

TOPIC:**Behind the Scenes: A Closer Look at the Title IX Resolution Letters and Agreements of 2014****AUTHOR:**[Kent Talbert](#)**INTRODUCTION:**

By one recent count, 129 universities are under investigation by the Office for Civil Rights (“OCR”) of the U.S. Department of Education (“Department”) for their handling of sexual violence reports [1] under Title IX of the Education Amendments of 1972 (“Title IX”). [2] During 2014, six institutions of higher education--Tufts University (“Tufts”), Virginia Military Institute (“VMI”), Ohio State University (“OSU” or “Ohio State”), Princeton University (“Princeton”), Southern Methodist University (“SMU”), and Harvard Law School (“Harvard”) [3]--executed resolution agreements concluding pending Title IX complaints or compliance reviews of sexual violence, sexual harassment, or both. [4] This NACUANOTE (“Note”) analyzes key issues and highlights common themes raised by these resolution agreements and accompanying letters of finding.

DISCUSSION:**I. Resolution Agreements Executed in 2014 [5]****A. Tufts University (April 17, 2014)**

Tufts University executed the first Title IX resolution agreement of 2014. The agreement arose from a complaint of sexual assault and sexual harassment filed with OCR in September 2010, and later amended in February 2011. [6] The complainant alleged that Tufts discriminated against her on the basis of sex by failing to take prompt and equitable steps to investigate and respond to her report that she was sexually assaulted by her then-boyfriend. Specifically, the student claimed that the university’s investigation took too long, that the university did not provide appropriate interim protective measures during the investigation, and that the university retaliated by threatening to remove her from a university leadership program. [7]

Upon concluding its investigation, OCR made several findings. First, it found that at the time the sexual assault was reported (January 2010) and through late 2011, the university was without a permanent Title IX Coordinator. [8] Second, OCR found that Tufts' Notice of Non-discrimination included inaccurate language about the applicable time period for filing a complaint with OCR. [9] Third, and perhaps most significantly, OCR found that the university "failed to respond in a prompt and equitable manner to complaints, reports, and other incidents of sexual harassment/violence of which it had notice, including the student's complaints of sexual violence and sexual harassment and at least one other complaint filed in the 2011-2012 and 2012-2013 academic years." [10] With respect to the complainant's allegations about her own perceived mistreatment, OCR faulted Tufts for failing to initiate an investigation within the first six months of the reported misconduct due to certain officials' beliefs that no action was necessary in the absence of a written complaint. [11] OCR also faulted the university for the length of time that transpired before it was able to reach a determination (18 months), for its delay in order to consolidate the accused's claims of fraud and misrepresentation against the complainant, and for allowing prejudicial evidence to be considered by the fact finder. [12]

In addition, although the university provided some interim relief to the student, OCR found that the measures were insufficient and that the university failed to do enough to protect the complainant. [13] OCR found shortcomings with the provision of safety escorts as well as with scheduling arrangements the university had implemented for the leadership program in which both students participated. [14]

Finally, as to harassment, OCR found that the university acted inappropriately by failing to conduct an investigation of and respond to the student's allegations that the accused's friends harassed her. [15] More broadly, OCR concluded that, "as a result of the University's actions and inactions in responding to the Student's reports and complaints of sexual violence and sexual harassment, the Student was subjected to a sexually hostile environment." [16]

These types of findings, collectively merged under OCR's overall findings that Tufts failed to administer its disciplinary proceedings in a "prompt and equitable" manner and that the complainant had been subjected to "a sexually hostile environment," are not uncommon in Title IX investigations. Such broadly worded findings inevitably give rise to far-reaching remedial plans. In this instance, the resolution agreement obligated Tufts to revise its Title IX Policies and Procedures, [17] impose additional requirements for training, [18] maintain particularized documentation for its Title IX investigations, [19] reimburse "educational and other reasonable expenses" (individual monetary remedies) incurred by the complainant, [20] publish informational pamphlets, [21] conduct climate checks, [22] launch bystander intervention campaigns, [23] and conduct a prescriptive and detailed review of past years' complaints. [24]

In addition to the investigatory and remedial components of the Tufts' resolution agreement, the agreement also includes a brief preamble, [25] a detailed section regarding the Title IX Coordinator actions already taken and those to be taken, [26] and an acknowledgement of the university's sexual violence Task Force and its ongoing role. [27] All of these elements are either found in prior years' OCR agreements or emerge as components found in other 2014 agreements. When used effectively by counsel, these components of resolution agreements, and particularly the preamble, can set forth the university's narrative of events. This is one of the few opportunities available to an institution to present its views of the context of a complaint and the actions taken by a university.

B. Virginia Military Institute (April 30, 2014)

Within days of the Tufts agreement, Virginia Military Institute executed its Title IX agreement. [28] Of the several issues raised by the complainant, two are discussed in this Note: (1) whether VMI's marriage and parenthood policy discriminated against female cadets [29]; and (2) whether VMI's Title IX procedures provided for the prompt and equitable resolution of cadet and employee complaints. [30]

OCR determined that VMI's policy discriminated against female cadets by requiring any cadet who married or became a parent to resign voluntarily or otherwise be deemed ineligible for enrollment. [31] OCR advised VMI that cadet pregnancy must be treated like other temporary medical conditions. [32] In response, VMI revised its policy to clarify that pregnant cadets are permitted to remain enrolled and participate in the VMI program as long as they are able to perform cadet duties and meet cadet standards. VMI further clarified that if it is determined a female cadet cannot participate safely in the military program, she will be granted leave in the same way as cadets with other temporary medical conditions. [33]

The resolution agreement then turned to the question of whether VMI's Title IX procedures provided for the prompt and equitable resolution of cadet and employee complaints. In finding that the grievance procedures failed to meet the prompt and equitable requirements, OCR examined the four VMI policies that addressed Title IX grievances—the sexual harassment policy, the sexual assault policy, the sex discrimination policy for employees, and the sex discrimination policy for cadets. [34] OCR found the sexual harassment policy did not designate “reasonably prompt timeframes for major stages of the complaint process.” [35] This finding signals that Title IX policies must contain concrete statements concerning the projected duration of various stages of an investigation. [36] Statements included in policies and procedures stating reports of sexual harassment should be made “promptly” and “as quickly as possible” to “allow for effective and equitable investigation of and response to alleged violations,” (e.g. statements found in VMI's procedures), will be found insufficient. [37]

As a part of its examination of the prompt and equitable component, OCR also determined that VMI's sexual harassment policy “d[id] not state that VMI will take interim steps to ensure the safety of the complainant while its investigation is in process (e.g., no contact order; change academic or living situations as appropriate with minimum burden on the complainant; counseling; health and mental services; escort services; academic support; retake a course or withdraw without penalty).” [38] This determination signals the degree to which OCR expects a school's sexual harassment policy to state expressly that appropriate interim steps will be considered and taken to help ensure the safety and well-being of the complainant.

One final matter that arises in this agreement, and also in the Princeton University resolution agreement outlined in Part D of this Note, is the relatively recent policy position OCR has taken regarding students serving on sexual misconduct hearing panels. OCR telegraphed its position in footnote 30 to its April 29, 2014 “questions and answers” guidance stating “[OCR] discourages schools from allowing students to serve on hearing boards in cases involving allegations of sexual violence,” though at the same time it acknowledged Title IX does not require this prohibition. [39] Absent from OCR's guidance is any rationale for its position. Consistent with this policy guidance, OCR's letter to VMI “cautions VMI that cadets should not be permitted to serve on hearing boards involving complaints of sexual violence” and that “VMI should ensure that the CEA's [Cadet Equity Association's] involvement with sexual assault complaints is limited to their receipt.” [40]

Finally, although VMI's resolution agreement, like the Tufts agreement, requires that VMI undertake various remedial actions, such as revising its policies and grievance procedures, [41] providing training on Title IX's requirements, and conducting annual climate checks; [42] the agreement expressly acknowledged actions that had already been taken by the university to enhance its Title IX compliance efforts. Again, this type of acknowledgement, commonly found in the 2014 resolution agreements, may be fashioned to temper the narrative about a particular fact pattern that supports an OCR finding of noncompliance by highlighting the universities' overall efforts to combat sexual violence.

C. Ohio State University (September 8, 2014)

Unlike the other resolution agreements of 2014, the Ohio State University agreement arose out of an OCR-initiated compliance review. The compliance review examined whether OSU "responded promptly and equitably to complaints, reports, or any other notice . . . of incidents of sexual harassment, sexual assault and other forms of sexual violence and whether any failure to respond appropriately allowed for the creation and/or continuation of a sexually hostile environment." [43]

Nearly four years into OCR's compliance review, OSU received a complaint against the director of the marching band alleging that the band's culture facilitated acts of sexual harassment, creating a sexually hostile environment for students. [44] The complaint cited a "sexualized" culture where members were required to affirm secrecy oaths about objectionable traditions and customs. [45] During the course of the OCR review, OSU independently concluded that a sexually hostile environment existed within the marching band and that the director of the band "failed to eliminate the sexual harassment, prevent its recurrence and address its effects." [46]

OSU terminated the band director, authorized an independent task force to review the matter in its entirety, and announced plans for policy and procedure changes, counseling and training, climate surveys, and other controls. [47] OCR incorporated OSU's corrective action steps into the university's resolution agreement. [48]

OCR's investigation took over four years from its initiation until the execution of the agreement in September 2014. [49] It could have taken longer but for OSU's request to resolve the review prior to completion of the investigation. [50] OCR determined not to complete its investigation of all issues, and noted it was not making a determination of whether OSU complied with the Title IX prompt and equitable requirements. [51] Among its findings, however, the OCR did conclude the Title IX policies of the university included an inappropriate definition of sexual harassment, applying only the "reasonable person" standard, rather than the subjective and objective perspective of a person in the alleged victim's position considering all of the circumstances. [52]

One final observation is the requirement to "[c]ontinue to offer counseling, health, mental health, or other holistic and comprehensive victim services to all members of the Marching Band affected by sexual harassment, and notify students of all Title IX related services and supports available in the university." [53] The agreement and resolution letter are not clear regarding whether OCR required actual monetary payments to complainants for counseling, health, mental health, and other holistic and comprehensive victim services, or in-kind services.

D. Princeton University (October 12, 2014)

A little more than a month after the Ohio State agreement, Princeton University executed the fourth Title IX resolution agreement of the year, which resolved three complaints. [54] The three complaints [55] alleged that the university discriminated against Students 1, 2, and 3 on the basis of sex by failing to adopt and publish grievance procedures that provide for the prompt and equitable resolution of student complaints and failed to respond appropriately to complaints of sexual assault that the three students made to the university during academic years 2009-2010 and 2010-2011. [56]

OCR found that Princeton did not provide a prompt response to Student 1's complaint, noting that the appeals process was unduly long. The final decision in the accused's appeal was not issued until nine months after the initial determination. [57]

With respect to Student 2, Princeton found insufficient evidence to substantiate a sexual assault. [58] OCR agreed with the university that there was no sexually hostile environment and concurred with most of Princeton's handling of the complaint, [59] but OCR found that the university failed to provide Student 2 an opportunity to appeal, though the accused did have that right. [60]

In Student 3's case, Princeton found it did not have sufficient evidence to substantiate the alleged sexual assault. [61] OCR again agreed with Princeton, concluding the evidence did not support a sexually hostile environment. It did, however, determine that the university erred in not providing an equal opportunity to appeal the outcome. [62]

Of particular note in the Princeton Agreement was its treatment of instances in which a single college or university has multiple policies and procedures that govern proceedings. By executing this settlement agreement, OCR confirmed that where multiple policies and procedures exist, OCR will closely scrutinize each policy and procedure for consistency and clarity. Here, OCR found the documents "often did not clearly reference one another, resulting in a policy that was not easily understood or easily located." [63]

The Princeton resolution agreement generally tracks key content areas found in other agreements. One deviation in this particular agreement is the extent to which OCR may delve into the inner workings of a university, campus police, and local law enforcement when fashioning remedial measures. For example, the agreement states that the university police "will promptly notify the Title IX Coordinator upon receipt of any complaint or report of alleged sexual misconduct." [64] The agreement further states that the university is required to "send a letter to the Mercer County Prosecutor's Office and any other external local law enforcement agencies with jurisdiction over the University and its students requesting a Memorandum of Understanding (MOU), where there is not an existing MOU." [65] Moreover, the agreement mandates in great detail the content of what must go into any such letter. [66] Further, the agreement required Princeton include in its files "the date on which the University temporarily suspended fact-finding while the Mercer County Prosecutor's Office or other external law enforcement agencies were in the process of gathering evidence, and the date on which the University resumed its Title IX administrative investigation." [67]

Finally, the agreement reaffirms OCR's recent policy position that students not serve on sexual misconduct panels. [68] It also obligated the university to reimburse the complainants for "appropriate University-related expenses as well as expenses for counseling." [69] These requirements, echoed throughout a number of the 2014 resolution agreements, raise significant issues with respect to the scope of institutional remedial obligations.

E. Southern Methodist University (November 16, 2014)

Nearly two months after Princeton's agreement, OCR released its resolution letter and agreement with Southern Methodist University on December 11, 2014. [70] The agreement resolved three complaints, the oldest of which dated to June 2011. [71]

The complaints involved three distinctly different fact patterns and allegations. In the first complaint, a student alleged that certain comments of an adjunct law professor during a criminal law clinic class in spring 2010 constituted sex and gender-based harassment, that the university did not take prompt and effective action to address the alleged harassment, and that the comments constituted a hostile environment. [72] Filed by a former SMU employee in March 2013, the second complainant alleged that the university had a "pattern and practice of condoning sexual harassment of and therefore sex discrimination against its female students and of retaliating against anyone who attempts to rectify the situation." [73] According to the resolution letter, Complainant 2 stated that she believed the university had a pattern of not responding appropriately to complaints of sexual harassment, citing to anecdotal and Clery Act data, and news reports. [74] Among other things, the third complainant (Complainant 3) [75] alleged that the university discriminated against him on the basis of sex when the university failed to appropriately respond after he notified the university he had been sexually assaulted. [76]

In conducting its investigations, OCR demonstrated its attention to the particularity of the institution's Notice of Nondiscrimination, finding the school's Notice insufficient for not including detailed contact information for the Title IX Coordinator. [77] This finding underscores an institution's obligation to weigh every word of a school's Notice against the requirements of 34 C.F.R. § 106.9; as well as the OCR's April 2011 Dear Colleague Letter.

In the resolution agreement, OCR also commented on the parameters of presidential discretion in student conduct matters. During the course of the OCR investigation, SMU initiated and submitted to OCR changes to its Title IX policies and procedures. [78] Because the revised procedures gave the president of the university unrestricted authority to review all student conduct decisions without further stating expressly that the review would comply with Title IX, the procedures were found to be insufficient. [79] OCR required the university to revise its policies and procedures to clarify that the president's review will be in accordance with Title IX. [80]

As with other cases in 2014, OCR found that the SMU procedures did not set forth sufficiently concrete timeframes (specifically for the appeals process), [81] and it determined that the university should have provided specific notice to the parties of their right to end the informal process and begin the formal process at any time. [82] Finally, OCR determined that the procedures did not specifically address conflicts of interest or specifically disallow evidence of past relationships. [83]

Turning to the merits of the individual complaints, OCR found that the university did not provide prompt and equitable responses to the first complainant's claims of gender harassment. [84] Underlying that conclusion, OCR determined that the grievance procedures did not make reference to gender-based harassment and that the process took too long to reach a final resolution. [85] On the complainant's hostile environment claim, OCR found the evidence insufficient to support any such conclusion. [86]

In resolving the second complaint, OCR concluded that "the sexual harassment reported by Complainant 2 did not substantiate that the harassment occurred." [87] Notwithstanding that Complainant 2 withdrew her complaint against SMU, OCR refused to close the case and instead included it in the final resolution agreement. [88] Thus, counsel should be aware that even though a complaint filed with OCR against a school may have been withdrawn, OCR may nevertheless determine not to administratively

close the case, and instead hold it open for disposition in a final resolution agreement. It appears that the only realistic means of raising a concern about such an untoward action by OCR is through a civil action under the Administrative Procedures Act. [\[89\]](#)

With respect to the third complaint, which alleged sexual assault, OCR determined that the SMU police promptly investigated the alleged assault and arrested a student for the alleged offense. [\[90\]](#) In its letter to SMU, OCR noted that the university removed and suspended the student, issued the accused a no-contact letter within three days, offered counseling and a housing change to the complainant, notified the complainant's professors and requested flexibility on his academic work, and granted the complainant's request for a withdrawal from the university. [\[91\]](#) Despite the foregoing, OCR determined that the university "did not provide a prompt and equitable response to Complainant 3's complaint . . . and that there was sufficient evidence to support a conclusion that Complainant 3 was subjected to a sexually hostile environment." [\[92\]](#) In making its determination, OCR pointed to concerns raised by Complainant 3 about phone calls, text messages, and other comments that did not receive a full investigation or sufficient response. [\[93\]](#)

Turning now to SMU's resolution agreement, two features not seen in previous agreements are SMU's longer than usual preamble, [\[94\]](#) and a lengthy itemization of the recommendations of the university's Task Force on Sexual Misconduct Policies and Procedures. [\[95\]](#) The longer preamble contains a more detailed disclaimer of liability and recitation of several proactive steps taken by the university, including its Task Force. [\[96\]](#) OCR agreed with 39 of the 41 Task Force recommendations and incorporated them into the agreement. [\[97\]](#) Not surprisingly, OCR did not agree with the Task Force's affirmation of students serving on sexual misconduct hearing boards. [\[98\]](#) However, no prohibition against such student participation appears in the final resolution agreement.

F. Harvard University (December 23, 2014)

Unlike the other Title IX resolution agreements, the final agreement of 2014 with Harvard Law School appears to be based upon a facial challenge to the law school's policies and procedures, or more broadly a challenge on behalf of other law students, generally. [\[99\]](#) On the one hand, no clear statement of any sexual harassment or sexual violence perpetrated against the complainant appears in OCR's resolution letter. [\[100\]](#) Instead, the allegations relate to how the policies and procedures failed "students" generally. [\[101\]](#) The complainant alleged:

[T] he Law School's grievance policies and procedures fail to comply with Title IX by not providing for the prompt and equitable resolution of sexual harassment complaints, including sexual assault complaints, against students by: 1) requiring victims to choose between filing criminal charges and filing a Title IX complaint with the Law School; 2) allowing for "rehearings" in the Law School's Title IX grievance procedures that further delay the process; and 3) using a clear and convincing evidence standard of proof in these procedures. [\[102\]](#)

On the other hand, OCR's investigation "revealed that there had been two sexual assault cases filed with the Law School during the time period reviewed [2005-2014]." [\[103\]](#) Contextually, the OCR statement reads as if the two assault cases were not specifically a part of the complaint but were discovered as OCR reviewed the policies, procedures and files of the law school. [\[104\]](#) Notable is OCR's review of Title IX records as far back as nine years (2005-2014)—a time period that exceeds that involved in any of the other 2014 OCR resolution agreements. [\[105\]](#)

OCR investigated the complaint allegations, but also examined “*more generally* whether the Law School provided for prompt and equitable responses to complaints of sexual harassment, about which it knew or reasonably should have known, and whether any failure to respond appropriately allowed for the creation and continuation of a sexually hostile environment.” [106] Among its findings, OCR determined that the law school’s prior policies and procedures in effect at the time of the filing of the complaint used the wrong evidentiary standard, [107] did not provide a specific timeframe for resolution of complaints, did not address complaints against third parties, and did not specifically provide in the grievance procedures for written notification of the outcome of the complaint (though in practice notification was given). [108] OCR also determined that the law school failed to provide an equal opportunity for both parties to participate in a post-hearing review of recommended sanctions in the two sexual assault cases at issue, both of which were decided under the prior policies and procedures. [109]

In July 2014, Harvard University adopted university-wide Title IX policies and procedures for all members of the Harvard community, including the law school. [110] Despite the university’s efforts, OCR found the policies and procedures to be unclear as to the right of a party to end the informal process and institute the formal process at any time and unclear that mediation is prohibited in sexual assault and sexual violence matters. [111] OCR also determined that the policies and procedures did not include “a statement ensuring that students know that the University is committed to responding to incidents of sexual harassment that the University knows or should know about, even if a complaint or report has not been filed.” [112]

Two months later, in September 2014, the law school adopted its “Interim Harvard Law School Sexual Harassment Policy and Procedures” in place of its former policy. [113] While OCR reviewed the newest policy and the associated procedures and noted that “a majority of [its] . . . Title IX concerns . . . have been addressed,” it still found that specific timeframes were lacking, that the policy and procedures did not clearly provide that the interim procedures “supersede all prior Law School-specific policies and guidelines relating to sexual harassment, including any Ad[ministrative] Board Procedures,” and that the “interplay between the Law School’s Interim Procedures and the University-wide Title IX Policy and Procedures may not be clear for a student seeking to file a complaint.” [114] Despite the extensive efforts of the law school and the university, OCR concluded that “the previous and current sexual harassment policies and procedures, as written and as applied to the two sexual assault complaints . . . have not provided for a prompt and equitable resolution of complaints of sexual assault and violence” as required by the Title IX regulations. [115]

Subsequent to the September 2014 interim policy and procedures, the law school adopted on December 18, 2014 new Title IX procedures titled “Harvard Law School Sexual Harassment Resources and Procedures for Students.” [116] The new procedures incorporated the July 2014 university-wide Title IX policy, but provided that the investigation and adjudication of law students’ grievances would be addressed by the law school through these new procedures, rather than by the university. [117] OCR agreed to review the new procedures as a part of its monitoring of the implementation of the resolution agreement. [118]

Finally, the law school’s resolution agreement imposes many of the same remedial obligations as the other 2014 agreements: revisions to policies and procedures, [119] Title IX training, [120] climate assessments, [121] and detailed reviews and reporting back to OCR about prior years’ Title IX complaints. [122] Of note, the preamble includes an expansive definition of “complaints” for purposes of the agreement and the grievance procedures. [123] The definition encompasses “all complaints, grievances, reports, or other instances of sex discrimination of which the Law School knows or should have known about.” [124] As reflected in other agreements, terms governing the actions of the Title IX Coordinator and campus police are included in the agreement. [125] The Title IX Coordinator, within certain limitations,

“will be given access to HUPD [Harvard University Police Department] records regarding Title IX investigations” and the law school “will . . . instruct the HUPD to report incidents of sexual violence directly to the Title IX Coordinator, if the complainant consents, after an explanation of the Law School’s confidentiality policy.” [\[126\]](#)

II. Common Themes

Several common themes emerge from the 2014 resolution letters and agreements discussed above:

- **Use of Preamble in Resolution Agreement.** The preamble to a resolution agreement provides a great opportunity for a university to put its best foot forward, including statements of proactive actions such as establishment of a Task Force, and statements about no admission of error, omission, wrongdoing, discrimination, or failure to otherwise comply with Title IX. OCR has generally demonstrated latitude by permitting such statements in the preamble.
- **Multiple Policies and Procedures.** Where there are multiple policies and grievance procedures of a university and its various schools (as opposed to one all-inclusive Title IX policy and procedure), OCR can be expected to closely examine the policies and procedures for any inconsistencies. These policies should clearly delineate to whom they apply and under what circumstances so that there is no confusion as to which of the many policies govern in a given circumstance. Any amended policies and procedures should contain a clause expressly declaring that the new policy supersedes any pre-existing policies.
- **Submission of Revised Title IX Policies and Procedures During an Investigation.** While some schools have proactively submitted revised Title IX Policies and Procedures during the course of an OCR investigation, the reality is it may be some time before an institution hears from OCR. In some cases, this may not be until the actual negotiation phase of a resolution agreement.
- **Oral Report Versus Formal Written Title IX Complaint with University.** OCR has construed Title IX to require a university to respond to any notice of possible sexual harassment or violence, and to investigate alleged or reported sexual harassment or violence, even in the absence of a written complaint.
- **Sixty (60) Calendar Day Time-Frame for Investigation.** OCR will closely examine a university’s grievance procedures, as well as its practices, to ascertain whether they provide for a 60-calendar day time frame for the entire investigative process (fact-finding investigation, hearing or other decision-making process to determine whether the alleged sexual violence occurred and created a hostile environment, determination of actions to eliminate a hostile environment and prevent its recurrence, any sanctions, and any remedies for the complainant and school community) apart from an appeal. Though the 60-calendar day rule does not include appeals, OCR has noted that an unduly long appeals process may impact whether a school’s response was prompt and equitable.
- **Notice of Non-Discrimination and Title IX Coordinator.** OCR can be expected to scrutinize very carefully the content of a school’s Title IX Notice of Non-discrimination, whether a school has designated a Title IX Coordinator, whether a school has allowed the Title IX Coordinator position

be vacant, and the level of detail regarding the coordinator's contact information (name, title, office address, email address, and phone number).

- **Student Membership on Sexual Violence Hearing Panels.** OCR can be expected to continue to insist upon inclusion of terms in a resolution agreement prohibiting students from serving on sexual misconduct hearing panels. However, such terms were not included in all agreements in 2014.
- **Both Parties Notified of Outcome and Opportunity to Appeal.** Institutions should ensure the Complainant and Respondent are both notified of the outcome of a Title IX disciplinary proceeding, and that where appeals are provided under the grievance procedures, both parties (including the prevailing party) may appeal.
- **Climate Checks.** Annual climate surveys have become a standard part of resolution agreements. OCR can be expected to continue to insist upon surveys as a condition for a resolution agreement.
- **Monetary Payments.** As observed in 2014, OCR can be expected to demand an institution pay for medical and counseling expenses incurred by a complainant where OCR has found noncompliance with Title IX.
- **Informal/Formal Process.** Policies and procedures should provide detailed descriptions of informal and formal complaint processes and specify that a complainant may end an informal process at any time and begin a formal complaint process. It is improper to mandate that a complainant seek to work out a problem directly with the alleged perpetrator. Finally, institutions should include an express statement that mediation or other informal processes cannot be used in cases of sexual assault.

Institutions can anticipate these themes and fashion compliance initiatives that proactively addresses these issues, while keeping in mind that the extent to which OCR has the authority to require all of the remedial content detailed above is a matter of much debate.

CONCLUSION:

Title IX resolution agreements continue to be the common means for resolving Title IX sexual harassment and sexual violence investigations. The six resolution letters and agreements reached in 2014 demonstrate the multiple challenges universities face in meeting the requirements of the Title IX statute, regulations, and the Department's sub-regulatory guidance.

As a general rule, a university will be well-positioned for any investigation if it has developed up-to-date Title IX policies and grievance procedures, followed the policies and procedures in practice, provided appropriate Title IX training to students and staff, taken prompt and equitable steps to investigate and respond to complaints and reports of sexual harassment and sexual violence, and made determinations, as appropriate, about interim relief.

RESOURCES:

Tufts University Resolution Agreement, Complaint No. 01-10-2089, 5-10 (April 17, 2014), available at <http://www2.ed.gov/documents/press-releases/tufts-university-agreement.pdf>

OCR Letter to Tufts University, Complaint No. 01-10-2089, 1 (April 28, 2014), available at <http://www2.ed.gov/documents/press-releases/tufts-university-letter.doc>

Virginia Military Institute Resolution Agreement, Complaint No. 11-08-2079, 1-3 (April 30, 2014), available at <http://www2.ed.gov/documents/press-releases/vmi-agreement.doc>

OCR Letter to Virginia Military Institute, Complaint No. 11-08-2079, 1 (May 9, 2014), available at <http://www2.ed.gov/documents/press-releases/vmi-letter.doc>

Ohio State University Resolution Agreement, OCR Docket No. 15-10-6002, 13-16 (Sept. 8, 2014), available at <http://www2.ed.gov/documents/press-releases/ohio-state-agreement.pdf>

OCR Letter to Ohio State University, OCR Docket No. 15-10-6002, 1 (Sept. 14, 2014), available at <http://www2.ed.gov/documents/press-releases/ohio-state-letter.pdf>

Princeton University Resolution Agreement, Case No. 02-11-2015, 6 (Oct. 12, 2014), available at <http://www2.ed.gov/documents/press-releases/princeton-agreement.pdf>

OCR Letter to Princeton University, Case No. 02-11-2025, 1 n.1 (Nov. 5, 2014) consolidating Case Nos. 02-11-2025 (Complainant 1), 02-11-2167 (Complainant 2), and 02-11-2166 (Complainant 3), available at <http://www2.ed.gov/documents/press-releases/princeton-letter.pdf>

Southern Methodist University Resolution Agreement ("SMU Resolution Agreement), Case Nos. 06-11-2126, 06-13-2081, and 06-13-2088 (Nov. 16, 2014). <http://www2.ed.gov/documents/press-releases/southern-methodist-university-agreement.pdf>

OCR Letter to Southern Methodist University, Case Nos. 06-11-2126, 06-13-2081, and 06-13-2088 (Dec. 11, 2014), available at <http://www2.ed.gov/documents/press-releases/southern-methodist-university-letter.pdf>

Harvard Law School Resolution Agreement, Complaint No. 01-11-2002, 1-4 (Dec. 23, 2014), available at <http://www2.ed.gov/documents/press-releases/harvard-law-agreement.pdf>

OCR Letter to Harvard Law School, Complaint No. 01-11-2002, 1-2 (Dec. 30, 2014), available at <http://www2.ed.gov/documents/press-releases/harvard-law-letter.pdf>

U.S. Department of Education, Office for Civil Rights Case Processing Manual (Revised Feb. 2015), available at <http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>

ENDNOTES:

[1] Matt Fossen, *Feds Slow and Struggling to Keep up with Growing List of College Sexual Assault Investigations*, FoxNews.com (August 11, 2015), <http://www.foxnews.com/politics/2015/08/11/feds-slow-and-struggling-to-keep-up-with-growing-list-college-sexual-assault>. Though the author of the article refers to “sexual violence,” this NACUANOTE encompasses all forms of sex discrimination prohibited by Title IX, including sexual assault and sexual harassment. A review of the U.S. Department of Education’s web site finds an initial list of 55 schools as of May 1, 2014 labeled “ARCHIVED INFORMATION.” <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations> (last visited October 27, 2015). No further updated list of the Department could be located.

[2] 20 U.S.C. §§ 1681-1688.

[3] Representatives of both the law school and the university signed the Harvard Law School Resolution Agreement, though the complaint under investigation was filed only against the law school. In a footnote, OCR stated that a Title IX investigation of Harvard College is pending, and that the law school resolution agreement did not resolve the Harvard College complaint. OCR Letter to Harvard Law School (“OCR Letter to Harvard”), Complaint No. 01-11-2002, 1 n.1 (Dec. 30, 2014).

[4] While space limitations do not permit a discussion of the Title IX agreements reached in 2012 (Xavier University; Yale University) or 2013 (State University of New York; University of Montana), the reader may wish also to review those agreements prior to entering any negotiations with OCR. For purposes of this Note, the term “sexual violence” encompasses all forms of sexual violence including “sexual misconduct” and “sexual assault,” unless otherwise indicated. Links to the respective resolution agreements and letters of findings may be found under “Additional Resources” at the end of this Note.

[5] In September 2015, OCR announced the completion of Title IX resolution agreements with Michigan State University and the University of Virginia. See Michigan State University Resolution Agreement, Case Nos. 15-11-2098 and 15-14-2113 (Aug. 28, 2015), available at <http://www2.ed.gov/documents/press-releases/michigan-state-agreement.pdf> (Michigan State University agreement); Letter from OCR to Michigan State University, Case Nos. 5-11-2098 and 15-14-2113 (Sept. 1, 2015), available at <http://www2.ed.gov/documents/press-releases/michigan-state-letter.pdf> (Michigan State University letter); University of Virginia Resolution Agreement, Case No. 11-11-6001 (Sept. 17, 2015), available at <http://www2.ed.gov/documents/press-releases/university-virginia-agreement.pdf> (University of Virginia agreement); OCR Letter to University of Virginia, Case No. 11-11-6001 (Sept. 21, 2015), available at <http://www2.ed.gov/documents/press-releases/university-virginia-letter.pdf> (University of Virginia letter). This Note does not include an analysis of agreements announced in 2015. Most resolution agreements are reached with OCR after an investigative determination pursuant to § 303 of the OCR Case Processing Manual (“OCR Manual”). U.S. Department of Education, Office for Civil Rights, Case Processing Manual (“OCR Case Processing Manual”) § 303 at 21-22 (Revised Feb, 2015, V 1.1), available at <http://www2.ed.gov/about/offices/list/ocr/docs/ocrspm.pdf> (last visited Dec. 1, 2015). Under § 303, OCR typically prepares a resolution agreement for negotiation with a school, and after execution of the agreement by a school, OCR releases a letter of findings. *Id.* § 303(b). OCR’s Manual also provides a process for reaching a resolution agreement prior to completion of an investigation and without a letter of findings. See *id.* at § 302.

[6] OCR Letter to Tufts University (“OCR Letter to Tufts”), Complaint No. 01-10-2089, 1 (April 28, 2014). “Any person who believes himself or any specific class of individuals to be subjected to discrimination

prohibited by this part may by himself or by a representative file with the responsible Department official or his designee a written complaint.” 34 C.F.R. § 100.7(b) (See 34 C.F.R. § 106.71 for applicability of § 100.7 to Title IX.) A “complaint” is a “written statement to the Department alleging that the rights of one or more persons have been violated and requesting that the Department take action.” § 101 of OCR Case Processing Manual, Office for Civil Rights, U.S. Department of Education, 5 (Revised Feb. 2015), <http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf> (last visited Oct. 27, 2015). Five of the resolution agreements reached in 2014—Tufts University, Virginia Military Institute, Princeton University, Southern Methodist University, and Harvard Law School—arose from complaints filed with OCR. The Ohio State University agreement arose from an OCR-initiated compliance review. Section 100.7(a) of title 34 of the Code of Federal Regulations authorizes periodic compliance reviews of funding recipients. 34 C.F.R. § 100.7(a) (“The responsible Department official or his designee shall from time to time review the practices of recipients to determine whether they are complying with this part.”). See also § 401 of OCR Case Processing Manual, 25 (“The compliance review regulations afford OCR broad discretion to determine the substantive issues for investigation and the number and frequency of the investigations. To address issues of strategic significance in civil rights areas facing educational institutions, OCR will identify, plan and implement a docket of compliance reviews.”).

[7] OCR Letter to Tufts at 10. OCR found insufficient evidence for retaliation. See *id.* at 2.

[8] *Id.* at 19, 24. See also 34 C.F.R. § 106.8(a) (requirement to “designate at least one employee to coordinate its [a school’s] efforts to comply with and carry out its responsibilities under this part [Title IX].”).

[9] OCR Letter to Tufts at 20.

[10] *Id.* at 23.

[11] *Id.* at 20.

[12] *Id.* at 21. The prejudice consisted of allowing consideration of the student’s medical history contrary to applicable policies, and even after the accused was found to have obtained the student’s confidential medical information by misrepresenting himself as a university medical student.

[13] *Id.* at 20-21.

[14] *Id.*

[15] *Id.* at 21. Tufts referred the complaints of harassment to the university police department, but it appears no “Title IX investigation” occurred by any university administrators, staff, or police.

[16] *Id.*

[17] Tufts University Resolution Agreement (“Tufts Resolution Agreement”), Complaint No. 01-10-2089, 5-10 (April 17, 2014).

[18] *Id.* at 10-12.

[19] *Id.* at 12-13. Particularized documentation refers to a checklist of things OCR required Tufts to include in its written reports of complaint investigations or in the investigative file: (1) name and sex or gender of alleged complainant, and if different, the name of the person reporting the allegation, and name and sex or gender of the respondent; (2) statement of allegation and a description of the incidents and dates and times, if known, of the alleged incidents; (3) date that the complaint or other report was made;

(4) date the complainant was interviewed; (5) date the accused was interviewed; (6) names of all persons alleged to have committed alleged sexual misconduct; (7) names of all known witnesses to alleged incidents; (8) dates that any relevant documentary evidence was obtained; (9) any written statements of the complainant and any written statements of the respondent; (10) if applicable, date on which the university temporarily suspended fact-finding while a law enforcement agency was in process of gathering evidence, and date on which the university resumed its investigation process; (11) outcome of the investigation and if any, disciplinary process; (12) response of university or campus personnel, including any interim or permanent steps taken with respect to the complainant and the accused; and (13) a narrative of all action taken to prevent recurrence of any harassing incidents, including any related written documents. *Id.*

[20] *Id.* at 13.

[21] *Id.*

[22] *Id.* at 14-15.

[23] *Id.* at 15.

[24] *Id.* at 15-16.

[25] *Id.* at 1.

[26] *Id.* at 1-3.

[27] *Id.* at 4-5.

[28] VMI executed its resolution agreement on April 30, 2014.

[29] Though nearly all of OCR's Title IX investigations and agreements have focused upon sexual assault or sexual harassment, one should be aware that the Title IX regulations also prohibit discrimination on the basis of actual or potential parental status, pregnancy, and related conditions. 34 C.F.R. § 106.40 (a-b). Section 106.40(a) of Title 34 prohibits a university recipient from "apply[ing] any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex," while § 106.40(b) prohibits discrimination "on the basis of [a] . . . student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient." *Id.* § 106.40(a). Further, a federal funding recipient "shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability." *Id.* §106.4(b)(4).

[30] OCR Letter to Virginia Military Institute ("OCR Letter to VMI"), Complaint No. 11-08-2079, 1 (May 9, 2014).

[31] *Id.* at 20; *see also* 34 C.F.R. § 106.40(b) (prohibiting discrimination on the basis of pregnancy).

[32] OCR Letter to VMI at 21.

[33] *Id.*

[34] *Id.* at 8.

[35] *Id.* at 9.

[36] *Id.* Similarly, neither the sex discrimination policy for employees nor the sex discrimination policy for cadets designated reasonably prompt timeframes for the major stages of the complaint process. *Id.* at 12-13. While the separate sexual assault policy did provide a reasonably prompt timeframe for the investigation (30-60 days), it did not designate reasonably prompt timeframes for other major stages, such as the time within which VMI officials who receive a sexual assault report will notify the Title IX Coordinator or when the parties will be apprised of the outcome of the investigation. *Id.* at 11. Whether a university maintains four Title IX-related policies and procedures or one unified policy such as VMI submitted to OCR, prompt, numerical timeframes are a very important part of a university's policies. See *id.* at 8. See also Virginia Military Institute Resolution Agreement ("VMI Resolution Agreement"), Complaint No. 11-08-2079, 1-3 (April 30, 2014).

[37] OCR Letter to VMI at 9.

[38] *Id.* at 10.

[39] Question and Answers on Title IX and Sexual Violence, Office for Civil Rights, U.S. Department of Education, 30 n.30 (April 29, 2014).

[40] OCR Letter to VMI at 13.

[41] The agreement acknowledges VMI's submission to OCR of a unified Title IX policy and grievance procedure three weeks prior to execution of the agreement. See VMI Resolution Agreement at 1.

[42] *Id.* at 1-7.

[43] OCR Letter to Ohio State University ("OCR Letter to OSU"), OCR Docket No. 15-10-6002, 1 (Sept. 14, 2014). The compliance review was initiated in June 2010. For a discussion of OCR's compliance review procedures, see Article V of the then OCR Case Processing Manual. OCR modified its Case Processing Manual in February 2015, revising the Article V and re-designating it as § 401. *Id.* at 1.

[44] *Id.* at 20.

[45] *Id.*

[46] *Id.*

[47] *Id.* at 20-21.

[48] *Id.* at 2; Ohio State University Resolution Agreement ("OSU Resolution Agreement"), OCR Docket No. 15-10-6002, 13-16 (Sept. 8, 2014).

[49] OCR Letter to OSU at 1-2.

[50] *Id.*

[51] *Id.* at 2.

[52] *Id.* at 2, 52.

[53] OSU Resolution Agreement at 14.

[54] Princeton signed its agreement on October 12, 2014.

[55] OCR Letter to Princeton University (“OCR Letter to Princeton”), Case No. 02-11-2025, 1 n.1 (Nov. 5, 2014) consolidating Case Nos. 02-11-2025 (Complainant 1), 02-11-2167 (Complainant 2), and 02-11-2166 (Complainant 3).

[56] *Id.*

[57] *Id.* at 15.

[58] *Id.* at 16.

[59] *Id.*

[60] *Id.*

[61] *Id.* at 17.

[62] *Id.*

[63] *Id.* at 18.

[64] Princeton University Resolution Agreement (“Princeton Resolution Agreement”), Case No. 02-11-2015, 6 (Oct. 12, 2014).

[65] *Id.* at 11.

[66] “The letter will state: (1) that in instances where conduct of a sexual nature is involved, the University is required to investigate in accordance with Title IX but will temporarily delay the fact-finding portion of its Title IX investigation during external local law enforcement’s evidence gathering process; (2) that upon notification from the Mercer County Prosecutor’s Office or a local law enforcement agency that the Prosecutor’s Office has completed its evidence gathering process, the University must promptly resume its fact-finding portion of its Title IX investigation; and (3) that during the pendency of the initial evidence gathering by the police, the University will not be precluded from providing witnesses with information about their Title IX rights or resources for students who experience sexual misconduct or taking such interim actions as may be necessary to ensure the safety and support of any students who experience sexual misconduct and the safety of the campus community. *Id.* at 11.

[67] *Id.*

[68] *Id.* at 1, 3. (“[T]he University affirms that these procedures . . . include . . . the following: . . . an understanding that current students should not serve on hearing boards in cases involving allegations of sexual misconduct.”) It is unclear from the agreement or resolution letter the extent to which OCR required this term as a condition for reaching an agreement.

[69] *Id.* at 12.

[70] OCR Letter to Southern Methodist University (“OCR Letter to SMU”), Case Nos. 06-11-2126, 06-13-2081, and 06-13-2088 (Dec. 11, 2014); Southern Methodist University Resolution Agreement (“SMU Resolution Agreement”), Case Nos. 06-11-2126, 06-13-2081, and 06-13-2088 (Nov. 16, 2014).

[71] OCR Letter to SMU at 1.

[72] *Id.* at 10.

[73] *Id.* at 12.

[74] *Id.*

[75] Though designated “Complainant 3” by OCR, and so characterized here for ease of reference, no Title IX complaint was filed with SMU by the student.

[76] *Id.*

[77] *Id.* at 7.

[78] *Id.* at 17.

[79] *Id.* at 17, 21.

[80] *Id.* at 8.

[81] *Id.* at 21.

[82] *Id.*

[83] *Id.*

[84] *Id.* at 19.

[85] *Id.* at 20.

[86] *Id.*

[87] *Id.* at 12.

[88] See SMU Resolution Agreement at 1 (“On November 6, 2014, the Complainant [Complainant 2] in Case No. 06132081 notified OCR of the Complainant’s [Complainant 2] withdrawal of all complaints against SMU.”).

[89] See *generally*, 5 U.S.C. §§ 701-706 (review of agency action).

[90] OCR Letter to SMU at 20.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] SMU Resolution Agreement at 1-2.

[95] *Id.* at 1-8.

[96] *Id.* at 1-2.

[97] *Id.* at 2-8.

[98] Report of the President’s Task Force on Sexual Misconduct Policies and Procedures, Southern Methodist University, Recommendations 22 and 23, 14-15 (April 22, 2013).

[99] OCR Letter to Harvard Law School (“OCR Letter to Harvard”), Complaint No. 01-11-2002, 1-2 (Dec. 30, 2014).

[100] *See generally id.*

[101] *Id.* at 1.

[102] *Id.*

[103] *Id.* at 2.

[104] *Id.* at 2, 12-13.

[105] *Id.* at 2; *see also* OCR Letter to Tufts at 7 (2010-2013), OCR Letter to VMI at 15 (2007-2013), OCR Letter to OSU at 2 (2008-Jan 2014), OCR Letter to Princeton at 1-2 (2009-2013), and OCR Letter to SMU at 1-2, 14 (2009-2013).

[106] OCR Letter to Harvard at 1-2 (emphasis added).

[107] The school used the “clear and convincing” standard instead of the “preponderance of the evidence.”

[108] *Id.* at 10-12.

[109] *Id.* at 12.

[110] *Id.* at 13.

[111] *Id.* at 13.

[112] *Id.* at 14.

[113] *Id.* at 15.

[114] *Id.* at 16.

[115] *Id.* at 16-17.

[116] *Id.* at 17.

[117] *Id.*

[118] *Id.*

[119] Harvard Law School Resolution Agreement (“Harvard Resolution Agreement”), Complaint No. 01-11-2002, 1-4 (Dec. 23, 2014).

[120] *Id.* at 6-7.

[121] *Id.* at 8.

[122] *Id.* at 9.

[123] *Id.* at 1.

[\[124\]](#) *Id.*

[\[125\]](#) *Id.* at 5.

[\[126\]](#) *Id.*

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