

RESOLUTION AGREEMENT

Wesley College
Complaint No. 03-15-2329

Resolution Agreement
Frostburg State University
Complaint Nos. 03-13-2328 and 03-15-2032



Federal appeal seeks to halt North Carolina restroom law while case ...
LGBTQ Nation - Oct 20, 2016
A billboard put up by Planting Peace after North Carolina passed HB2 is ... Court of
Appeals to expand the injunction to protect transgender residents statewide, ...

Judge reaffirms, expands reach of injunction against bathroom ...

Coveleaderpress (subscription) - 9 hours ago

Judge reaffirms, expands reach of injunction against bathroom directive ... accommodating
transgender students in the use of public school bathrooms and ... Texas Attorney General Ken
Paxton, in an Oct. 19 news release, said, "I am proud to ...

JOHN DOE,

Plaintiff,

v.

BROWN UNIVERSITY,

Defendant.

Title IX Update

Karen Ibach, Higher Ed Fall Forum, October 2016



Trending Now

- Recent Resolutions – Frostburg, Wesley
Local OCR Office – Region III
(DE, KY, MD, PA, WVA)
- Respondent Litigation
- Transgender Rights – Bathroom Access (and Beyond)



**Resolution Agreement
Frostburg State University
Complaint Nos. 03-13-2328 and 03-15-2032**

- September 9, 2016 Letter & Resolution
- Comprehensive Investigation; 2 Complainants
 - Alleged off-campus rape in 2013
 - 2014 report of alleged 2009 rape by campus police officer
- Numerous deficiencies found



Deficiencies in Title IX Case Processing

- Required reporting by mandatory reporters **that were not made** even though they had notice of an alleged rape.
- Repeated violations of a no-contact order that **were not properly addressed** and adequate steps to safeguard the victim were not taken.
- Sufficient interim measures that **were not provided** to victims.
- Requests for confidentiality that **were not balanced** against the need to keep the community safe.



Deficiencies in Title IX Case Processing

- **Off-campus incidents and incidents involving non-student victims or perpetrators** that were **not investigated** or were not fully investigated.
- Title IX investigations that **were not launched** due to an **improper reliance** upon local or campus police investigations and reports.
- Complaint **resolved informally** that should have gone through a formal hearing process; took **10 months** to resolve another complaint.
- Conflated hearing and investigation (hearing was investigation)



Policy & Procedure Deficiencies

Policies and procedures and Notice of Non-Discrimination in effect at time of investigation were not compliant with Title IX.

Non Compliant Notice of Non-Discrimination?



Policy & Procedure Deficiencies



Seriously?

But, Seriously...

Yes, the requirements seem pretty straightforward:

Page 6—Title IX Resource Guide

2. Notice of Nondiscrimination and Contact Information for the Title IX Coordinator

<http://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf>

But it is easy to miss important details when policies and procedures are diffuse and numerous, “updating” is scattered, and publication is cursory (must be widely disseminated)

Policy & Procedure Deficiencies

- At time of incidents, school had **FIVE** policies and procedures addressing sexual harassment and sexual harassment.
- Policies were confusing and contradictory to all involved – complainant, respondent, etc.
- Now has TWO policies.



Policy & Procedure Takeaways

- Consolidate policies for ease of use, clarity and consistency
- Need to provide a **clear avenue** to initiate a complaint of sexual assault against a student and against an employee
- Must provide for an **adequate, reliable and impartial** investigation – if you use your *Code of Student Conduct*, must meet Title IX requirements



Policy & Procedure Takeaways

- **Provide** clear guidance regarding victim resources available
- **Provide** timelines and time frames for investigation, and process for extending them
- **Address and explain** school's obligations re confidentiality
- Clearly designate responsible employees



Other Issues

- Title IX Coordinator:
 - Must be sufficiently trained
 - Must be able to identify problematic individuals, groups, locations, and to assess patterns – so must receive notice of all reports (here - 5 of 43 reported to coordinator over 4.5 years)
 - Must oversee efforts to comply with and carry out Title IX responsibilities and programs



Other Issues

- Training
 - Quality training for Title IX staff and for campus community
 - Quality, specialized training for panel members
- Record Keeping
 - Incomplete documentation for 31 of 43 incidents
- Climate Information
 - Low response rate
 - 70% of respondents in 2013 didn't think they received info re sexual assault



Suggestions

- ✓ Review policies & procedures for consistency, clarity, compliance. Consolidation will eliminate confusion.
- ✓ Publish with an eye toward ease of use, and publish widely
- ✓ Provide quality, specialized training
- ✓ Make sure coordinators, responsible employees, etc know their roles
- ✓ Read the Frostburg Letter & Resolution; use it as a training tool?



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- First time OCR resolved a complaint filed by a student who was accused and disciplined for sexual misconduct.
- School's process to adjudicate case -- and ultimately expel student -- was not "equitable" as required by Title IX



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Background:

The accused Student was a senior at the College during the 2014-2015 school year. On March 31, 2015, the accused Student was accused of planning and implementing the live streaming of a female student engaged in a sexual act with another male student (Student 1) sometime over the weekend of March 20-22, 2015, without the female student's knowledge. On April 1, 2015 the College notified the accused Student that he was charged with violating the College's Sexual Misconduct Policy. Following the Judicial Board Hearing on April 7, 2015, the College expelled the accused Student.



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SUMMARY OF FINDINGS

The College is required under Title IX to respond to allegations of sexual harassment or sexual violence when it knows, or reasonably should know, about possible sexual harassment or sexual violence. In undertaking this responsibility, the College must have an equitable process that ensures that the rights of survivors and those of the accused are protected.

OCR's role, after the College has responded to the allegations, is not to reinvestigate the underlying incident or substitute its judgement for that of the College. Rather, OCR's role in investigating Title IX sexual harassment and sexual violence allegations is to determine whether the College's grievance procedures for the resolution of complaints, such as those utilized for this complaint, are prompt and equitable and have been properly implemented.



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OCR also concludes that the *Title IX Policies and Procedures*, as written, provide for an adequate, reliable, and impartial investigation, including an opportunity to present witnesses and evidence. Specifically, the *Title IX Policy and Procedures* explicitly states that all investigations will be thorough, reliable, and impartial, and will entail interviews with all relevant parties and witnesses, obtaining available evidence and identifying sources of expert information, if necessary. However, as described more fully below, OCR's investigation revealed that the College failed to follow this stated practice in the incident involving the accused Student, and with regard to many of the other incidents of sexual harassment and/or sexual violence investigated by the College during the 2013-2014 and 2014-2015 academic years.



College acted contrary to its own policies

College :

- **immediately** issued an interim suspension, without undertaking any kind of preliminary investigation;
- **did not** interview the accused student;
- investigator prepared report for the judicial hearing **without** interviewing the accused student; and
- **skipped** a preliminary conference required by college policy (another opportunity for accused student to respond).



Hearing Process problems:

- College **failed** to provide the accused student with accurate information about the hearing process;
- Student **believed** that the judicial hearing that determined his responsibility was the “skipped” preliminary conference, and **did not bring witnesses or prepare a defense**;
- College **did not provide** student with advance copy of investigator's report and other key evidence, **despite being required by its own policy** to make such evidence available; and
- Student **was not allowed to hear the testimony** of the other students who had been charged -- he was denied the opportunity to hear/question their testimony.



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Also:

- Only **six business days** had passed between when the accused student received notice of the charge against him and the college's decision to expel him. AND:
- **College policy** provides for a longer time frame that gives respondents **adequate time to prepare to participate in the process.**



Other Findings

Not only a problem with this accused, or with accused students generally:

- Some problems widespread. College seemed to impose interim suspensions **without** preliminary investigation and deprived accused students of the opportunity to present witnesses/other evidence.
- College violated the rights of **complainants:**
 - failing to provide appropriate interim remedies like counseling and academic services; and
 - failing to provide complainants with written notice of the outcome.
- College failed to provide sufficient notice and dissemination of its policies, information about the Title IX Coordinator, and information about how to report sexual assault. [Cf. Frostburg!]



Respondent Litigation

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

_____)	
JOHN DOE,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 16-017 S
)	
BROWN UNIVERSITY,)	
)	
Defendant.)	
_____)	



Respondent Litigation

- Respondents prevailing more often
 - Due process
 - Lacking sufficient notice of charges
 - No access to evidence



Doe v. Brown

- Bench trial
- Issue: whether the university breached its contractual obligation to John Doe in the manner that it conducted the process by which he was found responsible and disciplined.
- John Doe prevails.



Doe v. Brown

- Student Handbook, including the Code of Conduct, form the basis of a contract between a student and the university.
- Version in place at time of violation controls.
- Brown used newer version for Doe's case. Big difference: new Code applied new definition of consent. Under new definition, consent could not be obtained through "manipulation." Charge was that he had manipulated another student to have sex.
- Brown argued that the consent definition merely "codified community standards" of consent
- Court disagreed.



Doe v. Brown

- BUT problem is limited only to those cases that occurred prior to the change of definition.
- Invalidated decision to suspend Doe, but Brown can hold another hearing using appropriate Code.
- Court was alarmed that Brown students organized an email campaign to criticize judge's earlier decision that allowed Doe to remain on campus while his case was pending.



Transgender Rights & the May 2016 DCL

Texas & 12 other states challenged propriety of joint DCL to extend antidiscrimination protections to transgender students.

Judge issued “nationwide” preliminary injunction; being appealed; clarified scope of preliminary injunction in October 2016.



Transgender Rights & the May 2016 DCL

- October Order:
 - Injunction is nationwide
 - Not applicable to EEOC
 - Only applies to intimate facilities (restrooms & locker rooms)
 - Asking for additional briefing re other agencies



Transgender Rights & the May 2016 DCL

BUT ... not necessarily a view shared by other jurisdictions –

A federal magistrate judge in Illinois rejected efforts of parents to prohibit School District from accommodating a transgender student's right to use the girls' locker room



Best advice – Move Forward and ..


**KEEP
CALM
AND
PAY
ATTENTION**