



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
REGION I
JOHN W. MCCORMACK POST OFFICE AND COURTHOUSE, ROOM 701
POST OFFICE SQUARE
BOSTON, MASSACHUSETTS 02109-4557

April 25, 2003

Dr. John Silber
President
Boston University
One Sherborn Street
Boston, MA 02215

Re: Complaint No. 01-02-2006

Dear Dr. Silber:

The Office for Civil Rights (OCR) of the U.S. Department of Education (Department) has completed its investigation of the above-referenced complaint filed against Boston University (University). The Complainant alleged that the University discriminated against her on the basis of sex. Specifically, the Complainant alleged that the University processed her sexual assault complaint in an unfair and untimely manner because the University sanctioned her for alcohol use, failed to consider all of the evidence, and failed to notify her of the outcome until months after her filing. She further alleged that the University retaliated by pursuing a complaint of sexual assault filed against her and distributing information about her to the media.

OCR specifically investigated the following issues:

1. Whether the University discriminated against the Complainant on the basis of sex by failing to process her complaint of sexual assault in a prompt and equitable manner; and
2. Whether the University retaliated against the Complainant in its processing of a sexual harassment complaint against the Complainant and the resulting disciplinary proceeding.

OCR has jurisdiction over this complaint because it contains alleged violations of Title IX of the Education Amendments of 1972, and its implementing regulation at 34 C.F.R. Part 106 (Title IX), which prohibit recipients of Federal financial assistance from the Department from discriminating on the basis of sex in education programs or activities. The University receives Federal financial assistance from the Department and is therefore subject to the provisions and requirements of Title IX.

As part of OCR's investigation of this complaint, OCR reviewed the University's policies and grievance procedures pertaining to sexual harassment. We also reviewed other complaints of sexual harassment, particularly sexual assault, filed with the University over the last two academic years. In addition, we interviewed several employees of the University responsible for responding to alleged incidents of sexual assault and harassment and for implementing and overseeing the University's internal policies and procedures with regard to sexual harassment. We also interviewed the Complainant and other witnesses. Based on the information reviewed by OCR, we have determined that there is insufficient evidence to establish a violation of Title IX. The bases for our determination are presented below.

Issue 1: Whether the University discriminated against the Complainant on the basis of sex by failing to process her complaint of sexual assault in a prompt and equitable manner.

Legal Standard

Under the Title IX implementing regulation at 34 C.F.R. § 106.31(a), no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in any of a recipient's education programs or activities.

Sexual harassment is a form of sex discrimination prohibited by Title IX. Sexual harassment is unwelcome conduct of a sexual nature that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program, or to create a hostile or abusive educational environment.

The Title IX regulation at 34 C.F.R. § 106.8(b) requires that recipients adopt and publish grievance procedures providing for the "prompt and equitable" resolution of students' and employees' complaints of sex discrimination. In investigating this issue, OCR examined the University's grievance procedures and how they were applied to the Complainant. In particular, we examined whether the procedures, as implemented in the Complainant's case, provided her with a prompt and equitable resolution of her complaint. In determining whether the University's grievance procedures meet the requirements of Title IX, OCR considered whether the procedures include elements such as 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 reasonably prompt timeframes for the major stages of the complaint process; notice to the parties of the outcome of the complaint; and an assurance that the University will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the Complainant and others, if appropriate.

Title IX also requires that a recipient designate an employee, pursuant to 34 C.F.R. § 106.8(a), to coordinate its efforts to comply with and carry out its responsibilities under Title IX, including investigation of any complaint communicated to such recipient

alleging noncompliance with Title IX. Under this section of the regulation, the recipient shall notify all its students and employees of the name, office address and telephone number of the appointed employee or employees.

The University's Policies and Procedures

OCR learned that the University's Office for Judicial Affairs and Student Safety Programs (Judicial Affairs) is responsible for investigating and adjudicating all nonacademic disciplinary matters involving University students, which includes all alleged student code of discipline violations and student-on-student sexual harassment/assault complaints.

The University's grievance procedures for sexual harassment are set forth in the University's Lifebook, the student handbook that is distributed annually at the beginning of each academic year. OCR received and reviewed a copy of the University's 2000-01 Lifebook, which states:

When a student believes that he or she has been a victim of sexual harassment, he or she may file in writing a formal grievance with the Director of Judicial Affairs, in the Office of Judicial Affairs and Student Safety Programs. . . .

If the complaint involves the conduct of another student, the Director of Judicial Affairs shall initiate an investigation in accordance with the Code of Student Responsibilities. . . .

In the event that the student is not satisfied with the resolution of the grievance, an appeal may be made to the Vice President and Dean of Students, and from there to the Provost [the University's Title IX Coordinator].

OCR interviewed the Director of Judicial Affairs (Director) and Assistant Director of Judicial Affairs (Assistant Director). According to them, after Judicial Affairs receives a complaint of sexual harassment, an informal meeting takes place with the complainant to discuss his or her complaint. At this meeting, they determine whether the immediate needs of the complainant have been met, including whether the complainant has received any counseling from the University. They also determine whether a stay-away order and/or housing relocation are necessary or desired. They ask the complainant for any documentation and a list of witnesses and then notify the accused of the charges in writing. Every Wednesday, the Director and the Assistant Director meet with the Dean of Students to discuss cases. An investigation is conducted by either the Director or the Assistant Director and consists of interviewing witnesses and collecting relevant documentation. Following the investigation, the alleged victim and the accused are informed of the outcome of the investigation and sanctions may be imposed. Students who are sanctioned can request a hearing and provide any new information. Parents are usually informed of the investigation and the results by letter. Also, according to Judicial Affairs, complainants are informed at the outset of an investigation that they may be sanctioned for their use of alcohol or drugs.

In investigating the first allegation, OCR focused on how the University responded once on notice of the alleged sexual assault.

The University's Response

The Complainant alleged that in the early morning of November 5, 2000, she was sexually assaulted by another University student (Accused) in his room in their on-campus dormitory at the University. The Complainant informed OCR that she first reported the incident to the University's Mental Health Center staff on either November 6th, or 7th. The Complainant then went to see a nurse practitioner at the University's Health Center on November 9th. The next day she reported the incident to the University police.

OCR interviewed the University police detective (Detective) who assisted the Complainant. According to the Detective, on November 10th, the Complainant came to the University police and reported that she had been sexually assaulted. The Detective stated to OCR that when he met with the Complainant, he explained that her police report would remain confidential and would not be shared with the University staff. Both the Complainant and the Detective agree that he informed her that, because she was underage and drinking alcohol, the University might sanction her. On November 13th, the Detective accompanied her to the hospital, where the Complainant was first seen by a licensed social worker and then by a sexual assault nurse examiner (SANE nurse). The social worker reported that the Complainant came to the hospital for a medical evaluation as a result of a sexual assault. A doctor then examined the Complainant on the same day and concluded, "some form of sexual manipulation had occurred," which resulted in two tears and abrasions.

On November 14th, the Complainant signed a release of records form in order for the police to access her medical records and the Detective secured a search warrant for the Accused's room, which was executed on November 15th. He also obtained a temporary restraining order against the Accused and gave a copy to the Complainant.

The Detective stated to OCR that he explained to the Complainant her options, including filing a complaint with Judicial Affairs. The Detective also contacted the then Director of Residential Life (Former Director) stating that the Complainant would like to discuss housing options with him. The University police had no further contact with Judicial Affairs regarding the Complainant, because the investigations by Judicial Affairs and the police are kept separate. On either November 28th or 29th, the Former Director received a written statement of the alleged rape from the Complainant. On the same day, the Former Director contacted the Assistant Director by telephone to inform him of the Complainant's allegations.

Since the Complainant felt uncomfortable in her living situation, the Former Director provided her access to an apartment in a different part of campus. He explained to the Accused that he was not to have any contact with the Complainant.

The University's Investigation

On November 30th, the Assistant Director met with the Complainant and her parents, who reported to him that she had been raped. On December 4th, the Complainant went to his office and provided a written statement. According to the Assistant Director, he explained to her the disciplinary process, and although he did not focus on alcohol use, he stated that she may be held accountable for alcohol use if it was determined that she consumed alcohol. The Complainant told OCR that she did not recall this discussion of sanctioning for alcohol consumption.

The Assistant Director stated that he also discussed with her the stay-away order against the Accused and gave the Complainant his pager number to contact him if the Accused violated the conditions of the order. On December 4th, the Assistant Director sent an administrative stay-away order to the Accused advising him to have no contact with the Complainant. The Assistant Director stated that he requested medical documentation of the Complainant and her former attorney, but the Complainant has denied that he made this request. The Assistant Director also stated that he asked her for names of any witnesses that she could provide, however, the Complainant directed him to her written statement.

On December 18th, the Assistant Director sent a letter to the Accused informing him of the allegations and asking him to contact him by December 23rd, to schedule an appointment to discuss the allegations.

On January 5, 2001, the Assistant Director sent letters to witnesses whose names were provided by the Accused. These were also the persons that the Assistant Director believed were relevant to the Complainant's complaint. In the letters, he requested a statement of what they observed on the date of the alleged sexual assault. All witnesses provided statements in a timely manner. None of the witnesses were present when the alleged sexual assault occurred, but their statements included descriptions of what they witnessed before and after the alleged assault.

The Assistant Director found that the witnesses' statements suggested differing impressions of what the Complainant initially stated to witnesses soon after the alleged assault and what she later conveyed in relation to what occurred between her and the Accused in his room. Particularly, the Assistant Director found that the statements reflected a lack of clarity as to whether the acts were consensual.

On February 16th, the Assistant Director interviewed the Accused. According to the Accused, the sexual acts that occurred between him and the Complainant were consensual. On this same day, the Accused filed a complaint with Judicial Affairs against the Complainant accusing her of sexual harassment, sexual assault and defamation related to events that occurred on the night of November 4th, prior to the alleged assault against the Complainant.

On March 19th, after the Complainant's former attorney canceled a number of meetings, the Assistant Director and the University's attorney met with the Complainant and her former attorney. The Assistant Director told OCR that at this meeting he again requested a copy of the Complainant's medical records. According to the Complainant, the Assistant Director requested no medical records. Also, at this meeting, according to the Assistant Director, he attempted to clarify inconsistencies identified in the witness statements with the Complainant, but was not successful.

On April 18th, Judicial Affairs issued a letter sanctioning the Accused for consuming alcohol and not being truthful about it during the course of its investigation. In the same letter, he was informed that "no charges or allegations are currently under review by this office concerning your alleged rape" of the Complainant. The letter informed the Accused of his appeal rights.

Thereafter, the Complainant was represented by her present counsel. At around this time, late April/early May 2001, the current attorneys for the Complainant and the University began discussions outside of the Judicial Affairs process to potentially settle the matter. No further action was taken by Judicial Affairs with regard to the complaint. The University counsel informed the Complainant's present counsel verbally that there was insufficient evidence to establish that a sexual assault had occurred. However, pursuant to discussions between the University and the Complainant's current attorneys, the University counsel invited them to provide any additional information to the University for its consideration.

In November, when present counsel for the Complainant explained to another attorney for the University, who usually handles matters concerning Judicial Affairs, that they had not received notice of the outcome of the complaint, the Assistant Director was directed to produce a letter stating the outcome to the Complainant's counsel. On November 26, 2001, the Assistant Director notified the Complainant by letter that there was insufficient evidence to support a finding against the Accused.

Analysis

In determining whether the University responded in a prompt and equitable manner, we looked at the timeline for investigating and providing an outcome of the complaint to the Complainant and found that the University's investigation of her complaint was prompt. The University provided a detailed timeline. Although the Complainant filed her complaint with the University on November 30, 2000 and did not receive written notice of the outcome until November 26, 2001, when the Assistant Director's letter was issued stating that there was insufficient evidence that the Complainant was assaulted, the University asserted that it orally notified the Complainant's former attorney in April 2001 of the decision and believed that he would inform the Complainant of the outcome. After numerous attempts at contact, OCR was unable to confirm this assertion with the Complainant's former attorney. University counsel stated to OCR that the Complainant's present attorneys were informed verbally in the late April/early May of 2001 that there was insufficient evidence but that they were welcome to provide more information. Additionally, OCR notes that in a letter dated April 18th, the Accused was notified that

he was not being charged with sexual assault. OCR also notes that the Complainant's former attorney canceled meetings with the University on numerous occasions, which also contributed to the delay in processing her complaint.

In light of these circumstances, OCR found that the University processed the complaint in a "prompt" manner. Although she was not formally notified of the outcome until a year from when she filed the complaint, OCR concluded that Judicial Affairs completed its investigation and promptly informed the Complainant's attorneys of the status of her complaint.

In determining whether the University responded in an equitable manner, we focused on the application of the procedure to complainants of harassment, especially the sanctioning of the Complainant for alcohol use. We also examined how adequate, reliable and impartial the investigation was, in particular, why Judicial Affairs considered no medical evidence. At the outset, OCR noted the immediate steps that the University took to ensure the Complainant's safety such as providing housing options and imposing a stay-away order against the Accused. In looking whether the complaint was processed in an equitable matter, OCR does not substitute its judgment for that of a university's investigator, but reviews the process to ensure that it was reasonably designed to identify and address any sexual harassment.

OCR questioned the University about its practice of sanctioning complainants for use of alcohol as being a potential deterrent from bringing complaints forward, especially since so many sexual assaults involve alcohol. With regard to the University's "zero tolerance" policy concerning alcohol use, OCR examined two years of complaints to determine whether the policy was uniformly applied to all sexual assault complaints. We determined that it was consistently applied with one exception. OCR found one case in which a female student was not sanctioned for alcohol use, however we found that there were extenuating circumstances from which one could conclude that the University's actions were reasonable. OCR interviewed a counselor at the University, who was often a first responder to victims of assault. She told OCR that she saw several female students per year who alleged that they had been assaulted. We asked her what the impact of the "zero tolerance" policy was on those students deciding whether to file a complaint. She stated that it was one of many factors that a student would consider but could not say definitively that this was the deciding factor. When OCR asked the Complainant, if she had recalled discussion of sanctioning for alcohol use and whether this would have deterred her from filing, she stated it would not have deterred her. Neither the counselor nor the Complainant could provide OCR with the names of individuals who had not filed a complaint because of concern about discipline. Based on this information, OCR was unable to find that the policy had a chilling effect in practice on those deciding whether to file sexual assault complaints. OCR also noted that such sanctioning was not a part of students' official academic records. Rather, it could only be accessed if students provided permission to a third party.

OCR also considered the adequacy, reliability and impartiality of the University's investigation of the Complainant's sexual assault complaint. OCR questioned the

University about why there was no documentation or consideration of any medical records. The Assistant Director stated that he requested a copy of the medical report more than once from the Complainant and her former attorney, but neither responded. According to the Complainant, she was not asked to provide medical records. Here, OCR noted that the Assistant Director was specifically trained in investigating sexual assault complaints and our file review indicated that the University routinely sought such documentation in the process of investigating sexual assault complaints. When making his determination without medical records before him in April 2001, the Assistant Director turned to witness statements and interviews. Because of the inconsistencies contained in the statements, he found that there was insufficient evidence to hold the Accused responsible for the alleged conduct. At the end of April, Judicial Affairs completed its process, and all communications were directed to the University's counsel in anticipation of potential litigation. In late April or early May, the Complainant's present counsel and the University began discussions about potential settlement and were notified verbally by the University's counsel that there was insufficient evidence but were invited to provide any additional information that they had for the University to consider. OCR received documentation showing that the present counsel faxed the University counsel the Complainant's medical records in the summer of 2001. The University counsel did not recall discussion of medical records and could not confirm receipt of the records by the University. If documentation was received, it was in the context of potential settlement negotiations and not with regard to the investigation conducted by Judicial Affairs, which was already completed. Further, any medical records obtained by the Detective were kept confidential and separate from Judicial Affairs. Based on the information obtained in his investigation, OCR does not find the Assistant Director's determination to be unreasonable or a failure to conduct an impartial investigation.

OCR also questioned the University regarding notice to the parties of the outcome of the complaint. As a matter of practice, OCR confirmed from our case file review that the University provides a written outcome to complainants. In this instance, according to the University, it gave a verbal notification to the Complainant's former and present counsel stating that the University did not have enough information to find for the Complainant, but that any additional information provided would be considered. The Complainant's current counsel does not dispute that they were verbally informed that there was insufficient evidence but any additional information would be considered. Finally, in November 2001, written notice of the outcome was provided. In light of the particular circumstances in this instance, OCR could not conclude that in this case notice was not provided. Further, OCR found that, generally, written notice was provided to complainants.

For the above reasons, OCR found that there was insufficient evidence to show that the University failed to investigate the Complainant's complaint of sexual assault in an equitable manner.

While overall, OCR determined that there was insufficient evidence to show that the University did not respond in a prompt and equitable manner regarding the Complainant in this instance, OCR and the University discussed possible improvements to its policies

and procedures with respect to Title IX. The University decided to take the following steps to improve its policies and procedures:

- Publication of procedures and Title IX Coordinator: There were inconsistencies in the information provided in the University's Safety booklet and the Lifebook. These have now been made consistent. Further, the name of the Title IX Coordinator was not published in the Lifebook or elsewhere. This has also been addressed.
- Notice of the procedure to students and employees of the procedure, including where complaints may be filed: While the student Code was readily available, the fact that students could file complaints of sexual assault pursuant to the Code, via Judicial Affairs, was not made entirely clear. The University has addressed this issue.
- Timeframes in the grievance procedure: The grievance procedure lacked timeframes for major stages by which the University would take action. The University has modified the grievance procedures in its on-line publications to include reasonably prompt timeframes. Next year's printed Lifebook will also include these changes.
- The notice of nondiscrimination lacked OCR and the Title IX Coordinator's contact information. The University has addressed this issue in its on-line publications. Next year's printed Lifebook will also include these changes.
- Adequacy, reliability and impartiality of the investigation of complaints: OCR noted that there was no rationale contained in the files maintained by Judicial Affairs for the decisions rendered. The University now places a written explanation of the outcome in its files.

The University voluntarily took the above-discussed steps for the purpose of improving its procedures. However, based on the totality of the circumstances, there is insufficient evidence to show that the University violated Title IX with regard to the Complainant's allegation.

Issue 2: Whether the University retaliated against the Complainant in its processing of a sexual harassment complaint against the Complainant and the resulting disciplinary proceeding.

Legal Standard

The standards for determining the University's compliance in regard to retaliation are set forth in the regulation implementing Title IX at 34 C.F.R. § 106.71. The regulation incorporates by reference the procedural provisions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.*, and its implementing regulation at 34 C.F.R. §100.7(e).

The regulation requires that no recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or because he/she has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing. In order to establish that unlawful retaliation has occurred, OCR must determine that: (1) the individual engaged in a protected activity; (2) the recipient was aware of the protected activity; (3) the recipient took adverse action against the individual contemporaneous with or subsequent to the protected activity; (4) there was a causal connection between the adverse action and the protected activity; and (5) the recipient cannot show legitimate, nondiscriminatory reason for its action.

Background

OCR learned that on February 16, 2001, the Accused filed a sexual harassment, sexual assault, and defamation complaint against the Complainant, as a result of her alleged actions on the same night but prior to the alleged assault on November 5, 2000.

On February 26th, the Director, who investigated the complaint filed by the Accused, issued an administrative stay-away order to the Complainant advising her to have no contact with the Accused and informed her of the Accused's allegations. This letter also requested that the Complainant contact Judicial Affairs by March 5th, to schedule an appointment to discuss the charges filed by the Accused against her. The Director sent a follow-up letter on March 19th, since he had not heard from her.

The Complainant eventually scheduled an appointment for March 30th that was canceled by the Complainant's former attorney. The University reported that other appointments were scheduled with the Complainant and her former attorney that were canceled by her former attorney. Therefore, Judicial Affairs was unable to interview the Complainant regarding the complaint against her prior to issuing its findings.

On April 23rd, Judicial Affairs issued a letter to the Complainant sanctioning her for sexually harassing the Accused, engaging in disorderly conduct and consuming alcohol. This conclusion was reached after conducting an investigation, including interviewing witnesses present at the time of the incident at issue.

Further, the Complainant was notified of her right to a hearing before the University panel, if she contested the findings. The Complainant appealed these findings in a May 4th letter to the University's Office of the Vice President and Dean of Students. On November 28th, the Complainant attended a hearing at which she appealed the findings against her. At or around the time of the hearing, the University distributed press packets to media outlets that contained information obtained by Judicial Affairs in the course of investigating her complaint. On December 4th, the Vice President and Dean of Students issued a letter to the Complainant informing her that the University still found her guilty of consuming alcohol as a minor and disorderly conduct. The sanctions against her included a fine and that she undergo substance abuse counseling. However, in regard to the sexual harassment and sexual assault allegations, the University panel found that the

evidence provided in the hearing was inconclusive, and they did not support the sexual harassment and sexual assault allegations and these charges were dropped. On December 14th, the Complainant appealed the outcome of the alcohol consumption and disorderly conduct findings to the Provost. In a letter dated January 30, 2002, the Provost informed the Complainant that the hearing decision was upheld.

Analysis

The Complainant alleged that the University retaliated against her in its processing of a sexual harassment complaint against her and in its disciplinary proceeding.

Here, (1) the Complainant engaged in protected activity when she filed a complaint of sexual harassment with the University; (2) the recipient was aware of this activity; (3) the University sanctioned the Complainant for use of alcohol and processed a complaint of sexual harassment against her filed by the Accused; and (4) had the Complainant not filed a complaint of sexual harassment, the adverse actions would not have occurred because it is unlikely the University would have discovered her consumption of alcohol and the Accused admitted to the Complainant that he would not have filed a complaint on February 16th, against her had she not filed the original complaint against him. (5) The University stated to OCR and OCR confirmed that it has a strict "zero tolerance" policy regarding alcohol consumption. It regularly sanctions students who file complaints and are then found to have consumed alcohol. OCR finds this to be a legitimate, nondiscriminatory reason. With regard to the processing of a complaint of sexual harassment against her, the Accused filed a complaint of sexual harassment with the University against the Complainant and the complaint was processed in accordance with its grievance procedures. However, OCR notes that the press packet distributed to media outlets, which contained information obtained by Judicial Affairs in the investigation of both complaints by the University, was troubling. The University counsel advised Judicial Affairs not to answer OCR's questions regarding the distribution of the press packet. Nonetheless, although the University indicated its actions were taken because of the Complainant's use of the media, it acknowledged OCR's concern regarding this matter. Although this may raise other privacy issues, in this context, we could not conclude that the University's actions were taken in retaliation for filing a complaint with Judicial Affairs. Although inappropriate, these actions appeared to stem from both the University and the Complainant's extensive use of the media.

Therefore, OCR determined that there was insufficient evidence to establish that the University retaliated against the Complainant when it applied its "zero tolerance" policy to her and processed a complaint of sexual harassment against her, including the distribution of the press packet. As a result, there is insufficient evidence to find that the University violated Title IX with regard to this complaint.

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OCR wishes to thank the University for its patience and cooperation in this matter. We especially recognize the efforts of University counsel, Mr. Michael Rosen. If you have any questions about this letter, please contact me at (617) 223-9683 or Mr. Robert Lynch at (617) 223-9696.

Sincerely,

A handwritten signature in cursive script, reading "Carolyn F. Lazaris".

Carolyn F. Lazaris
Program/Administrative Manager

cc: Michael B. Rosen, Esq.
Office of the General Counsel
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Boston, MA 02215