UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION II

32 OLD SLIP, 26th FLOOR
NEW YORK, NY 10005-2500

REGION II
NEW JERSEY
NEW YORK
PUERTO RICO
VIRGIN ISLANDS

October 31, 2016

Jennifer J. Raab,
President
Hunter College of the City University of New York
695 Park Avenue
New York, New York 10065

Re: Case No. 02-13-2052
Hunter College of the City University of New York

Dear President Raab:

This letter is to inform you of the determinations made by the U.S. Department of Education, Office for Civil Rights (OCR), based on its investigation of the above-referenced complaint filed against Hunter College (the College), an institution that is part of the City University of New York (CUNY). OCR investigated whether the College failed to promptly and equitably respond to the Complainant's report of sexual harassment against a professor (the Professor), and other complaints of sexual harassment, including sexual assault and sexual violence, of which it had notice; and whether as a result, the Complainant and other students were subjected to a sexually hostile environment (Allegation 1).[1] OCR also investigated the Complainant's allegation that in retaliation for filing a sexual harassment complaint against the Professor with the College in September 2012, the College rescinded an offer to modify the payment terms for the Complainant's outstanding tuition balance, which prohibited her from registering for courses for the fall 2012 semester (Allegation 2).

OCR investigated this complaint under the authority of Title IX of the Education Amendments of 1972 (Title IX), as amended, 20 U.S.C. § 1681 et seq., and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in education programs and activities receiving financial assistance from the U.S. Department of Education (the Department). CUNY and the College are both recipients of financial assistance from the Department. Therefore, OCR has jurisdictional authority to investigate this complaint under Title IX.

[1] Notice to a recipient exists when a responsible employee knew, or in the exercise of reasonable care should have known about harassment.

Legal Overview

The regulation implementing Title IX, at 34 C.F.R. § 106.31, provides generally that, except as provided elsewhere in the regulation, "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 . . . education programs or activities" operated by recipients of Federal financial assistance.

Sexual harassment that creates a hostile environment is a form of sex discrimination prohibited by Title IX. Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, such as sexual assault or acts of sexual violence.

The regulation implementing Title IX, at 34 C.F.R. §§ 106.8 and 106.9, requires a recipient to designate a Title IX Coordinator, adopt grievance procedures, and implement specific and continuing steps to provide notice that it does not discriminate on the basis of sex in its education programs or activities.

These regulatory provisions are discussed in more detail below, issue by issue.

Summary

For the reasons briefly stated below, and discussed further in this letter, OCR determined that CUNY and the College failed to adopt and implement grievance procedures that fully comply with the requirements of Title IX. Although CUNY and the College, during OCR's investigation, have worked to improve the grievance procedures, the procedures still do not meet the procedural requirements of Title IX in all respects. For instance, the procedures do not effectively advise individuals where to file complaints, do not ensure an equitable opportunity to present witnesses and evidence, and do not provide sufficient information about timeframes. OCR also identified violations with respect to the College's designation of a Title IX Coordinator and its notice of non-discrimination.

OCR found the College's response to the Complainant violated Title IX because it was not prompt and it was not equitable. The College took approximately four months to complete its investigation, and it did not deliver the outcome of that investigation to the Complainant until approximately seven months after she filed her complaint, while the College immediately communicated preliminary investigation results to the Professor. The College provided some interim measures to the Complainant as part of its initial response to her complaint, and at OCR's request it provided other measures during the course of OCR's investigation, but the College did not take any measures to assess and address the effects of a possible hostile environment due to harassment by the Professor identified by the College at the end of its investigation. OCR's review of other case files revealed either a violation or a concern in every file reviewed through the 2012-2013 school year, including other instances where the College did not provide prompt and equitable investigations and took insufficient measures to assess and address the impact of harassment and possible hostile environments, as detailed below.

CUNY and the College did not execute a Resolution Agreement within either the 90-day negotiation period following OCR's notice that OCR found the College in violation of Title IX or the 10-day period following OCR's notice of impasse to the College.

On October 24, 2016, the tenth day of the 10-day impasse period, CUNY and the College notified OCR that they agreed to the last-negotiated terms of the Resolution Agreement; the Agreement could not be signed without approval of the CUNY Board of Trustees; and counsel for CUNY and the College would brief the CUNY Board of Trustees on the evening of October 26, 2016, at a scheduled board meeting. The College and CUNY delivered separately signed copies of the Resolution Agreement to OCR on October 27, 2016.

This letter summarizes OCR's findings. For each issue, OCR states the applicable legal standards, the evidence gathered during the investigation, and OCR's determinations.

Background Information

CUNY is a public university system in New York City, consisting of 24 constituent institutions, including the College. The College, which is largely a commuter school, has five postsecondary campuses, which are all located in the borough of Manhattan: Main Campus, Brookdale Campus, Silberman School of Social Work Campus, Voorhees Campus (Master of Fine Arts Program), and Roosevelt House Campus (Public Policy Institute).

OCR reviewed the College's campus crime statistics and security information pursuant to the Jeanne Clery Disclosure of Campus Security Policy and Crime Statistics Act (the Clery Act), which is reported by calendar year. According to the Clery Act data, in 2010 and 2011, there were no forcible or non-forcible sexual offenses reported; for 2012, there were three forcible sexual offenses reported (one on the Main Campus and two on the Brookdale Campus); for 2013, there were two forcible sexual offenses reported (both on the Main Campus); and in 2014, there were no reported acts of sexual offenses on any campus.[2]

The Complainant filed her complaint with OCR on December 19, 2012. She alleged that: (i) the College failed to respond appropriately to a complaint of sexual harassment made against the Professor in August 2011; (ii) the College failed to respond appropriately to a complaint of sexual harassment made against the Professor in May 2012; (iii) in retaliation for filing sexual harassment complaints against the Professor, in September 2012, the College prohibited the Complainant from registering for courses for the fall 2012 semester; and (iv) in further retaliation, the College rescinded an offer to modify the payment terms for her outstanding tuition balance. This letter is organized around two broad allegations: first, whether the College failed to provide a prompt and equitable response to the Complainant's two alleged complaints, as well as other complaints of sexual harassment, and whether as a result, the Complainant and other students were subjected to a sexually hostile environment; and second, whether the College retaliated against the Complainant.

During the investigation, OCR reviewed documentation that the Complainant, the Complainant's sister, and the College submitted, including relevant College policies and procedures. OCR also

[2] Data for calendar year 2015 had not yet been reported as of October 27, 2016.

interviewed the Complainant, her sister, and College personnel, including the College's Dean of Diversity and Compliance (the Diversity Dean), who is a member of the College's Sexual Harassment Awareness and Intake Committee (Sexual Harassment Committee); the Vice President of Student Affairs and Dean of Students (Dean of Students); and the Associate Dean of Students, who also served as the Assistant Vice President for Student Affairs. OCR reviewed the College's handling of individual complaints of sexual harassment made between academic years 2011-2012 and 2012-2013.

Designation and Notice of a Title IX Coordinator

The regulation implementing Title IX, at 34 C.F.R. § 106.8(a), requires each recipient to designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under the regulation implementing Title IX, including investigation of any complaint communicated to the recipient alleging any actions which would be prohibited by the regulation implementing Title IX. It also requires each recipient to notify all of its students and employees of the name, office address and telephone number of the employee or employees so designated.

OCR determined that the College has designated the Diversity Dean as its Title IX Coordinator, and the Human Resources Labor Relations Manager (HR Manager) and the Director of Student Conduct as its Deputy Title IX Coordinators. The Diversity Dean served as the College's Title IX Coordinator at all times relevant to the actions that OCR reviewed during the course of this investigation. The College relies upon websites to notify students and employees of the identity and contact information for the designated Title IX Coordinators.

CUNY's website, on the "Campus Title IX Webpages" page, lists each constituent college, with a hyperlink for each college to a different webpage on CUNY's website listing the Title IX Coordinator for that constituent college.[3] The hyperlink on CUNY's website for the College links to a separate webpage that includes the name, telephone number, and electronic mail (email) address for the College's Title IX Coordinator, but not his office address.[4] In addition, this webpage did not include any information for the College's Deputy Title IX Coordinators. The College's website had a section on the "Office of Diversity and Compliance" page, which provided the complete contact information for the designated Title IX Coordinator and Deputy Title IX Coordinators.[5]

Based on the foregoing, OCR determined that the College has designated at least one person to coordinate its efforts to comply with and carry out its responsibilities under the requirements of Title IX; however, CUNY purports to provide notice to all of its students and employees of the contact information for the College's Title IX Coordinator on its website, but CUNY failed to provide the office address for the College's Title IX Coordinator, and it failed to provide any contact information for the College's Deputy Coordinators, other employees whom the College

[3] *See* http://www1.cuny.edu/sites/title-ix/campus-websites/campus/university/. All College/CUNY websites referenced in this letter were last visited by OCR on August 23, 2016.
[4] *See* http://www1.cuny.edu/sites/title-ix/?post_type=campus_profile&p=146.
[5] *See* http://www.hunter.cuny.edu/affirmativeaction/#shpolicy.

chose to appoint. Accordingly, OCR determined that CUNY is in violation of the regulation implementing Title IX, at 34 C.F.R. § 106.8(a).

Notice of Non-Discrimination

The regulation implementing Title IX, at 34 C.F.R. § 106.9(a), requires each recipient to implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational program or activity which it operates, and that it is required by Title IX and this part not to discriminate in such a manner. Such notification shall state at least that the requirement not to discriminate in the education program or activity extends to employment therein, and to admission thereto, unless Subpart C does not apply to the recipient, and that inquiries concerning the application of Title IX and this part to such recipient may be referred to the employee designated pursuant to § 106.8, or to OCR's Assistant Secretary. Section 106.9(b) requires each recipient to include the notice of non-discrimination in each announcement, bulletin, catalog, or application form which it makes available to the types of persons described in § 106.9(a), or which is otherwise used in connection with the recruitment of students or employees.

The College had several versions of a non-discrimination notice[6] that appeared in some of its publications. The non-discrimination notice found in one of the College's former grievance procedures stated that the College does not discriminate on the basis of sex and that the requirement not to discriminate extends to employment and admission; however, the notice of non-discrimination did not state that any inquiries concerning the application of Title IX and its implementing regulation may be referred to the College's designated Title IX Coordinators or to OCR.[7] Although the Faculty Handbook contained a notice that the College does not discriminate on the basis of sex, which further indicated that inquiries could be referred to the College's Title IX Coordinator, the notice did not state that inquiries concerning Title IX could also be referred to OCR. OCR also reviewed several job announcements found on the College's website, and did not find that these contained an appropriate notice of non-discrimination. In addition, OCR reviewed the College's student application worksheet found on the College's website, and did not find a notice of non-discrimination.[8]

Based on the foregoing, OCR determined that the College is in violation of Title IX and its implementing regulation at 34 C.F.R. § 106.9. OCR determined that the College has not developed a non-discrimination statement that complies with Title IX, including that any inquiries concerning the application of Title IX and its implementing regulation may be referred to the College's designated Title IX Coordinator or to OCR. Further, based on the College's website last viewed on August 23, 2016, the College has not taken continuing steps to notify applicants for employment, students, employees, and all unions or professional organizations

[6] *See*, for example, http://www.hunter.cuny.edu/affirmativeaction/index.shtml.
[7] OCR found the referenced non-discrimination notice in CUNY Policies and Procedures on Equal Opportunity, Non-Discrimination, and Against Sexual Harassment," dated January 1, 2015, at pages 1-2.
[8] *See* http://www.hunter.cuny.edu/ugprospects/repository/files/CUNYWorksheetforFreshman.pdf.

holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of sex in the education programs or activities it operates, as the College has not published the appropriate notice in each announcement, bulletin, catalog, or application form that it makes available to the persons described above, or which is otherwise used in the recruitment of students or employees, as required by 34 C.F.R. § 106.9.

Grievance Procedures

The regulation implementing Title IX, at 34 C.F.R. § 106.8(b), requires that a recipient adopt and publish grievance procedures providing for the prompt and equitable resolution of student and employee complaints alleging any action prohibited by the regulation implementing Title IX. OCR has identified a number of elements necessary in evaluating if grievance procedures are prompt and equitable, including whether the procedures provide for: (a) notice to students and employees of the procedures, including where complaints may be filed, that is easily understood, easily located, and widely distributed; (b) application of the procedures to complaints alleging discrimination or harassment carried out by employees, students, and third parties; (c) adequate, reliable, and impartial investigation, including an equal opportunity to present witnesses and evidence; (d) designated and reasonably prompt timeframes for major stages of the grievance process; (e) written notice to parties of the outcome and any appeal; and, (f) an assurance that the recipient will take steps to prevent further harassment and to correct its discriminatory effects on the complainant and others, if appropriate. [9]

The regulation implementing Title IX does not require a recipient to provide separate grievance procedures for sexual harassment complaints; however, a recipient's grievance procedures for handling discrimination complaints must comply with the prompt and equitable requirements of the regulation implementing Title IX. Recipients should ensure that complainants are aware of their Title IX rights and any available resources, such as counseling services, and their right to file a complaint with local law enforcement.

To ensure individuals can invoke grievance procedures without fear of reprisal, the regulation implementing Title IX prohibits the recipient and others, including students, from retaliating against any individual "for the purpose of interfering with any right or privilege secured by [Title IX]," or because that individual "has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title IX. 34 C.F.R. § 100.7(e) (incorporated by reference through 34 C.F.R. § 106.71). Prohibited retaliatory acts include intimidation, threats, coercion, or discrimination against any such individual. At a minimum, recipients therefore should take steps to prevent any retaliation against a student who makes a complaint or any student who provides information regarding the complaint, and must ensure that complainants and their parents/guardians, if appropriate, know how to report any subsequent problems, and should follow up with such individuals to determine whether any retaliation or new incidents of harassment have occurred.

[9] For further explanation, see generally OCR's Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, at: http://www.ed.gov/about/offices/list/ocr/docs/shguide.html (Jan. 19, 2001) [hereinafter "2001 Guidance"].

Pending the outcome of an investigation, Title IX requires a recipient to take steps to protect the complainant from further harassment as necessary, including taking interim steps before the final outcome of the investigation.

The College currently relies upon two documents for its grievance procedures: the "CUNY Policy on Sexual Misconduct" (Procedure A),[10] and the "CUNY Policy on Equal Opportunity and Non-Discrimination" and the corresponding procedure implementing said policy, "Complaint Procedures Under CUNY's Policy on Equal Opportunity and Non-Discrimination" (collectively referred to as Procedure B).

Procedure A:

Procedure A became effective on January 1, 2015. It was amended on October 1, 2015, in order to incorporate New York State law requirements. OCR reviewed, and analyzes here, the version of Procedure A as revised on October 1, 2015.

This is a CUNY-wide procedure applicable to complaints of sexual and gender-based harassment, including sexual assault. Terms included in the policy (e.g. "Gender-Based Harassment," "Sexual Assault," and "Sexual Harassment") are defined, and examples of conduct that fall within several definitions are provided. There is a "Student's Bill of Rights," which explains the rights for students who experience campus-related sexual or gender-based harassment or sexual violence, including sexual assault, stalking, domestic violence, intimate partner violence, or dating violence. There are assurances that CUNY colleges will take steps to prevent further harassment and to correct its effects, if appropriate, and it explicitly states that retaliation is prohibited. The procedure is found on CUNY's "Title IX" webpage[11] and on the College's "Affirmative Action" webpage.[12]

There are four main steps: (1) "Reporting Sexual Harassment, Gender-Based Harassment or Sexual Violence to the College"; (2) "Reporting/Confidentiality Obligations of College and University Employees"; (3) "Interim and Supportive Measures"; and, (4) "Investigating Complaints of Sexual Harassment, Gender-Based Harassment or Sexual Violence."[13]

Students, employees, and visitors can file complaints against students, employees or visitors. Students are to file a complaint with the Title IX Coordinator, the Office of Public Safety, the Dean of Students, or Residence Life personnel. Employees are to file a complaint with the Title IX Coordinator, Director of Human Resources, or Office of Public Safety. Visitors are to file a complaint with the applicable college Title IX Coordinator, the Office of Public Safety, or Residence Life personnel. Each reporting direction provides only titles; names and contact information are not provided. Procedure A includes a link to Procedure B.

---

[10] In addition, Procedure A also refers to other related policies and procedures, including the "CUNY Campus and Workplace Violence Prevention Policy"; "CUNY Domestic Violence in the Workplace Policy"; "CUNY's Policy Against Drugs and Alcohol"; and, "CUNY's Drug/Alcohol Use Amnesty Policy."
See
http://www.hunter.cuny.edu/affirmativeaction/CUNY_Sexual_Misconduct_Policy_Hunter_College_20160211.pdf .

[11] *See* http://www1.cuny.edu/sites/title-ix/cuny-policies/campus/hunter-college/.

[12] *See* http://www.hunter.cuny.edu/affirmativeaction/.

[13] These four main steps are found beginning at Section V and running through Section VIII.

"Responsible Employees" have a duty to report incidents of sexual/gender-based harassment and sexual violence to the Title IX Coordinator. They are identified as the Title IX Coordinator and his/her staff; Office of Public Safety employees; the Dean of Students and all of the staff housed in those offices; Residence Life staff in housing owned or operated by CUNY or a CUNY college, including all Resident Assistants; the college President, Vice Presidents, and Deans; Athletic staff; Department Chairpersons and Executive Officers; Human Resources staff; Office of General Counsel employees; attorneys of CUNY colleges and their staff; labor designees of CUNY colleges and their staff; faculty members leading or supervising students on off-campus trips; faculty or staff advisors to student groups; employee managers; SEEK/College Discovery staff; Childcare Center staff of CUNY colleges; and, Directors of "Educational Opportunity Centers" affiliated with CUNY colleges. "Confidential Employees" are defined as well.

A complainant may request that the matter be investigated without her/his identity or any details regarding the incident being divulged further, but is advised that the college's ability to meaningfully investigate the incident and pursue disciplinary action may be limited by a request for confidentiality. A complainant may request that no investigation be conducted or no report be made to outside law enforcement. In all such cases, the Title IX Coordinator will weigh the complainant's request against the college's obligation to provide a safe, non-discriminatory environment for all students, employees and visitors, including the complainant. Notwithstanding the decision of the Title IX Coordinator regarding the scope of any investigation, the college will provide the complainant with ongoing assistance and support, including, where appropriate, interim and supportive measures.

Immediate steps are to be taken to protect the complainant and other affected parties, as well as the college community, following an allegation of sexual/gender-based harassment or sexual violence, and a college will minimize the burden on the complainant. The complainant and the respondent shall each be afforded, upon request, a prompt review of the need for and terms of any interim or supportive measure that directly affects him or her, and shall be permitted to submit evidence in support of his/her request. Possible interim remedial measures are listed.

Once a complaint has been received, the Title IX Coordinator is responsible for conducting the investigation in a prompt, thorough, and impartial manner, and s/he shall inform the respondent that an investigation has commenced and provide the respondent with a written summary of the allegations. An investigation should be completed within 60 calendar days of the receipt of the complaint. The college may need temporarily to delay the fact-finding portion of its investigation for a law enforcement investigation, but temporary delays may not last more than ten days except when law enforcement specifically requests and justifies a longer delay. A respondent who is an employee covered by a collective bargaining agreement may consult with and have a union representative present at any interview conducted as part of an investigation; there is no provision for similar representation for the complainant, student respondent, visitor, or an employee who is not covered by a collective bargaining agreement.

Mediation is not permitted in complaints alleging sexual violence. In instances of sexual/gender based harassment where mediation may be appropriate, both the complainant and the respondent must consent to mediation, and either party may terminate the mediation at any time and proceed with the investigation process. A respondent employee covered by a collective bargaining

agreement may consult with and have a union representative present during a mediation session; there is no provision for similar representation for the complainant, student respondent, visitor, or an employee who is not covered by a collective bargaining agreement. Unless the mediation results in a timely resolution agreed to in writing by the complainant, the respondent and the college, the college shall end the mediation and resume the investigation; what constitutes a "timely resolution" is not specified.

Following an investigation, the Title IX Coordinator shall report his/her findings in writing to the college President, who shall make a final determination as to whether to accept the Title IX Coordinator's findings and as to any action the President deems necessary to address the issues raised by the findings, including the recommendation of discipline. There is no timeframe for the college President to make a determination regarding the findings. If the President does not recommend any disciplinary action, then the Title IX Coordinator will notify both the complainant and the respondent of the determination, in writing and contemporaneously. If disciplinary action is recommended, no timeframe is provided for completing the disciplinary action step, regardless of whether the respondent is a student, employee or visitor.

For discipline of a student, the President will refer the complaint to the college's Office of Student Affairs, and action will be taken in accordance with "Article XV of the CUNY Bylaws"; Procedure A includes a link to the applicable bylaws.[14] Procedure A and the applicable section of the bylaws (namely, Article XV: Students, Section 15.4: Student Disciplinary Procedures) state that under this disciplinary process, complainants and respondents have the right to: receive notice of the charges; participate fully in a disciplinary hearing; present witnesses and evidence; be represented by an attorney or advisor of their choice; receive notice of the decision of the faculty-student disciplinary committee in writing; and, to appeal. Neither Procedure A nor the bylaws specify that both the complainant and the respondent will receive notice of the appeal determination in writing. In this provision governing students, it states that the College will use the preponderance of the evidence standard in making a determination.

For discipline of an employee, the President will refer the complaint for action in accordance with "applicable policies, rules, and collective bargaining agreements," which are not specified further. A college's ability to take action/discipline against a visitor is described as extremely limited; however, a college is to take all appropriate actions within its control, such as restricting the visitor's access to campus or referring the matter to local law enforcement where appropriate. In connection with both employee and visitor discipline, there is no statement that the complainant and the employee respondent will be treated equitably during this process, that any additional process will be adequate or impartial, that a preponderance of the evidence standard will be used, or that the parties will be notified of the outcome.

Procedure B:

OCR reviewed, and analyzes here, the version of Procedure B effective as of January 1, 2015.

This is a CUNY-wide procedure applicable to complaints of general discrimination and retaliation involving applicants, students, employees, and visitors; it is only applicable to

[14] *See* http://policy.cuny.edu/bylaws/article_xv/text/#Navigation_Location.

complaints of sex-based discrimination that do not involve sexual harassment or violence. Procedure B includes a link to Procedure A and directs individuals to follow Procedure A for complaints of sexual assault, stalking, and domestic and intimate violence. CUNY publishes Procedure B on its "Title IX" webpage[15] and the College publishes Procedure B on its "Affirmative Action" webpage.[16]

There are six main steps: (1) "Reporting Discrimination and/or Retaliation"; (2) Preliminary Review of Employee, Student, or Visitor Concerns" (which may or may not involve the formal filing of a complaint); (3) "Filing a Complaint"; (4) "Informal Resolution"; (5) "Investigation"; and, (6) "Action Following an Investigation of the Complaint." The college's Chief Diversity Officer conducts the process. There is no appeal process.

Applicants, employees, visitors and students are directed to raise discrimination complaints with the Chief Diversity Officer at their campus location. No name or other contact information is provided for each campus.

The Chief Diversity Officer will inform the complainant of available options, including an informal resolution or investigation. The Chief Diversity Officer may also advise the complainant that his or her situation is more suitable for resolution by another entity within CUNY. There is no timeframe specified for this preliminary review.

Following the discussion with the Chief Diversity Officer, individuals who wish to pursue a complaint of discrimination and/or retaliation should be provided with a copy of the CUNY complaint form. Complaints should be made in writing whenever possible, including in cases where the complainant is seeking an informal resolution.

There is an informal resolution process that is voluntary and requires the consent of both parties. There is a thirty (30) calendar day timeframe allotted for informal resolution, but either party may declare that attempts have failed prior to the expiration of the 30 days. The informal resolution process may be extended, and the complainant may request a full investigation if no informal resolution of the complaint is achieved.

Full investigation of a complaint may commence when warranted after the preliminary review by the Chief Diversity Officer, or after informal resolution has failed. The respondent will be informed that retaliation is prohibited. A respondent who is an employee covered by a collective bargaining agreement may consult and have a union representative present during an investigatory interview; however, complainants or respondents who are not covered by a collective bargaining agreement are not specifically accorded the right to similar representation. The college will attempt to identify and interview any additional relevant witnesses and obtain additional information; parties are not expressly accorded an opportunity to present witnesses and evidence. An investigation should be completed within 60 days of receipt of the complaint. There is no standard of proof identified.

---

[15] *See* http://www1.cuny.edu/sites/title-ix/cuny-policies/campus/hunter-college/.
[16] *See* http://www.hunter.cuny.edu/affirmativeaction/.

A college is to inform the complainant and the respondent, in writing, of the outcome of the complaint and any action to be taken; however, no timeframe for such notification is specified. There is no statement that the College will take steps to prevent further harassment and to correct its effects, if appropriate.

Based on the foregoing, OCR determined that the College is in violation of Title IX and its implementing regulation, at 34 C.F.R. § 106.8(b), for failing to adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging discrimination on the basis of sex. Specifically, OCR determined that Procedures A and B do not sufficiently identify the individuals with whom complaints should be filed, such as the name and/or office address, email address, and telephone number of the individual(s) designated to receive Title IX complaints. Procedure B does not specify that the parties will have the opportunity to present witnesses and evidence, and Procedure A does not specify that parties may provide witnesses and evidence unless the parties move on to a disciplinary process. Procedure B does not provide timeframes for the preliminary review or for action after an investigation, which could include commencing and completing a disciplinary action. Procedure A states that investigations overall should be completed within 60 days but provides no timeframes for mediation efforts (unavailable for complaints of sexual violence), the report of findings, and disciplinary action. If a disciplinary process is conducted, Procedure A does not specifically provide for notice of the outcome in the case of a disciplinary process against an employee or visitor, or for notice of the outcome of any appeal by a student, employee or visitor from a disciplinary process. Procedures A and B do not afford complainants, student respondents, visitors or employees who are not covered by a collective bargaining agreement, the right to representation during an investigation interview or mediation session. In addition, OCR has concern that Procedure A's definition of "responsible employees" is too narrow and thus may result in instances where the College fails to discharge its obligations under 34 C.F.R. § 106.31.[17]

While CUNY states in one section of Procedure A concerning student discipline that it uses the preponderance of the evidence standard, OCR has concern that the absence of such a standard stated for other sections of Procedure A and Procedure B may lead someone not to know what standard to use or to conclude a different standard of proof can be used. OCR also notes that only Procedure A addresses interim measures, which could lead someone to conclude interim measures are not available for complaints filed under Procedure B.

Handling of Criminal Complaints/Law Enforcement's Role

As noted above, a recipient must provide a prompt resolution of complaints under Title IX pursuant to 34 C.F.R. § 106.8(b). The regulation does not provide an exception for the recipient to perform its duty in the event that law enforcement activities are also occurring. Consistent with the grievance procedures, the College stated that it cooperates with law enforcement investigations, and assesses on a case-by-case basis whether to refer a matter to law enforcement

[17] *See* 2001 Guidance at page 13 (defining "responsible employee" as those with the authority to take action to redress harassment, who have the duty to report harassment or any other misconduct, or individuals whom students reasonably believe have such authority or responsibility).

authorities despite a complainant's objections.[18] If law enforcement agents request that the College postpone aspects of a Title IX investigation, in the interests of the criminal investigation, the College stated that it will comply, when reasonable.[19] In most circumstances, however, the College will not suspend the investigation entirely, but it may agree to delay certain components of the investigation (e.g., witness interviews that might interfere with the criminal investigation by causing the suspect to flee, lie, or destroy evidence). The College further stated that it would provide the complainant with an explanation for the postponement of any portion of the investigation and take appropriate interim measures to protect the safety and well-being of the complainant while the investigation is pending.[20]

CUNY's Office of Public Safety[21] maintains a "Memorandum of Understanding Regarding Police Response to Incidents and Events Occurring at the City University of New York" (MOU)[22] with the NYPD for emergencies[23], non-emergencies[24], and investigative response. The MOU applies to all of CUNY's constituent schools, including the College and its Department of Public Safety. The MOU does not explicitly address cases of criminal sexual conduct, although such coverage is implied in the provisions addressing the NYPD's role in both emergencies and non-emergencies. With respect to emergency situations that may implicate Title IX, such as when an incident of sexual misconduct on or near the College poses an immediate risk to the safety of the campus community, the MOU would apply. Further, the NYPD is permitted to enter the campus and investigate a reported emergency regardless of the source of the report. Regarding non-emergency situations that may implicate Title IX, the College stated that it may be appropriate for the College to request assistance from the NYPD pursuant to the MOU.

OCR determined that the written grievance procedures will help the College provide prompt and equitable resolutions when there are concurrent investigations by law enforcement agencies also responding to complaints of sexual assault and violence. As discussed below, OCR identified one instance in 2012 when the College suspended an investigation for approximately 8 weeks at the request of the Manhattan District Attorney. OCR has determined that the revised Procedure A, which now states that investigations cannot be suspended for more than ten days without specific and justified requests for more time, should prevent such a situation from arising again.

---

[18] The College also stated that when the respondent is a College student, a member of the College's Behavioral Response Team, within the Office of Student Affairs, will communicate directly with prosecutors in appropriate cases.

[19] As noted earlier, Procedure A specifies that temporary delays may not last more than ten days except where law enforcement specifically requests and justifies a longer delay.

[20] The College also stated that it may consult with the complainant to determine whether s/he supports the postponement of certain aspects of the investigation in the interests of the criminal investigation. If the complainant does not agree, the College will make a determination as to whether or not it must comply with the request by law enforcement.

[21] The College stated that CUNY's Office of Public Safety is different from the College's Department of Public Safety (Public Safety), but the two entities coordinate closely on safety issues, including those related to Title IX.

[22] The MOU is dated March 6, 1992.

[23] The MOU defines an "emergency" or "reported emergency" as referring to the "ordinary meaning" of the terms, but shall also include any circumstances in which there is the potential for injury to any person or substantial damage to or loss of property.

[24] The MOU defines a "non-emergency" as including any situation, which in the judgment of the College president or any designated College official, does not constitute an immediate danger to persons or substantial damage to or loss of property or require immediate police assistance, such as the report of a past crime (except for the preservation of a crime scene), a peaceful and lawful demonstration, or a campus event, etc.

Training

As previously discussed, the regulation implementing Title IX requires both the designation of a Title IX Coordinator and grievance procedures that provide for the prompt and equitable resolution of complaints. One means to ensure these measures are effective is for recipients to provide training to responsible employees, including the Title IX Coordinator, and to students.[25]

The College provides annual training to staff regarding Title IX requirements and CUNY's policies on sexual assault and non-discrimination. The College informed OCR that the various training sessions have been attended by: Student Affairs Officers, Title IX Coordinators, Chief Diversity Officers, Legal/Labor Designees, Academic Affairs Council, Chairs of the Faculty-Student Disciplinary Committee, Student Conduct Officers, Deans and Assistant Deans, Public Safety Directors/Assistant Directors, Residential Life staff, Project Administrators, University Council of Student Life Directors, Public Safety recruits, Athletics personnel, and University Veterans Affairs Coordinators. The College further informed OCR that it typically provides training to College Residential Life staff in the fall semester, and then conducts similar training in the spring semester to review the Title IX principles discussed in the fall semester. Finally, the College engages students, staff, and faculty in educational and creative activities that aim to instill a sense of civic responsibility, community participation, activism, and awareness for the College community about sexual and domestic violence, and other issues impacting gender, and in 2015, it posted a Title IX Training Curriculum for Students on its website.

OCR identified no concerns in connection with the College's training efforts under Title IX. Once the College revises its grievance procedures to address the violations discussed above in connection with Procedures A and B, OCR will monitor training to ensure effective implementation of the revised, Title-IX-compliant procedures after they are in place.

Record Keeping Practices

The College is required to meet its legal obligation to comply with the record-keeping provisions of the regulation implementing Title IX.[26] A recipient is required to make available to OCR information that may be pertinent to reach a compliance determination. OCR determined that the College was inconsistent in maintaining complete records of investigations for the time period for which OCR reviewed files, academic years 2011-2012 and 2012-2013. For example, in several cases, the College did not maintain (or provide to OCR) adequate documentation of material information ascertained during its investigations. Some of the information not included in the files is identified in case discussions below, including a lack of documentation when the College suspended or otherwise closed investigations before making findings or reaching a conclusion. The absence of complete records means that relevant information was not available to OCR during its investigation to assess whether the College is carrying out its legal obligations under the regulation implementing Title IX. OCR reviews pertinent practices and policies of the

[25] The importance of training is explained more fully in the 2001 Guidance at pages 13-14, 19, and 21; *see also* Title IX Q & A at Questions J-1 to J-3.

[26] The regulation implementing Title VI, at 34 C.F.R. § 110.6(b) and (c), requires that a recipient of Federal financial assistance make available to OCR information that may be pertinent to reach a compliance determination. This requirement is incorporated by reference in the regulation implementing Title IX at 34 C.F.R. § 106.71

College, the circumstances in which the noncompliance occurred, and other factors relevant to a determination of whether the College is in compliance with Title IX.

Allegation 1: College's Response to Complaints of Sexual Harassment/Violence

The regulation implementing Title IX, at 34 C.F.R. § 106.31(a), provides that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity operated by a recipient. Sexual harassment that creates a hostile environment is a form of sex discrimination prohibited by Title IX. Sexual harassment creates a hostile environment if the conduct is sufficiently serious that it denies or limits a one's ability to participate in or benefit from the recipient's program.[27]

In determining whether the sexual harassment of a student was sufficiently serious such that it denied or limited the student's ability to participate in or benefit from the recipient's program, OCR examines all of the relevant circumstances from an objective and subjective perspective, including: the type of harassment (e.g., whether it was verbal or physical), the frequency and severity of the conduct, the age and relationship of the individuals involved (e.g., teacher-student or student-student), the setting and context in which the harassment occurred, whether other incidents have occurred at the college or university and other relevant factors. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the harassment is physical. For example, a single instance of rape is sufficiently severe to create a hostile environment.

If a recipient knows or reasonably should have known about sexual harassment that creates a hostile environment, Title IX requires a recipient to take immediate and appropriate action to investigate or otherwise determine what occurred. If an investigation reveals that discriminatory harassment has occurred, a recipient must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring. These duties are a recipient's responsibility regardless of whether a student has complained, asked the recipient to take action, or identified the harassment as a form of discrimination.

Additionally, under Title IX, a recipient must process all complaints of sexual violence, regardless of where the conduct occurred, to determine whether the conduct occurred in the context of an education program or activity or had continuing effects on campus or in an off-campus education program or activity. Further, once a school is on notice of off-campus sexual harassment against a student, it must assess whether there are any continuing effects on campus or in an off-campus education program or activity that are creating or contributing to a hostile environment; and, if so, address that hostile environment in the same manner in which it would address a hostile environment created by on-campus misconduct.

Complainant's Case

The Complainant alleged that the College failed to respond appropriately to two complaints of sexual harassment made against the Professor. The Complainant first enrolled in the College for

[27] For further explanation, see 2001 Guidance, at Section V.A.

the fall 2008 semester. The Complainant informed OCR that in late 2009 or early 2010, during the second year that the Complainant was attending the College, when she was 19 years old, she met the Professor, who was her sister's mentor and instructor.

The first complaint allegedly was made in August 2011. The Complainant informed OCR that her mother and sister made a complaint on her behalf during a meeting with the Diversity Dean. The Complainant's sister initially informed OCR that she and her mother told the Diversity Dean that there was a "conflict of interest" because the Professor was a faculty mentor/instructor to the Complainant's sister, and she may have mentioned that the Professor harassed the Complainant "generally." Subsequently, the Complainant's sister informed OCR that she had informed the Diversity Dean that the Professor had sexually harassed the Complainant.

The Diversity Dean stated that he met with the Complainant's sister and mother on or about September 19 or 20, 2011, and not in August 2011.[28] The Diversity Dean denied that the Complainant's sister or her mother provided information regarding harassment of any kind, or inappropriate activity, sexual or otherwise, regarding the Professor. Rather, the Diversity Dean stated that they discussed the Complainant having emotional difficulties due to her relationship with the Professor. The Diversity Dean assumed they were referring to a consensual relationship, based on their reference to trips that the Complainant had taken with the Professor. At the time, there was no CUNY/College policy prohibiting fraternization between students and faculty.[29]

The Complainant asserted that she subsequently filed a formal complaint with the Diversity Dean in May 2012, by email, but he did not respond. The Diversity Dean denied receiving a complaint in May 2012, by email or by any other means. The Complainant did not respond to OCR's repeated requests for a copy of her email or other documentation related to her complaint in May 2012. Furthermore, the Complainant later acknowledged that she did not file a complaint with the Diversity Dean in May 2012.

Later, on September 14, 2012, the Complainant filed a complaint against the Professor via email to CUNY's Chancellor, who forwarded the Complainant's complaint to the College's Diversity Dean for investigation. The Complainant provided additional information regarding her complaint during an intake interview with members of the College's Sexual Harassment Committee on September 28, 2012, and in an email to the Dean of Students dated September 29, 2012.[30]

The Diversity Dean commenced an investigation of the Complainant's complaint on or about September 28, 2012, by requesting information from both parties and providing both parties with an opportunity to present evidence and witnesses. In the course of the investigation, the Diversity Dean, along with other members of the College's Sexual Harassment Committee

[28] The Diversity Dean stated that his assistant noted the meeting on his appointment calendar. He stated that he did not know if the Complainant's sister or mother stated the purpose of their visit when they scheduled the meeting.

[29] In November 2012, CUNY/the College revised its sexual harassment policies and procedures to prohibit faculty members and other employees from engaging in intimate relationships with students for whom they have a professional responsibility, including undergraduates, graduate and professional students and postdoctoral fellows.

[30] The Dean of Students forwarded this email to the Diversity Dean, who considered this information in his investigation.

interviewed the Complainant[31] and the Professor[32]; reviewed the Complainant's academic records; reviewed records regarding the Professor's academic and financial activities; reviewed texts and email messages provided by the Complainant and the Professor; and, obtained information from other College faculty members regarding the relationship between the Complainant and the Professor. The Complainant did not identify any other witnesses to the alleged harassment.

At the conclusion of the investigation, the Diversity Dean provided the College's President with an investigative report (the Report), dated December 21, 2012, summarizing his findings. The Diversity Dean did not make findings with respect to each of the incidents/events enumerated by the Complainant; rather, he considered the nature of the Complainant's and the Professor's relationship and/or interactions in their totality. The Diversity Dean determined that although the relationship between the Professor and the Complainant "clearly involved people of unequal status," the Complainant acknowledged that the relationship was once a consensual one. The Report concluded that the Professor preyed upon the Complainant's immaturity and family circumstances, including her mother's illness, and used interactions with the Complainant's sister in order to further his relationship with the Complainant. With respect to an overseas trip that occurred in April 2010, the Diversity Dean determined and asserted to OCR, and OCR confirmed, that the Complainant did not allege that the Professor sexually assaulted her, but rather recounted the experience with regret. Regarding the Professor's later visit to the state where the Complainant had moved, the Diversity Dean determined that, contrary to her assertion, the Complainant texted her address to the Professor so that he could meet up with her. The Diversity Dean determined that, based on the Professor's email correspondence with the Complainant, the Complainant clearly rejected the Professor's unwanted sexual advances and attempts to reestablish a relationship. Ultimately, the Report concluded that as of April 2012, the Professor's conduct was unwelcome.

After submission of the Report to the President, the Diversity Dean orally directed the Professor not to have any contact with the Complainant and reminded him of the prohibition against retaliation. The Diversity Dean further advised the Professor that the College does not condone romantic relationships between faculty and students. Although the Report had not been adopted by the President as final, on January 30, 2013, the College provided the Professor with a copy of the Report in order to permit him to respond as the Report was being placed in his personnel file.[33] The Professor took steps to appeal and to grieve the College's proposed employment actions. The College did not provide the Complainant with a copy of the Report, because it asserted that the outcome was not final given the Professor's pending appeal and grievance. The College attempted to schedule meetings with the Complainant on January 22 and February 15, 2013, to discuss the findings, but she did not respond. The College reached a settlement with the

[31] The Diversity Dean and members of the Committee met with the Complainant again in mid-November 2012 to obtain additional documents. OCR determined that the investigation was delayed slightly due to Hurricane Sandy.

[32] The Diversity Dean stated that the Professor was not forthcoming during his interview; however, the information and documentation that the Professor provided supported his assertion that the relationship was consensual. The Professor also provided the Diversity Dean with emails from August 31 through September 5, 2012, in which the Complainant and her sister requested his assistance with the Complainant's financial difficulties and efforts to register for the fall 2012 semester.

[33] Counsel for the College stated that CUNY generally does not provide a copy of an investigative report to either complainants or the respondents as part of the sexual harassment complaint process.

Professor, dated May 24, 2013. The College then sent the Complainant a letter, dated July 10, 2013, informing her that the College found that the Professor's "conduct became inappropriate," and had taken action permanently to sever the Professor's relationship with the College and CUNY. The College did not provide or offer the Complainant any additional remedies regarding the Professor's conduct towards her.

Based on the foregoing, OCR determined the Complainant filed one complaint of sexual harassment, which the College received on September 14, 2012. OCR determined that the College promptly initiated the investigation; however, OCR determined that even though the College concluded its investigation in December 2012, it did not try to share its conclusions with the Complainant until just over four months had elapsed, and it took almost seven months for the College to issue the Complainant a final written determination.

OCR determined that the College should have addressed hostile environment as part of its investigation. The College concluded that the Professor and the Complainant had a consensual relationship until April 2012; after that time, the Professor's conduct became "non-consensual, uninvited, and unwelcomed … [i]t offended, annoyed and harassed [the Complainant]." The College's determination that the Professor engaged in repeated, unwelcome and graphic communications after April 2012 should have caused the College to assess whether a sexually hostile environment existed for the Complainant.

The College did not provide the Complainant with any interim measures during the course of the complaint investigation, and its final determination did not address whether the Complainant required any individualized remedies to address the effects of the Professor's sexual harassment, such as counseling, or determine whether a sexually hostile environment existed that caused the complainant to incur additional debt and/or delay her attempted return to the College. Further, OCR determined that the College treated the Complainant inequitably, by failing to provide her with a copy of the Report, even though it provided a copy to the Professor on January 30, 2013.

During the course of OCR's investigation, OCR requested that the College provide the Complainant with individual remedies to address compliance concerns OCR identified. The College agreed to comply with OCR's request and provided the Complainant with the requested remedies. Specifically, in a letter to the Complainant, dated August 20, 2013, the College offered the Complainant counseling, informed the Complainant that she could reenroll for the fall 2013 semester without completing paperwork if she satisfied any outstanding financial obligations to the College, and provided her with a copy of the Report.

Review of 12 Investigative Case Files

In addition to the College's handling of the Complainant's case, OCR reviewed how the College handled other sexual harassment complaints, including complaints of assault and violence, filed between academic years 2011-2012 and 2012-2013, totaling 12 files.[34]

[34] OCR requested all documentation relevant to each complaint, as well as a detailed description of the College's complaint investigation procedures. OCR's findings are based on the materials produced by the College in response to OCR's data requests.

OCR concluded that the Diversity Dean and other members of the College's Sexual Harassment Committee weighed the evidence in the 12 case files consistent with a preponderance of the evidence standard. Based upon its review of these 12 files alone, however, OCR identified violations of Title IX and other concerns, which are discussed below.[35]

OCR determined that information the College provided demonstrated that the College sometimes failed to provide prompt resolutions, and other times failed to provide equitable resolutions to these complaints, in violation of the regulation implementing Title IX at 34 C.F.R. §§ 106.8(b). As previously mentioned, OCR identified one file in which the College failed to provide a prompt resolution because it suspended its investigation for eight weeks, following a request from the Manhattan District Attorney's office to allow that office's investigation to proceed first.[36] The information provided by the College was not sufficient for OCR to assess this extended time period or whether the College attempted to conduct any investigative activities during this time period. OCR identified 5 files that reflected no resolution because the College failed to complete investigations.[37] In addition, the documents the College provided to OCR showed 7 instances where the College provided either no notice of resolution at all, or sent such notice only to one party.[38] Case Number 6 is illustrative of the failure both to complete an investigation and to send notice about the resolution.

> *Case Number 6*
>
> On March 25, 2012, a student (the complainant) filed a complaint with a sergeant of the College's Department of Public Safety regarding a Department of Public Safety employee (the respondent). The complainant alleged that the respondent grabbed her shoulder and breast while making photocopies in a College library. She also asserted that two officers tried to get her to say that the incident was only an accident. The sergeant conducted a preliminary investigation by interviewing four other public safety officers who witnessed the incident; thereafter, the sergeant referred the complaint to the Diversity Dean and the Associate Director.
>
> Although the College promptly initiated an investigation, it did not complete the investigation because the complainant failed to respond to the College's requests for interviews and ceased taking classes. There was no information from the file to indicate that the College provided written notice of the outcome to either party.

Cases that the College failed to investigate included two complaints involving students who were placed in off-site locations for internships or clinical programs. The regulation implementing Title IX, at 34 C.F.R. § 106.31(d)(2), states that a recipient is required to develop and implement

[35] The College twice provided case files to OCR in 2013, once on October 2, 2013, and once on October 23, 2013. The College used the sequence of roman numerals to identify the files in both submissions, and the files were not submitted in chronological order. In addition, the October 23rd submission included a 2009 file outside of the time period being reviewed by OCR, and thus not assessed or considered for redress by OCR (this was labeled by the College as "V"), and two related but separate files under one number (the College labeled both of these "I"). OCR put the files in chronological order and applied case numbers from 1 to 12.

[36] This occurred in Case Number 7.

[37] This is reflected in Case Numbers 1, 5, 6, 11 and 12.

[38] This is reflected in Case Numbers 2, 3, 4, 7, 8, 9, and 10.

a procedure designed to assure itself that the operator or sponsor of an educational program or activity to which a recipient requires, facilitates, permits or considers participation by any applicant, student, or employee, as part of or equivalent to participation in the recipient's program or activity, takes no action affecting any applicant, student or employee of the recipient prohibited by Title IX; and, that the recipient shall not facilitate, require, permit or consider such participation if the other entity does not take action to assure the recipient of such. The College provided no information to support that it took steps that the regulation implementing Title IX requires in order to assure itself that its relationship with the operators of these off-site educational programs will comply with this Title IX regulatory requirement. Case number 1 illustrates this failure.

Case Number 1

On June 27, 2011, a student (the complainant) filed a complaint with two members of the Sexual Harassment Committee regarding a third-party physician and preceptor (the respondent) at the hospital where complainant was assigned for a nursing internship. The complainant alleged that while completing her nursing internship, the respondent sexually harassed her during a meeting in his office by stating to her that: he liked black women, he felt superior to black women, he previously had an affair with a black nurse at the hospital, and he masturbates to photos of black women on the Internet. The complainant further alleged that when she attempted to leave the meeting, the respondent hugged her and rubbed his genitals against her leg. The complainant informed the College that she complained to a hospital employee, who served as a liaison to the College. The complainant reported that the liaison stated that he would reassign the complainant to another preceptor and seemed unsurprised by the respondent's conduct, and she further reported the hospital did not investigate or take any other action regarding her complaint. The complainant also informed the College that other individuals at the hospital informed her that the respondent had a history of sexually harassing women. The complainant also informed the College that she had agreed to meet with the respondent again and secretly recorded the meeting, during which the respondent acknowledged engaging in some of the alleged harassment, including rubbing against the complainant.[39] The complainant informed the College that after this second meeting with the respondent, the hospital reassigned her to another preceptor, but she expressed concern that the preceptor was an associate of the respondent.

OCR determined that the College filed a summary of the complainant's complaint with the hospital's Human Resources division, and the College's Diversity Dean informed the hospital's Labor Relations representative that it must not place student-interns under the respondent's supervision in the future. The College did not provide any information regarding when these actions were taken or the hospital's response.

[39] The complainant provided a copy of the recording to the College.

> OCR determined that the College did not conduct an investigation of the complainant's report of sexual harassment; it improperly failed to investigate because the complainant had graduated by the time she filed her complaint with the College and the alleged harassment had occurred at an off-site location.
>
> OCR further determined that the College contacted the hospital about the complaint, but there was no indication in the file that the College followed up with the hospital to determine if it investigated the allegations and took any action. Even though a school's ability to take direct action against a particular respondent may be limited, the regulation implementing Title IX, at 34 C.F.R. § 106.31, requires a school to ensure that a complainant, and where appropriate the broader school population, can fully participate in all education programs and activities, which may require the College to provide supportive measures like counseling. The College, however, merely requested that the hospital not place any other College students with the respondent and took no steps to assess the impact on the complainant or any other student who may have been placed with respondent.

OCR's review identified 9 files with no record that the College assessed the need for or provided interim measures, or with records that demonstrated limited and sometimes improper interim measures.[40] A recipient must provide interim measures where appropriate to comply with the regulation at 34 C.F.R. §106.31 and ensure individuals can fully access a recipient's programs while an investigation is pending. Case number 7 is a notable example of the College providing both improper and limited interim measures.

> *Case Number 7*
>
> On May 25, 2012, the Associate Director of Residence Life reported a complaint to the College's Department of Public Safety; a student (the complainant) alleged that another student (the respondent), had sexually assaulted her in a dormitory building after drinking together in a bar with friends. The complainant did not recall having sexual intercourse, but she learned that others observed them having intercourse, and that other students found her naked on the floor of the men's restroom later that morning.
>
> The complaint was referred to the Diversity Dean and the Associate Director, who initiated an investigation. On June 6, 2012, the Manhattan District Attorney's (DA's) Office requested that the College postpone any witness interviews until the end of June 2012. The College complied with this request and suspended its investigation for approximately 8 weeks following receipt of the complaint. The College removed the complainant and the respondent from the dormitory building that they shared and placed them into two other locations, but OCR could not determine when this action took place.

[40] This is reflected in Case Numbers 1, 2, 3, 5, 6, 7, 9, 10 and 11.

> OCR determined that the College, by removing the complainant from the dormitory she shared with respondent, placed an unnecessary burden on the complainant. The file also did not reflect any assessment of the need for or the provision of any additional interim measures.[41]

Finally, OCR's file review showed that even for those cases where the College determined that sexual harassment had occurred, there was often no information in the file to indicate that the College had assessed, and if necessary addressed, whether a hostile environment existed. Case number 3 illustrates this violation.[42]

> *Case Number 3*
>
> In a complaint dated October 18, 2011, an undergraduate student (the complainant) alleged that after she rebuffed the sexual advances of and refused dinner invitations from a doctoral student with whom she worked (the respondent), he made a comment, which she interpreted as a threat to remove her from the lab, and made other inappropriate comments, including accusing her of being "mentally ill."
>
> OCR determined that the College promptly investigated the complainant's report of sexual harassment, and determined that the respondent subjected the complainant to sexual harassment, by psychologically and emotionally taking advantage of her once she rejected his sexual advances; however, there was no information in the file that indicated the College had assessed, and addressed if necessary, whether complainant suffered from a hostile environment. Since, however, the College determined that the respondent had subjected the complainant to sexual harassment, the fact that the College kept the complainant and the respondent working together pending the investigation suggests that it was important for the College to determine if a hostile environment existed.

Allegation 2: Complainant's Allegation of Retaliation

With respect to Allegation 2, the Complainant alleged that in retaliation for filing a complaint of sexual harassment against the Professor, the College's Associate Dean of Students rescinded an offer to modify the payment terms for the Complainant's outstanding tuition balance, which prohibited her from registering for courses for the fall 2012 semester. She alleged that the Associate Dean of Students previously offered to modify the terms of her outstanding debt and accept the repayment of half of her debt, or approximately $1,500, but that after she filed her complaint, the Associate Dean of Students rescinded the offer.

In analyzing whether retaliation occurred, OCR must first determine whether the three prima facie elements of retaliation can be established, namely: (1) whether the complainant or alleged injured party engaged in a protected activity; (2) whether the complainant or alleged injured

[41] The College's investigation revealed witness accounts confirming that the intercourse was consensual, and there was no other evidence to support a finding of hostile environment.
[42] In addition to Case Number 3, this is reflected in Case Numbers 5, 6, 9, 10 and 12.

party experienced a materially adverse action by the recipient; and (3) whether there is a causal connection between the protected activity and the materially adverse action. If the evidence demonstrates a prima facie case of retaliation, OCR then determines whether the recipient has a legitimate, non-retaliatory reason for the challenged action or whether the reason adduced by the recipient is a pretext to hide its retaliatory motivation.

The Complainant withdrew from the College on February 16, 2011, during the spring 2011 semester. The Complainant did not inform the College that she was withdrawing from the College due to her relationship with the Professor or because he had sexually harassed her. At that time, she owed the College 75% of the tuition for the semester, as well as approximately $3,000 in federal loan money (the Loan) that she had received directly. The College waived tuition and refunded the Complainant's tuition money as of December 13, 2011, because the Complainant informed College personnel that her mother was ill and because the Complainant was a good student. Because the College repaid the Loan to the federal government on the Complainant's behalf, however, the Complainant was obligated to repay the College directly.

The Complainant did not repay, causing the College to follow its standard policies and procedures and place "stops" on the Complainant's record, which prevented the Complainant from registering for the spring 2012 semester. Over the next nine months or so, the College negotiated with the Complainant to lift those "stops," including one exchange memorialized in an email dated August 28, 2012, wherein the Associate Dean of Students agreed to permit the Complainant to register for the fall 2012 semester if she repaid half of the Loan (or approximately $1,500). On September 13, 2012, however, the Complainant offered to repay $700 in exchange for registering late, and to repay the remainder in December. On September 14, 2012, the Associate Dean of Students and the Complainant exchanged several emails about repayment, including a last email sent at 3:59 p.m. in which the Associate Dean of Students rejected the Complainant's offer and reiterated that the Complainant was obligated to repay the Loan in its entirety.[43]

As noted above, OCR found that the Complainant did not file a sexual harassment complaint until September 14, 2014. Specifically, she engaged in protected activity when she filed with CUNY, on September 14, 2012, at 7:59 p.m., a complaint of sexual harassment against the Professor, thus satisfying the first element of a retaliation claim. While the Complainant arguably experienced a materially adverse action when the College decided to make her pay the Loan in full, the second required element for a retaliation claim, the third element of a causal connection cannot be satisfied. The College made a decision about full repayment and communicated to the Complainant at 3:59 p.m. on September 14, 2012, several hours before the Complainant engaged in her protected activity with CUNY. In the absence of evidence that the Complainant suffered an adverse action contemporaneous with, or subsequent to, the recipient's learning of the Complainant's involvement in a protected activity, no causal connection between

[43] The Associate Dean of Students stated that at this point, she required the Complainant to repay the Loan in full in order to register, because the Complainant would have a "clean state" and would have taken responsibility for the Loan. The Associate Dean of Students stated that if she had permitted the Complainant to register at this point, the issues would have kept accumulating, such that the Complainant would have had to file a registration appeal, and so forth.

Complainant's protected activity and the alleged material adverse action can be established. Accordingly, OCR will take no further action regarding Allegation 2.

Summary of Resolution Agreement

CUNY and the College delivered separately executed copies of the Resolution Agreement to OCR on October 27, 2016. The Resolution Agreement addresses the compliance concerns identified in OCR's investigation, and when fully implemented, will resolve the College's noncompliance with Title IX.

In accordance with the Resolution Agreement, the College and CUNY agree to:

- Revise CUNY's website to include the office address for the College's Title IX Coordinator, as well as the name/title, office address, electronic mail address, and telephone number of the Deputy Title IX Coordinator(s) the College has chosen to appoint.
- Revise the College's notice of non-discrimination and take steps to ensure it is appropriately published and distributed.
- Revise CUNY's grievance procedures for addressing complaints alleging discrimination on the basis of sex (including sexual harassment, sexual assault, and sexual violence) to ensure that these comply with Title IX.
- Provide training to all College staff who have the authority to take action to redress sexual harassment, who have the duty to report to appropriate officials sexual harassment or any other sexual misconduct, or who are likely to witness or receive reports of sexual harassment.
- Assess and possibly enhance student involvement on the College's existing Campus Security Advisory Committee, which is charged in part with identifying and recommending strategies to ensure that students understand their rights under Title IX and the College's procedures for addressing incidents of sexual harassment and assault/violence.
- Continue to provide annual training for all incoming students, as well as for students who are leaders of student groups, student athletes, and students in residence halls, addressing sexual misconduct and information on CUNY and the College's Title IX policies and procedures.
- Ensure that existing informational materials contain information on: how and where to file a complaint of sexual harassment or sexual assault/violence with the College; the name and contact information for the College's Title IX Coordinator, and a description of the responsibilities of the Title IX Coordinator; information on how to obtain counseling and academic assistance in the event of sexual harassment and sexual assault; and information on what interim measures can be taken to protect a complainant and how to request interim measures.
- Continue to conduct bi-annual climate surveys for students that contain questions about the student's knowledge of sex discrimination (including sexual harassment and sexual assault/violence), any experiences with sex discrimination while attending the College, and the student's awareness of the College's Title IX policies and procedures.

- Provide documentation to OCR to demonstrate that the College's procedures designed to assure the College that operators or sponsors of education programs or activities at which the College places students comply with Title IX, and provide documentation demonstrating how the above procedures were applied with respect to Cases 1 and 5 reviewed by OCR.
- Address any remaining effects that the Complainant may have suffered due to sexual harassment by a College employee, which may have affected her ability to participate in the College's education programs or activities.
- Take actions to address violations and concerns OCR identified with respect to the 12 cases OCR reviewed from academic years 2011-2012 and 2012-2013.
- Reexamine all reports of sexual harassment and sexual assault/violence filed with the College during academic years 2013-2014, 2014-2015, and 2015-2016, to determine whether each complaint was handled consistent with Title IX; and take appropriate action to address any problems identified, including providing remedies that may still be available for the complainants in these cases, such as counseling or academic adjustments.
- Provide complaint files and information about the College's processing of sexual harassment complaints for the next three academic years.

Conclusion

This letter should not be interpreted to address the College's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the College may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this should occur, an individual may file a separate complaint alleging such harassment or intimidation.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions about OCR's determination, please contact David Krieger, Compliance Team Attorney, at (646) 428-3893 or david.krieger@ed.gov; or Félice Bowen, Compliance Team Leader, at (646) 428-3806 or felice.bowen@ed.gov.

Sincerely,

/s/

Timothy C.J. Blanchard

Encl.

cc: Rachel Nash, Esq.