



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. 01-02-2037

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 adequately consider the evidence, and conditioned its investigation on parental notification. She further alleged that the University retaliated by pursuing disciplinary action against her. OCR 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 her for filing a sexual assault complaint by initiating disciplinary action against her.

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 harassment and for implementing and overseeing its 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 failed to process the Complainant's 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.

Background

The Complainant alleged that she was assaulted in her off-campus apartment by another student (Accused) at the University on January 31, 2002, around 12:30 or 1:00 a.m. At approximately 1:15 a.m., the Complainant went to the on-campus apartment of a friend, who was also a Residential Life Assistant (RA) at the University. After hearing the Complainant's story the RA called the University police. Two officers came to the apartment. They called an ambulance, which took the Complainant to the hospital, where a Sexual Assault Nurse Examiner (SANE nurse) examined her within two hours of the incident. The SANE nurse administered a rape kit and in her report, she noted vaginal and anal tearing, indications of an assault. On the same day as the assault, the Complainant also went to see her counselor, employed by the University. Her counselor explained to her that she could file a complaint with Judicial Affairs.

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

The University's Investigation

On February 5th, the Complainant met with the Assistant Director. She gave the Assistant Director a verbal statement and answered questions he posed. According to the Assistant Director, he asked for medical records and a list of her roommates. He asked if drugs were involved; the Complainant hesitated in answering and then, according to the Complainant, the Assistant Director stated that as long as the Complainant was not selling or growing drugs, she would not be held accountable. According to the Complainant, he persuaded her that it was in her best interest to be honest. She then answered that she had smoked a small amount of marijuana prior to the alleged assault. She stated to OCR that she understood the Assistant Director's assurances to mean that this information would not be used against her.

When OCR questioned the Assistant Director on this point, he stated that he meant nothing would happen to her criminally nor would she be expelled. When asked if it was possible for her to have understood his words to mean that the University would also not sanction her, he answered that it was possible that she could have interpreted his words to mean this and that he could not recall if he explicitly stated that her actions could result in sanctioning.

On March 21st, the Director informed the Complainant that she was being investigated for marijuana use. According to the Complainant, it was not until she received this letter from the Director that she realized that the information would be used against her. The Complainant met with the Director on April 8th and told him that the Assistant Director had granted her immunity regarding her use of marijuana. In a letter dated April 23rd, Judicial Affairs informed her that it had determined she had violated the Code of Student

Responsibilities (Code) by engaging in drug use. The Complainant appealed this finding. The panel that heard the appeal overturned this decision based on its determination that it was unclear whether the Complainant had been given assurances by the Assistant Director that she would be given immunity for engaging in conduct that was in violation of the Code.

The Complainant also stated that the Assistant Director informed her during their February 5th meeting that she would be required to notify her parents about the incident. She returned to Judicial Affairs on February 8th and identified the Accused in a photo line-up and submitted a written statement. A “stay away order” was then put into effect. According to the Complainant, when meeting with the Assistant Director on February 8th, he again inquired whether she had told her parents. She said “no” and that it should be her decision. She told OCR that the Assistant Director said he could not proceed to investigate her complaint if she did not inform her parents. The Complainant reported that the Assistant Director also said that the Dean of Students would tell her parents if she did not. A few days later, she notified her parents. When OCR questioned the Assistant Director about requiring the Complainant to tell her parents, he stated that he told the Complainant that he would have to look into whether her parents would be required to be notified. However, before he could get her an answer, she had already notified her parents. He stated to OCR that he never said to the Complainant that he would not proceed to investigate her complaint if she did not tell her parents.

In February and March, the Assistant Director interviewed witnesses, including the Complainant’s roommate, a friend and two males, all of whom were in the apartment at the time of the alleged incident. The Complainant’s other roommate, who had parted from the group earlier in the evening, was also interviewed. The Complainant stated that the Assistant Director asked irrelevant, improper and personal questions of her roommates, including about her sexual practices and whether she exhibited signs of a rape victim. According to the Assistant Director, he was trying to determine the cause of unexplained vaginal tearing in the SANE nurse’s report, for which neither the Complainant nor the Accused could account.

On March 15th, the Complainant and a friend met with the Assistant Director, at which time she was given a letter dated March 8th. The letter stated that Judicial Affairs had determined that “the evidence was insufficient to support a finding against” the Accused. At the meeting, the Assistant Director explained to the Complainant that there was insufficient evidence to hold the Accused responsible for sexual assault. In particular, he discussed discrepancies between the Complainant’s version of events as reported to the SANE nurse. The Complainant, according to the report, had told the nurse that she was pushed down forcefully on her stomach. The Complainant’s complaint to Judicial Affairs stated that she was placed on the bed on her back. According to the Complainant and the SANE nurse, she had asked the nurse to change the report to make it reflect that she was on her back but the nurse declined to do so as a matter of practice. The nurse stated to OCR that in the larger context this detail would have meant very little to her at the time. When we questioned the Assistant Director again about this he said that he viewed this issue in the context of the broader investigation, in which he had found

several other discrepancies between the Complainant's report of the incident and the evidence and some witness statements.

An April 2nd letter from the Complainant's attorney stated that the Complainant wanted to present additional evidence. A letter from the Assistant Director to the Complainant dated April 5th stated that he welcomed additional information. In correspondence dated April 8th to the Assistant Director, the Complainant requested that he speak with the SANE nurse, the RA and her counselor. The Assistant Director thereafter either spoke with or received written statements from the SANE nurse, the RA and the counselor. In an e-mail dated April 26th, the Assistant Director documented his call with the SANE nurse, which included discussion of the medical report. Upon further inquiry by OCR regarding the nature of the Assistant Director's questioning of witnesses and focus on the medical information, he stated to OCR that some of the medical findings could not be accounted for by either party on the night in question. This led him to conclude that it must have happened on a prior occasion. According to the Assistant Director, the Complainant was non-responsive when asked about her sexual encounters around the time in question. The Complainant was subsequently notified that there was still insufficient evidence to find that the Accused assaulted her.

Analysis

In determining whether the University responded in a prompt and equitable manner, OCR looked at the timeline for investigating and providing an outcome of the complaint to the Complainant and found that the University's response was prompt. The University provided a detailed timeline that demonstrated that there were not significant delays in its processing of the complaint at issue. The Complainant filed her complaint on February 5th and she was notified of the outcome in a meeting with Judicial Affairs on March 15th. The University's response was prompt given all that took place from the beginning of the investigation to the end, including identifying the Accused, interviewing several witnesses in addition to the Complainant and the Accused, putting a stay away order into effect, and obtaining documentation such as medical records.

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 drug use and the issue of parental notification. We also examined how adequate, reliable and impartial the investigation was, specifically on what basis the investigator reached his conclusion given the strength of the medical evidence.

With regard to the University's "zero tolerance" policy concerning drug and alcohol use, OCR examined two years of complaints to determine whether the policy was uniformly applied to all 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. The Complainant's counselor, who was often a first responder to victims of assault, told OCR that she saw several female students per year who had been assaulted. She stated to OCR that potential

sanctioning was one of many factors that a student would consider but could not say definitively that this was the deciding factor. 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. The University also stated that such sanctioning was minor and would not become a part of a student's academic record and such information would only be released at the request of the student who was sanctioned. OCR asked the Complainant whether she would have proceeded with her complaint had she known she would be sanctioned, and she replied that in hindsight it was difficult to answer definitively. 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 harassment complaints.

The Complainant also raised the issue of parental notification as being a deterrent to those filing complaints. Here, the Complainant stated that the Assistant Director told her that if she did not tell her parents he could not proceed with the investigation or that the University would notify her parents. The Assistant Director stated to OCR that when the Complainant expressed reservation about informing her parents, he stated that he would check with the Dean of Students about what to do and get back to her, but he denied that he stated to the Complainant that he would not proceed to investigate her complaint without parental notification. He stated that before he could look into the issue, she had already notified her parents. Therefore, there is insufficient evidence to show that the issue of parental notification had a chilling effect on the Complainant's filing of a complaint with Judicial Affairs. OCR also determined that it was not the University's position that if a student refuses to permit parental notification the University would not proceed to investigate his or her complaint. OCR notified the Complainant's attorneys that the Family Educational Rights Privacy Act, the enforcement of which is outside the scope of OCR's jurisdiction, directly covers issues related to disclosure of students' records.

OCR also reviewed the adequacy, reliability and impartiality of the investigation of this sexual assault complaint. 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 noted that a SANE nurse administered a rape kit in this instance and that her report concluded that a sexual assault had occurred. When we questioned the Assistant Director about how he reached his conclusion, he stated that there were several inconsistencies in the Complainant's version of events and that witnesses present in the apartment at the time of the alleged incident presented a different story. These discrepancies included what was discussed at a bar with witnesses prior to the Complainant, the Accused and witnesses going to the Complainant's apartment, and whether there was a knock on the Complainant's door and then a conversation between a witness and the Complainant just prior to the alleged assault regarding whether the Accused was staying in her room or leaving the apartment with other witnesses. The Assistant Director also stated that he could not conclude that what was contained in the SANE nurse's report was entirely the result of that night. This is also why, when OCR questioned the Assistant Director regarding his questions about her sexual practices, he said he asked these questions because he could not determine when certain medical findings occurred and neither the Accused nor the Complainant could

account for it. Based on this explanation, 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 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.

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 for filing a sexual assault complaint by initiating disciplinary action against her.

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.

Analysis

Here, (1) the Complainant engaged in protected activity by filing a sexual harassment complaint; (2) the University was aware of this activity; (3) after filing the complaint with Judicial Affairs, the Complainant was sanctioned for drug use; and (4) there is a causal connection between the filing of the complaint and the sanctioning because but for the filing of the complaint, the University would not have known about the drug use and would not have sanctioned the Complainant. (5) However, the University applies a “zero-tolerance” policy for drug and alcohol use. Almost without exception, when the University discovers drug or alcohol use, including via complaint filings, it imposes sanctions on those involved. OCR found this to be a legitimate, nondiscriminatory reason. The University stated that the policy applied to non-sexual related assaults involving alcohol or drugs as well. This statement was consistent with OCR’s file review.

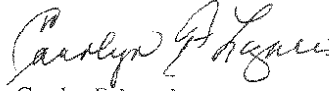
Because of the University’s uniform application of its “zero tolerance” policy, OCR did not find that the University retaliated against the Complainant in a discriminatory manner when it sanctioned her for drug use. We note that the Complainant appealed this finding on the ground that the Assistant Director failed to clearly state that her actions would result in sanctioning. The panel that heard the appeal overturned this decision because it was unclear whether the Complainant had been given assurances by the Assistant Director that she would be given immunity for engaging in conduct that was in violation of the Code.

Therefore, OCR determined that there was insufficient evidence to establish that the University failed to process the Complainant’s complaint of sexual assault in a prompt and equitable manner and that it retaliated against the Complainant when it applied its “zero tolerance” policy to her. As a result, there is insufficient evidence to find that the University violated Title IX with regard to this complaint.

Page 10 -- Dr. John Silber, Complaint No. 01-02-2037

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 that reads "Carolyn F. Lazaris".

Carolyn F. Lazaris
Program/Administrative Manager

cc: Michael B. Rosen, Esquire