealed that the University did attempt to respond to the complaints presented to them. When there were allegations that the Classmate and some of his friends called her derogatory names, the Director of Security asked for a written complaint. The Complainant never filed a written complaint. The Director of Security did talk to the Classmate, who denied any incident taking place. There was also a review of security tapes but no incident of harassment was recorded on the tapes. The Director of Security offered to provide an escort to the Complainant at her request.

Although the Complainant asserted that the University did not take immediate and appropriate action with respect to the aforementioned incidents, the University did take some responsive actions. Given the results of the University's investigation(s) and hearing, the University's responses may have seemed appropriate at the time – the University process had concluded that

Stephen W. Vescovo, Esq.
Page 9 of 10

she had not been harassed, thus, it might have appeared that she was being overly sensitive to her subsequent limited interactions with the Classmate. However, as noted above, there were significant problems with the investigation(s) and hearing. Had the University handled the initial allegation of harassment appropriately and concluded that the Complainant been harassed, the relative credibility of the parties and the nature of the subsequent incidents might have seemed entirely different.

OCR has determined that the University's policies and procedures regarding sex discrimination and sexual harassment should be revised to ensure that they provide for prompt and equitable resolution of such complaints. OCR has also identified a number of concerns regarding the University's response to the complaint at issue. The University has agreed to address the concerns identified above regarding its compliance with Sections 106.8 and 106.9 in the enclosed Commitment to Resolve. The revisions made by the University to its policies and procedures since the time of the incident, the revisions to be made pursuant to the Commitment to Resolve, and the other commitments contained therein should help to ensure that future complaints of harassment will be handled in accordance with the requirements of Title IX and OCR's regulations. As indicated in the Commitment to Resolve, OCR remains available to assist the University with these efforts.

Finally, while not part of the initial complaint, the Complainant has brought to our attention that, when she decided to return to the University, she was asked to sign a statement containing several conditions that could be reasonably construed as retaliatory. While not specifically addressed in the investigation, OCR raised several concerns with the University regarding the content and timing of this letter. The University has agreed to modify the letter as part of the enclosed Commitment to Resolve.

This concludes OCR's investigation of the above allegations, and we are closing this complaint effective the date of this letter. This determination letter addresses only the issues discussed therein and should not be construed to cover any other issues regarding compliance with Title IX that may exist.

The University is advised that no recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the laws OCR enforces, or because one had made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing held in connection with a complaint.

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, to the extent provided by law, personal information that, if released, could constitute an unwarranted invasion of personal privacy.

Stephen W. Vescovo, Esq.
Page 10 of 10

We wish to thank the University for its cooperation in this investigation and for the efforts it has made and will continue to make to change its policies and procedures to better ensure a safe learning environment for its students. If you have any questions about OCR's determination, please contact Judith Risch at (202) 208-7627 or Judith.Risch@ed.gov.

Sincerely,


Howard Kallem
Chief Attorney

Enclosure

cc Brother Stanislaus Sobczyk, FSC
President
Christian Brothers University