



Ferris State University

TITLE IX POLICY AUDIT

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HUSCH BLACKWELL

Higher Education Group

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EXECUTIVE SUMMARY

Husch Blackwell has completed a Title IX legal and compliance audit for Ferris State University (“Ferris State” or “University”). The audit consisted of a review of the University’s applicable policy and procedure documents, along with some key benchmarking of relevant policies, definitions and organizational structure. We reviewed relevant documentation to determine substantial compliance with Title IX, its implementing regulations, and applicable guidance as it relates to sexual misconduct, as well as compliance with the requirements imposed by the Violence Against Women Act reauthorization (“VAWA”).

We found that Ferris State has developed and implemented policies in an effort to meet its obligations under Title IX and VAWA. We find that these policies can benefit from consolidation, removal of redundant content, and the addition of provisions to cover compliance areas that are currently unaddressed. To that end, this report not only articulates our findings, but also contains suggested action items for the University to consider.

Notwithstanding our suggestions, we recognize that institutions make policy decisions in light of their unique cultures and business needs, such that the University may choose not to prioritize certain recommendations. Please keep in mind that our comments and suggestions contained within this report are not intended as a criticism of prior work or administrative and resource choices, but, rather, raise potential compliance vulnerabilities and recommend education law best practice points based on available guidance and information.

This report begins with an overview of Title IX and VAWA. Following this overview is an in-depth discussion of our review of the University’s policies and procedures in this area. We have incorporated findings and recommendations from the University’s Sexual Misconduct Task Force Report (2018) into this section as appropriate. We then provide an outline of recent case law that impacts the institution’s policies and procedures. The report closes with a conclusion summarizing recommended next steps for responding to the suggested action items discussed throughout the report.

OVERVIEW OF APPLICABLE AUTHORITIES CONSIDERED

TITLE IX

Title IX of the Education Amendments of 1972 (“Title IX”) is a civil rights law intended to help eliminate sex discrimination and gender inequity in America’s schools, colleges, and universities. While the reach of Title IX has historically provided protection from various forms of sex discrimination, including sexual harassment, sexual violence, and gender stereotyping, up until the last decade, much of the nation’s attention to Title IX related to inequity in athletics.

In 2011, the primary agency charged with enforcing Title IX, the U.S. Department of Education’s Office for Civil Rights (“OCR”),¹ issued the first of several guidance documents that set sweeping new compliance expectations for how colleges and universities prevent and address allegations of sexual misconduct. Sexual misconduct committed by students and employees can constitute prohibited sex discrimination if it is sufficiently severe so as to interfere with a person’s participation in a school’s programs and activities (i.e., it creates a “hostile environment”). Therefore, under Title IX, schools that receive federal funds have an obligation to respond to reports of sexual misconduct occurring in their programs and activities, to redress sexual misconduct that has occurred, and prevent its recurrence. Institutions of higher education are subject to Title IX’s legal and regulatory requirements as recipients of federal financial assistance. Because Ferris State accepts federal financial assistance, namely federal student loans and grants under the Title IV student loan program, Ferris State is subject to Title IX.

As a result of this guidance, the higher education sector has spent the last several years building a Title IX infrastructure in effort to: support prevention, awareness,

and educational programming; provide resources to impacted parties; and refine their investigation and adjudication processes. However, in September 2017, OCR withdrew two critical guidance documents that have shaped institutions’ Title IX programs.² OCR also announced its plan to develop new Title IX regulations through the notice and comment rulemaking process.

Notably, OCR issued its proposed rules on November 16, 2018, and the public comment period to provide input on the proposed rules closed January 30, 2019.³ If adopted in their current form, the proposed regulations would make significant changes to the definitions of sexual harassment, the responsibility of schools to address incidents of sexual misconduct occurring off campus, as well as institutions’ investigation and adjudication processes. The proposed regulations, however, are currently not binding on institutions and may undergo substantive revision prior to their adoption. We believe it would be premature for institutions to align their policies and procedures to the proposed regulations. Instead, we encourage institutions to continue to ensure that their policies and procedures remain consistent with binding case law, as well as current regulatory requirements and applicable guidance. While the proposed regulations are pending, the OCR’s September 2017 Guidance remains in effect.

In addition to shifts in agency guidance, we have seen significant case law developments through federal court decisions on Title IX-related disputes that are also driving changes to the way institutions respond and investigate complaints. With both dynamics at play, the state of Title IX is undoubtedly in flux.

Our analysis of the University’s compliance is rooted in the Title IX statute and regulations, as well as currently applicable OCR guidance. OCR has published several

¹ The U.S. Department of Justice, among other agencies, shares enforcement authority over Title IX with OCR. See: 2015 Resource Guide, FN 1, page 1, <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf>

² OCR’s 2017 Dear Colleague Letter can be found at: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>; its 2017 Q&A Guidance can be found at: <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

³ Due to technical difficulties with the online comment submission system, the Department added an additional day for comment on February 15. (See <https://www.federalregister.gov/documents/2019/02/14/2019-02566/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.)

significant guidance documents discussing institutions' obligations under Title IX. As mentioned above, on September 22, 2017, OCR withdrew extensive guidance that was issued during the Obama administration. Key OCR guidance documents on Title IX issues and the status of those documents are listed below.

We have included the recently withdrawn guidance for two reasons. First, several concepts from the withdrawn guidance remain instructive as to how institutions develop and implement their policies and procedures. Second, some of the principles in the prior guidance documents may be reinstated in the final version of regulations issued by the Department.

APPLICABLE

A document titled "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties" published in January 2001 ("2001 Guidance").⁴ This document explains that sexual harassment is covered by Title IX's prohibition against sex discrimination and describes an institution's responsibilities to prevent and address sexual harassment.

A Dear Colleague Letter published in April 2015 ("2015 DCL"). The 2015 DCL focuses on the role of an institution's Title IX Coordinator.⁵

A Title IX Resource Guide published in April 2015. This guide provides high-level information about various aspects of Title IX and its application to institutions and provides lists of other resources.⁶

A Dear Colleague Letter published on September 22, 2017 ("2017 DCL"). The 2017 DCL informs the higher education community that OCR intends to engage in rulemaking to develop new Title IX regulations, withdraws the 2011 DCL and 2014 Q&A Guidance and reaffirms the OCR's 2001 Guidance.⁷

⁴ The 2001 Guidance can be found at: <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

⁵ The 2015 DCL can be found at: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf>.

⁶ The Title IX Resource Guide can be found at: <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf>.

⁷ The 2017 DCL can be found at: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>.

⁸ The 2017 Q&A Guidance can be found at: <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

⁹ The 2011 DCL can be found at: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

¹⁰ The Q&A Guidance can be found at: <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

A guidance document, in Question-and-Answer format, published on September 22, 2017 ("2017 Q&A Guidance"). In large part, the 2017 Q&A Guidance supplements the 2017 DCL by summarizing or further clarifying key points discussed in the 2017 DCL. The 2017 Q&A Guidance also provides additional information that an institution should consider when evaluating its Title IX compliance.⁸

WITHDRAWN

A Dear Colleague Letter published in April 2011 ("2011 DCL"). The 2011 DCL substantially expands upon the 2001 Guidance and provides specific items that must be included (or that are strongly recommended to be included) in an institution's policy and procedures related to sexual harassment and sexual violence.⁹

A guidance document, in Question-and-Answer format, published in April 2014 ("Q&A Guidance").¹⁰ In large part, the Q&A Guidance supplements the 2011 DCL by summarizing or further clarifying key points discussed in the 2011 DCL. The Q&A Guidance also provides additional information that an institution must consider when evaluating its Title IX compliance.

Collectively, we refer to applicable documents as the "Guidance Documents" or "Guidance" in the remainder of this report. While the Guidance Documents do not have the same force and effect as a statute or regulation, they do reflect OCR's position regarding Title IX enforcement in the event OCR investigates a particular institution's compliance with Title IX. As a result, most institutions have developed their policies and procedures to comply with the standards articulated in the Guidance.

VAWA

The Violence Against Women Reauthorization Act of 2013 (“VAWA”) is a federal law that amended the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (“Clery Act”). VAWA intersects with Title IX because it requires procedures for addressing not only complaints of sexual assault, but also complaints of dating violence, domestic violence, and stalking.¹¹ Dating violence, domestic violence, and stalking will often also constitute sexual harassment or sexual violence, but not always. The result of the intersection between these laws is that institutions generally develop policies and procedures that address both reports of sexual harassment and sexual violence, as well as reports of dating violence, domestic violence, and stalking.

The University is subject to VAWA because it receives federal financial assistance, namely federal student loans and grants. The requirements included in VAWA are closely related to the core Title IX obligations and are instructive for assessing the University’s alignment with applicable Title IX requirements and best practice, particularly as VAWA pertains to standards for addressing dating violence, domestic violence, and stalking. For this reason, we have also evaluated the University’s policies against these regulatory requirements.

STATE OF MICHIGAN REQUIREMENTS

The University must provide annual certification to the State of Michigan that it is in compliance with Title IX and other requirements imposed through the State’s appropriations process for public universities. To the extent the appropriation requirements relate to the Title IX or VAWA requirements analyzed in this report, they have been identified in the relevant sections of the report.

EMERGING CASE LAW TRENDS

This review was also informed by our review of court decisions involving relevant Title IX and constitutional

due process issues within the Sixth Circuit Court of Appeals, which includes Michigan, as well as other circuits which are instructive. These cases focus primarily on three trends in Title IX civil claims: deliberate indifference, biased process/erroneous outcome, and due process.

It is important to keep in mind that federal court decisions resolve injunctive or money damages claims asserted by a plaintiff against an institution. That said, in many cases, the standard for civil liability is *not* the same as the standard for regulatory compliance (i.e., compliance with Title IX regulations or sub-regulatory guidance). For example, courts have often held that a failure to comply with Title IX regulations does not necessarily establish deliberate indifference sufficient to recover money damages under *Davis v. Monroe County Board of Education*.¹²

Because each case we evaluated was decided on its facts, our reliance on recent court decisions is only intended to provide instructive themes under each theory and to comment generally on how the University’s policies relate to those themes. Such disputes are often so fact-specific that ascertaining a clear precedent is difficult, if not entirely elusive. For this reason, we do not render any opinion regarding how a hypothetical claim against the University would be resolved in light of recent case decisions. Instead, the University should work with its litigation counsel to carefully analyze the facts of any given dispute and the likely outcome of a lawsuit arising from such facts.

BEST PRACTICES AND PEER BENCHMARKING

Our experience and observations from working with hundreds of institutions of higher education on Title IX-related policies, investigations and lawsuits informs this review. Given our experience, it is our view that there is no “best way” for preventing and addressing sex discrimination and sexual misconduct. Instead, institutions’ Title IX policies and practices are ever-evolving and improving. With every case—and every training—institutions can improve their practice and enhance their policies to better reflect their educational

¹¹ VAWA’s regulations, which took effect on July 1, 2015, can be found at: <http://ifap.ed.gov/fregisters/attachments/FR102014FinalRuleViolenceAgainstWomenAct.pdf>.

¹² 526 U.S. 629 (1999).

values and fit their communities' needs. Many institutions of higher education have embraced a culture of continuous improvement in this area. At the same time, this evolution and experimentation in the policies and procedures and practices relating to Title IX programming has resulted in a number of trends and best practices, which further inform this review.

It is against this backdrop that we offer Ferris State University recommendations to better demonstrate compliance with applicable requirements. We note that while some recommendations may relate directly to Title IX compliance requirements, other suggestions may be entirely discretionary and should be considered by Ferris State against its broader goals, culture, and educational values, as well as administrative resources and community expectations.

In addition, our work also included benchmarking key components of the University's policies in comparison to

peer institutions. For purposes of these comparisons, we relied upon a cohort of eight (8) university peers among the other Michigan public institutions of higher education: Central Michigan University, Eastern Michigan University, Grand Valley State University, Michigan Technological University, Northern Michigan University, Oakland University, Saginaw Valley State University, and Western Michigan University. We note that our analysis is intended to capture, in aggregate form, the general features of these institutions' Title IX-related policies and procedures and the broad trends demonstrated by these policies. Given the degree of variation and nuance within each institution's Title IX-related policies, our analysis necessarily relied upon estimation in order to categorize similar approaches. For this reason, our results identify broad trends and are presented in aggregate form. While we anticipate that the University will find our comparisons instructive, we have not identified institutions, as those universities are in the best position to speak to the specifics of their Title IX-related policies.

COMPLIANCE WITH TITLE IX AND VAWA

POLICIES CONSIDERED

The University's key policies related to Title IX and VAWA include the following:

- › Code of Student Community Standards (Section III)
- › Non-Discrimination Grievance Procedures
- › Employee Dignity / Harassment / Discrimination (FSU-HRPP 2005:51)
- › Policy on Non-Discrimination (Subpart 7-3)
- › Responsible Employee Policy (2015-1)
- › Relationship Violence & Sexual Misconduct Policy (2019:02)

We also reviewed the University's Title IX website located at <https://ferris.edu/title-ix/>. The website includes information tabs regarding the following topics:

- › How to File a Complaint / Report an Incident
- › Confidential Support
- › Reporting Protections
- › Ferris Policy
- › Ferris Definitions
- › Prevention, Education, & Training
- › Campus Climate Survey Reports
- › FAQ
- › Title IX Coordinator Information
- › Title IX Newsletter
- › Victim Booklet
- › Sexual Misconduct Task Force Report (2018)
- › Student Affairs Complaint Procedures
- › Statewide Student Resources
- › Kendall Student Resources

We observe that there is not one governing policy regarding sexual violence and other forms of sexual misconduct on campus. The Non-Discrimination Grievance Procedures and Code of Student Community Standards function as the two primary policy documents, although neither is specific to Title IX. During our campus visit, different groups identified different policies as the primary source of information on sexual misconduct for members of the campus community. Numerous individuals noted that information is spread out among policies and individuals must know where to look in order to find relevant information. Others suggested the need to streamline and consolidate policy language. As noted in our recommendations below, we share these observations and believe the University's policy framework can be strengthened by some consolidation and streamlining.

TITLE IX REQUIREMENTS

NOTICE OF NONDISCRIMINATION

Title IX and other OCR-enforced statutes require institutions to publish a notice of nondiscrimination.¹³ With regard to Title IX, the notice must advise prospective and current members of the institutional community of the following:

- › The institution does not discriminate on the basis of sex in its educational programs or activities, including, specifically, employment and admissions; and
- › The name or title, office address, telephone number, and email address of the designated Title IX Coordinator.

The University's Non-Discrimination Statement is linked from the University's homepage and meets the requirements above in that it identifies the office address and telephone number for the designated Title IX

¹³ See 34 C.F.R. § 106.9; OCR Fact Sheet (August 2010), available at: <http://www2.ed.gov/about/offices/list/ocr/docs/nondisc.html>.

Coordinator and specifically states that the University's non-discrimination obligation extends to employment and admissions. The Statement does not include the email address for the Title IX Coordinator.

NPRM Note: The Proposed Regulations contain requirements for the content and publication of the Notice of Non-Discrimination.

THE TITLE IX COORDINATOR

Institutions are also required to designate at least one individual to coordinate its Title IX compliance efforts and to receive complaints of sexual misconduct.¹⁴ Ferris State has done this by designating Kaitlin Zies as its Title IX Coordinator and providing clear access to her contact information by posting it on the University's Title IX website.¹⁵

However, we believe that information regarding the role of the Title IX Coordinator needs to be integrated more prominently and comprehensively into the University's policies and procedures as well in order to align with applicable Guidance. Appendix 1 of the Non-Discrimination Grievance Procedures contains the most comprehensive policy summary of the role of the Title IX Coordinator:

The Ferris State University Title IX Coordinator is responsible for oversight of the University's response to Title IX complaints, identifying and addressing any patterns or systematic problems revealed by such reports and complaints. The Title IX Coordinator is responsible for ensuring the provision of appropriate training and community education relevant to preventing and responding to sexual harassment/violence on campus.

The Title IX website contains a similar description of the Title IX Coordinator's role:

The Ferris State University Title IX Coordinator is the individual who has been designated by the University to oversee compliance with

federal requirements under Title IX. This includes all duties associated with effectively responding to allegations of sexual violence, ensuring annual training campus-wide, and the provision of educational opportunities and prevention efforts for the campus community.

While the descriptions above are helpful, their effectiveness may be undermined by the fact that the other related policy documents contain little or no information about the Title IX Coordinator's role and duties:

- ▶ The Code of Student Community Standards contains no information regarding the role or duties of the Title IX Coordinator;
- ▶ The Sexual Assault Policy (Subpart 8-6) provides a limited description of the role of the T9C: "The University's Title IX Coordinator shall be responsible for administering policies regarding sexual assault."
- ▶ The Relationship Violence & Sexual Misconduct Policy lists the contact information for the Title IX Coordinator (no name or email) along with other offices. There is no information about her role.
- ▶ The Employee Dignity/Harassment/Discrimination policy contains no reference to the Title IX Coordinator or her role; indeed, the policy refers reports of harassment to the supervisor, Director of Employee Relations and Affirmative Action, and/or the Director of Human Resources.
- ▶ The Non-Discrimination Grievance Procedures contain a chart of positions to which reports of Title IX and other complaints of discrimination based on sex can be made, including several Deputy Title IX Coordinators. There is no explanation of how the Title IX Coordinator relates to the Deputy Title IX Coordinators.

The limited information provided regarding the role of the Title IX Coordinator is aggravated by the fact that there is not one primary policy document to which members of the campus community may turn to seek information about Title IX. Rather, there are numerous policy documents, the most comprehensive of which address Title IX within the

¹⁴ See 34 C.F.R. § 106.8(a); See also: 2015 DCL and 2015 Resource Guide; See also, 2017 Q&A Guidance, Answer, Question 1.

¹⁵ See <https://ferris.edu/title-ix/coordinator.htm>.

context of other student conduct or anti-discrimination policies. The two stand-alone Title IX policies contain little substantive information.

Although other guidance has been withdrawn by the current administration, the 2015 DCL and accompanying resource guide regarding the expected role of Title IX Coordinator remain in effect. Ideally, the University's student and employee sexual misconduct policies should make it clear that the Title IX Coordinator is expected to fulfill essential functions. The duties outlined in the Guidance include:

- ▶ Coordinate the institution's compliance with Title IX, including the grievance procedures for resolving Title IX complaints.
- ▶ Be informed of all reports and complaints raising Title IX issues, even if the complaint is filed with another individual or office or the investigation will be conducted by another individual or office.
- ▶ Coordinate the response to all complaints involving possible sex discrimination, including monitoring outcomes, identifying and addressing any patterns, and assessing effects on the campus climate.
- ▶ Participate in the drafting and revision of all policies on sex discrimination to help ensure they comply with Title IX.
- ▶ Coordinate the collection and analysis of an annual climate survey (if one is conducted).
- ▶ Provide training and technical assistance on school policies related to Title IX to assure all members of the University community are aware of their rights and obligations under Title IX.

While almost all of these duties are touched upon in Appendix 1 of the Non-Discrimination Grievance Procedure, we recommend including all the required information in the primary Title IX policy and featuring it more prominently, ideally at the beginning of the document for ease of access.

Task Force Note: The 2018 Task Force Report identified the structure and role of the Title IX Coordinator as a policy and procedure gap. In particular, the Task Force noted that the Title IX Coordinator is not part of the oversight of all cases. We agree this should be addressed.

Appropriation Requirement Note: The annual certification to the State of Michigan requires that the Title IX Coordinator or Title IX Office provide quarterly reports to the University's governing board and president that contain aggregated data of the number of sexual misconduct reports that the office received for the academic year, the types of reports received, including reports received against employees, and a summary of the general outcomes of the reports and investigations. The University must also share its annual Title IX report containing specified statistical and summary data with legislative and governmental officials. We note that Ferris State issued its first such annual report regarding gender-based discrimination and sexual misconduct on October 25, 2018.

Benchmarking Note: During our campus interviews, we received several questions about whether the reporting line of the Title IX Coordinator is consistent with peer institutions. It is our understanding that the Title IX Coordinator reports to the Vice President of Student Affairs. Of the 8 comparator schools evaluated, the majority of Title IX Coordinators report to an equity office or student affairs, while 3 report to the Office of the President.

TRAINING AND EDUCATION PROGRAMS

Training and educational programming designed to prevent sexual misconduct in the first instance is an important component of a strong compliance program. Indeed, OCR has continually conveyed the importance of training and educational programming in the realm of Title IX.¹⁶ These expectations overlap with training and educational programming requirements imposed by VAWA.¹⁷

¹⁶ See 2015 DCL, (discussion of training for Title IX Coordinators).

¹⁷ See VAWA regulations 34 C.F.R. 668.46(k)(2)(ii) (discussion of training for officials involved in investigations and final decisions relating to disciplinary actions of alleged dating/domestic violence, stalking or sexual assault.)

Appropriation Note: The University's annual certification to the State of Michigan contains the following training requirements:

- ▶ For all freshman and incoming transfer students enrolled, an in-person sexual misconduct prevention presentation or course, which must include contact information for the Title IX office of the university.
- ▶ For all students not considered freshmen or incoming transfer students, an online or electronic sexual misconduct prevention presentation or course.

Section VIII of the Non-Discrimination Grievance Procedures provides a comprehensive summary of the training requirements related to issues of non-discrimination, including Title IX. The Policy:

- ▶ Assures that appropriate educational session will be conducted on an ongoing basis to (1) inform students, faculty, and staff about identifying and preventing discrimination and harassment and the problems they cause, (2) advise members of the University community about their rights and responsibilities, and (3) train personnel in the administration of this procedure;
- ▶ Affirms the institution's commitment to provide all community members with education on discrimination awareness, bystander intervention, prevention and risk reduction, and ongoing campaigns and/or programming;
- ▶ Requires individuals conducting investigations to receive annual training on issues related to discrimination and investigation techniques and processes which promote safety and accountability for the university community; and
- ▶ Requires University officials who are involved in the discrimination grievance process including reporting officials, designated investigators, supervisors, managers, Deans, Directors, Student Affairs administrators, and other University leadership, to receive appropriate training on recognizing and appropriately responding to allegations of conduct in violation of University policies.

The other policy documents are silent on the issue of training and education programs, although the Code of Student Community Standards does contain a paragraph about sexual violence education and awareness efforts as well as related campus initiatives.

In addition to the policy language, the Title IX website has information about prevention and education offerings, including the bystander intervention program "Step Up," a prosocial behavior and bystander intervention program that educates students to be proactive in helping others. Step Up training provides a framework explaining the bystander effect, reviews relevant research and teaches skills for intervening successfully using the "5 decision making" steps, combined with the "Direct, Distract, Delegate Model" for effective helping. The website also lists other prevention and education programs, including:

- ▶ **Communication, Choices, & Consent:** An interactive program is presented in collaboration with Lindsay Barber – Director of Birkam Health & Counseling. It covers healthy relationships, consent as well as the Bystander effect, and how to safely and effectively intervene.
- ▶ **Campus Needs You:** Campus Needs You was created by the student assistants at the Ferris State University Title IX Office as a resource for those who want to learn more about rape culture and the importance of consent. The goal of the program is to provide resources for survivors, as well as prevent sexual assault from happening on campus or in the community.

The University also provides a campus speaker series and other facilitated programs.

Task Force Note: The 2018 Task Force Report identified the need for more frequent and comprehensive training for employees and more focused training for addressing sexual misconduct in clinics. The Task Force Report also identifies a number of best practices in the areas of training, education, and prevention work for further internal discussion.

Benchmarking Note: Of the 8 comparator schools we evaluated, the majority of policies or Title IX websites provide reference to training for both students and employees and contain a summary description of the training content. Few policies or Title IX websites provide clear information about the frequency and delivery method of that training. Only 1 policy references annual training, while 2 policies reference training at orientation (students) and upon hire (employees). Of those policies that specify training delivery method, 3 schools provide training both online and in-person, while 1 school provides training only online. Only 3 policies state that training is mandatory, with 1 institution's website elaborating on the imposition of consequences for students who fail to complete.

KEY STATEMENTS OF POLICY

Below we outline the information that should be covered in the University's policies related to sexual misconduct in order to demonstrate compliance with Title IX requirements.

An adequate definition of sexual harassment.¹⁸

The Non-Discrimination Grievance Procedures contain an adequate definition of sexual harassment in Appendix 1: Definitions. The Non-Discrimination Grievance Procedures also include definitions of sexual misconduct (an umbrella term encompassing dating violence, domestic violence, sexual assault, sexual harassment, and stalking), sexual violence, stalking, dating violence, and domestic violence.

It is noted that the definition of sexual harassment in the Non-Discrimination Grievance Procedures is substantively the same as the definition included in the Employee Dignity/Harassment/Discrimination Policy, with the important clarification that the definition covers unwelcome conduct or communication "regarding or on the basis of sex" and also includes examples of behaviors that might create a hostile environment. We recommend that the definition within the Employee Dignity/Harassment/Discrimination Policy be revised to align with the Non-Discrimination Grievance Procedures.

We also note that a definition of sexual harassment is included on the Title IX website under "Ferris Definitions."

However, the website's definition is different than that contained in the Non-Discrimination Grievance Procedures. The website should be revised and aligned with the definition in the Procedures. The website also directs users to the Code of Student Community Standards for more complete information and definitions, yet the Code of Student Community Standards only includes a general definition of "harassment" rather than sexual harassment. This discrepancy should be addressed.

Finally, we recommend that the University consider moving (or including) definitions for all forms of sexual misconduct to the Relationship Violence and Sexual Misconduct Policy. Although that policy currently links to the Non-Discrimination Grievance Procedures, placing the definitions in the Relationship Violence and Sexual Misconduct Policy would make them easier to find and give them greater visibility.

NPRM Note: The Proposed Regulations include definitions of "sexual harassment" and "actual knowledge."

An explanation as to when sexual harassment creates a hostile environment.¹⁹

The Non-Discrimination Grievance Procedures (Appendix 1: Definitions) define sexual harassment to include "any unwelcome conduct or communication regarding or on the basis of sex that is sufficiently persistent or serious as to create an objectively harassing environment and/or interfere with one's ability to participate in or benefit from Ferris State University's programs, services, or activities." The definition goes on to include "unwelcome verbal or other conduct that has the purpose or effect of substantially interfering with a person's working conditions or that creates an intimidating, hostile, or offensive work environment." This last point is included in the definition contained in the Employee Dignity policy as well.

This definition adequately introduces the concept of hostile environment sexual harassment. However, the policy does not explain what factors the University will consider in determining whether conduct raises to the level of creating a hostile environment. This deficiency can be addressed by including those factors in this definition.

¹⁸ 2001 Guidance, discussion on the definition of harassment, p. v.

¹⁹ 2001 Guidance, discussion on the definition of harassment and hostile environment, pp. 5-7.

*Examples of the types of conduct that constitute sexual harassment.*²⁰

The Non-Discrimination Grievance Procedures (Appendix I: Definitions) contain a list of examples when behavior might constitute a hostile environment.

*An adequate definition of sexual violence.*²¹

The definition of “sexual violence” contained within the Code of Student Community Standards and the Non-Discrimination Grievance Procedures satisfies this requirement. We recommend the terms provided within the definition of “sexual violence” (i.e., rape, sexual assault, sexual battery, sexual abuse, and coercion) also be defined in the corresponding policy documents. Some, but not all, of the terms are currently defined in the policy documents and not all definitions are in the same document.

We also recommend that the University consider adding an explicit prohibition against sexual exploitation into its definition of sexual misconduct. Although not required by the Guidance, many schools find it helpful to include such a prohibition and reference. The Code of Student Community Standards already encompasses some elements of sexual exploitation in its prohibition against explicit images. The following are examples of the way other universities define “sexual exploitation”:

EXAMPLE: Sexual exploitation is a form of sexual violence/assault that occurs when a person takes non-consensual or abusive sexual advantage of another for his/her own advantage or benefit, or to benefit or advantage anyone other than the one being exploited, and that behavior does not otherwise constitute one of other sexual misconduct offenses. Examples of sexual exploitation include, but are not limited to: Invasion of sexual privacy; prostituting another; non-consensual video or audio-taping of sexual activity; going beyond the boundaries of consent (such as letting your friends hide in the closet to watch you having consensual sex); engaging in voyeurism; knowingly transmitting a sexually transmitted disease (such as HIV); exposing one’s genitals in non-consensual circumstances; inducing another to expose their genitals.

EXAMPLE: Sexual exploitation is knowingly committing non-consensual abuse or exploitation of another person’s sexuality for the purpose of sexual gratification, financial gain, personal benefit or advantage, or any other non-legitimate purpose.

Examples include, but are not limited to:

- Observing, recording, or photographing another individual’s nudity or sexual activity or allowing another to observe, record or photograph consensual sexual activity without the knowledge and consent of all parties involved under circumstances where the individual would have a reasonable expectation of privacy;
- Streaming or distribution of private images, photography, video or audio recording of sexual activity or nudity without the knowledge and consent of all parties involved;
- Prostituting another individual;
- Exposing one’s genitals in non-consensual circumstances;
- Knowingly exposing another individual to a sexually transmitted infection or virus without their knowledge; and
- Inducing incapacitation for the purpose of making another person vulnerable to non-consensual sexual activity.

*An adequate definition of “consent” (as it relates to sexual misconduct).*²²

The definition of “consent” contained within the Code of Student Community Standards and the Non-Discrimination Grievance Procedures satisfy this requirement.

We note that the concept of incapacitation is referenced in the University’s definition of consent but the term is not defined. Because incapacitation is a critical and common state that negates consent, we recommend including a full definition of incapacitation. In our experience, it is also useful to provide examples of potential signs

20 2001 Guidance, discussion on *quid pro quo* and hostile environment and accompanying examples, pp. 5-7.

21 2015 Resource Guide, discussion on sex-based harassment, p. 15.

22 2015 Resource Guide, discussion on sex-based harassment, p. 15.

of incapacitation such as slurred or incomprehensible speech, vomiting, inhibited physical faculties (i.e. stumbling, inability to hold items), and incontinence.

Benchmarking Note: Five universities of the 8 evaluated include definitions of incapacitation in their policies.

Likewise, Ferris State’s definition of consent refers to the term “coercion” to define what consent is not.²³ Many institutions’ policies emphasize the point that consent means freely agreeing to sexual activity, rather than submitting to it as a result of force or coercion. However, we recommended defining the term coercion, as it is otherwise extremely subjective, particularly in addressing reports where the presence of coercion may be in question.

Benchmarking Note: Six universities of the 8 evaluated include definitions for coercion in their policies.

The following are examples of the way other universities define “coercion”:

EXAMPLE: The use of an unreasonable amount of pressure to gain sexual access. Coercion is more than an effort to persuade, entice, or attract another person to have sex. When a person makes clear a decision not to participate in a particular form of Sexual Contact or Sexual Intercourse, a decision to stop, or a decision not to go beyond a certain sexual interaction, continued pressure can be coercive. In evaluating whether coercion was used, the University will consider: (i) the frequency of the application of the pressure, (ii) the intensity of the pressure, (iii) the degree of isolation of the person being pressured, and (iv) the duration of the pressure.

EXAMPLE: Coercion includes conduct, intimidation, and express or implied threats of physical or emotional harm that would reasonably place an individual in fear of immediate or future harm and that is employed to persuade or compel someone to engage in sexual contact.

EXAMPLE: Coercion may consist of physical force, intimidation, threats, or severe or persistent pressure that would reasonably cause an individual to fear significant consequences if they refuse to engage in sexual contact.

An explanation that prohibited sex discrimination covers sexual harassment, including sexual violence.²⁴

The University satisfies this requirement. The Relationship Violence and Sexual Misconduct Policy clearly states that sexual harassment, including sexual violence, is a form of prohibited gender discrimination. This explanation is also contained in the Code of Student Community Standards and on the Title IX website under the “Title IX” tab.

Sexual harassment and sexual violence are prohibited when the alleged perpetrator and victim are members of the same sex.²⁵

We see no reference to this in the policy and procedure documents. We recommend making this prohibition explicit given applicable Guidance on this point. In our experience, OCR has historically reviewed institutions’ policies for specific prohibitions in this regard.

Benchmarking Note: Only 2 of the 8 universities evaluated explicitly prohibit gender stereotyping in their policies.

Title IX covers claims of harassment based on failure to conform to stereotypical notions of masculinity or femininity (i.e. gender stereotyping).²⁶

Guidance has long taken the position that gender stereotyping is a form of sex discrimination, and courts have generally agreed with this view. While we recognize that Ferris State’s Policy on Non-Discrimination prohibits discrimination on the basis of sexual orientation and gender identity, we recommend that Ferris State consider including this as a prohibited form of gender discrimination. Alternatively, or in addition, Ferris State

²³ The definition of “sexual violence” also references the term “sexual coercion.”

²⁴ 2015 Resource Guide, discussion on sex-based harassment, p. 15.

²⁵ 2001 Guidance, discussion of harassment by parties of the same sex as the victim, pp. 25-26, FN 11.

²⁶ 2001 Guidance, discussion of harassment based on gender stereotypes, p. v, and pp. 25-26, FN 11.

could include within its policies a list of example acts of sexual harassment that illustrate the concept of gender stereotyping.

Benchmarking Note: Only 2 of the 8 universities evaluated explicitly prohibit gender stereotyping in their policies.

Title IX protects all students regardless of national origin.

Ferris State's Policy on Non-Discrimination prohibits discrimination and harassment on the basis of national origin generally. However, the OCR's 2015 Resource Guide specifically provides that Title IX protections apply regardless of national origin. Notably, OCR's withdrawn 2014 Q&A Guidance specifically extended to individuals irrespective of national origin, immigration status or citizenship. While this guidance has been withdrawn, an individual's immigration status and citizenship would have no impact on their ability to be protected from misconduct, and, given the commitments clearly expressed in the University's policy, we have no reason to believe the University is not applying the policy equally to community members regardless of national origin, immigration status, or citizenship status. We recommend, therefore, that the University consider including a short statement explicitly addressing this standard in Title IX-related policy statements.

Retaliation is prohibited.²⁷

The Code of Student Community Standards and Non-Discrimination Grievance Procedures both contain a clear prohibition against retaliation. While the Code of Student Community Standards includes a definition of retaliation, the Non-Discrimination Grievance Procedures do not. We recommend that the University consider including a definition of retaliation in the Procedures.

EXAMPLE: Retaliation: an action, performed directly or through others, that is aimed to deter a reasonable person from engaging in a protected activity or is done in retribution for engaging in a protected activity. Action in response to a protected activity is not retaliatory unless (1) it has a materially adverse effect on the working, academic, or other University-related environment of an individual; and (b) it would not have occurred in the absence of the protected activity.

Examples of materially adverse action that could constitute retaliation include but are not limited to:

- Giving a negative performance evaluation or grade;
- Negative decisions relating to one's work assignment, vacation or promotion or advancement opportunities (employment or academic);
- Reducing one's salary;
- Removal from a student organization, academic program, or lab;
- Interfering with a job search;
- Engaging in harassment conduct that is sufficiently severe, pervasive and/or persistent to create a hostile environment, judged by both an objective and subjective perspective; and
- Threats to engage in any of the actions listed above.

Include the name or title, office address, telephone number, and email address of the Title IX Coordinator.²⁸

See the analysis above regarding the identification of, and information provided for, the Title IX Coordinator.

NPRM Note: This requirement remains unchanged in the Proposed Regulations.

²⁷ 34 C.F.R. § 106.71 (incorporating by reference 34 C.F.R. § 100.7(e)); and 2015 Resource Guide, p. 24.

²⁸ 34 C.F.R. § 106.8(a); 2015 Resource Guide, p. 6.

Title IX Coordinator responsibilities include (1) overseeing the process of responding to sexual misconduct complaints, and (2) identifying and addressing any patterns or systemic problems that arise during the review of such complaints. The policies should include a statement regarding the Title IX Coordinator's responsibilities that cover these concepts.

The University's policies contain minimal and dispersed information about the role of the Title IX Coordinator. The Non-Discrimination Grievance Procedures contains the most comprehensive description of the role in Appendix 1. The Appendix makes clear that the Title IX Coordinator is responsible for oversight of the University's response to Title IX complaints, identifying and addressing any patterns or systemic problems revealed by such reports and complaints. The Title IX Coordinator is also responsible for ensuring the provision of appropriate training and community education relevant to preventing and responding to sexual harassment/violence on campus.

The body of the Non-Discrimination Grievance Procedures contains a chart of reporting offices for complaints of discriminatory conduct, including Title IX. That chart includes references to the Title IX Coordinator and several deputy coordinators. The Non-Discrimination Grievance Procedures also reference the Title IX Coordinator as the recipient of appeals from investigation findings/conclusions.

In contrast to the Non-Discrimination Grievance Procedures, the other relevant policies provide less fulsome information about the role of the Title IX Coordinator:

- ▶ The Code of Student Community Standards includes an entry labelled "Reporting to the University Title IX Coordinator" with the Coordinator's name and contact information. No information is provided, however, regarding the Title IX Coordinator's role or responsibilities.
- ▶ There is no mention of the Title IX Coordinator in the Relationship Violence and Sexual Misconduct policy.

- ▶ Mention of the Title IX Coordinator is notably absent from the Policy on Non-Discrimination. That policy states that violations should be reported to the Office of Equal Opportunity, Office of Human Resources, appropriate Vice President, Dean or supervisor, or other appropriate University officials.
- ▶ The Sexual Assault Policy contains only a brief mention of the Title IX Coordinator as the person responsible for administering policies regarding sexual assault.
- ▶ The Title IX website briefly describes the Title IX Coordinator as the "Individual designated by the University to oversee compliance with federal requirements under Title IX."

Although other guidance has been withdrawn by the current administration, the 2015 DCL and accompanying resource guide regarding the expected role of Title IX Coordinator remain in effect. Ideally, Ferris State's sexual misconduct policies should make it clear that the Title IX Coordinator is expected to fulfill essential functions, such as:

- ▶ Monitoring outcomes
- ▶ Identifying and addressing patterns
- ▶ Drafting and revising policies
- ▶ Collecting and analysis of information from climate survey
- ▶ Case intake
- ▶ Coordinating or supervising the provision of interim measures

We recommend that to the extent the Title IX Coordinator is involved in these activities, that these core functions be referenced consistently and prominently in the University's Title IX-related policies. The following sample language from another institution's policy describes the role of the Title IX Coordinator:

EXAMPLE: The Title IX Coordinator oversees the College's centralized review, investigation, and resolution of reports of Prohibited Conduct. The Title IX Coordinator also coordinates the College's compliance with Title IX.

The Title IX Coordinator is:

- Responsible for oversight of the investigation and resolution of all reports of Prohibited Conduct;
- Knowledgeable and trained in relevant state and federal laws and College policy and procedure;
- Available to advise any individual, including a Complainant or Respondent, about the courses of action available at the College, both informally and formally;
- Available to provide assistance to any College member regarding how to respond appropriately to reports of Prohibited Conduct;
- Responsible for monitoring full compliance with all requirements and timelines specified in the complaint procedures; and
- Responsible for compiling Annual Reports.

A school should make clear to all of its employees and students which employees have an obligation to report sexual misconduct so that students can make informed decisions about whether to disclose information to those employees and so the employees know of their reporting obligations.²⁹

The University has a Responsible Employee Policy that defines the term to include any employee:

- Who has the authority to take action to redress sexual harassment including sexual violence, or
- Who has a duty to report to appropriate school officials (Title IX Coordinator) sexual harassment including sexual violence or any other misconduct by students or employees; or
- Whom an individual could reasonably believe has this authority or responsibility.

The Policy then lists 14 categories of officials who have been designated as Responsible Employees for complaint reporting purposes. This includes faculty members, part-time instructors, and adjunct instructors.

In addition to the categories of officials designated as Responsible Employees, the Policy states: "Not all employees are identified as Responsible Employees in this policy; however, if an individual could reasonably believe an employee has the authority or responsibility to report, they would be considered a responsible employee. Given that, all employees should immediately share all known details of an incident of sexual violence (names of the alleged perpetrator(s) and individual(s) involved as well as pertinent facts concerning the alleged occurrence – date, time, and location) with the Title IX Coordinator or designee to help protect students (and employees) and the campus community."

Portions of this policy are reproduced or summarized in other policy documents, including the Code of Student Community Standards, Non-Discrimination Grievance Procedures, and Relationship Violence & Sexual Misconduct Policy. However, they generally do not contain the list of officials designated as Responsible Employees or language clarifying the reporting expectations for all employees. This has the potential to lead to confusion as to whether all employees are required to report or only those officially designated as a Responsible Employee. During our campus visit, we were informed that all employees (other than counselors and medical professionals constrained by confidentiality and privilege issues) are required to report sexual violence and sexual misconduct to the Title IX Coordinator. If that is the intent of the policy, we recommend the policy language be simplified to make that expectation clear.

Multiple policy documents provide information to Responsible Employees and members of the campus community regarding their reporting options:

- The Responsible Employee Policy requires immediate reports of sexual violence to the Title IX Coordinator.
- The Code of Student Community Standards directs Responsible Employees to report to the appropriate University official.

²⁹ 2001 Guidance, discussion on notice of harassment, p. 13.

- ▶ The Relationship Violence & Sexual Misconduct Policy requires reports to the Title IX Coordinator but lists contact information for the Title IX Coordinator, deputy coordinators, Director of Equal Opportunity, and Associate Vice President – Human Resources.
- ▶ The Non-Discrimination Grievance Procedures state that Title IX and other complaints of discrimination based on sex, including sexual harassment, sexual violence, sexual assault, dating violence, domestic violence, stalking, or gender discrimination go to the offices listed in the reporting chart. That chart lists six positions to which reports can be made depending on the status of the complainant, including the Title IX Coordinator, deputy coordinators, and Director of Equal Opportunity/Staff Attorney.

Under Title IX, only a school’s “responsible employees” have an obligation to report incidents of sexual misconduct. The 2001 Resource Guide specifies responsible employees as those (1) who have the authority to take action to redress sexual misconduct; (2) who have been given the duty of reporting incidents of sexual misconduct or any other misconduct by students to the Title IX Coordinator or other appropriate school designee; or (3) who could reasonably be believed to have this authority or duty. In lieu of designating “responsible employees,” some institutions choose to require, as a matter of institutional policy, that all of its employees report information about sexual misconduct. In our experience, requiring all employees to report sexual misconduct, as opposed to identifying responsible employees, eliminates confusion about who must report and in what circumstances. The universal requirement (excluding confidential reporters) is arguably easier to communicate to employees—clearly articulating the University’s expectation that employees fulfill this reporting obligation.

We are concerned that directing reports to different offices, depending upon the status of the reporting party, creates some risk of a report not getting to the right place and raises questions about the role the Title IX Coordinator is fulfilling in overseeing all reports and investigations of sexual misconduct. Many schools that we work with have one party or office (usually the Title IX Coordinator) who receives these reports. This ensures that all reports go directly to a party who is trained and who has knowledge of Ferris State’s process directs the report to the right

office, thereby ensuring that the institution is complying with its obligations for responding to the potential victim and providing them with their rights and options.

We also have concern that the policy language regarding reporting is inconsistent with respect to the types of potential offenses that must be reported. Some policies speak to harassment and misconduct (Code of Student Community Standards and Non-Discrimination Grievance Procedures); others refer to sexual violence (Responsible Employee Policy & Title IX website); while others reference sexual misconduct (Relationship Violence & Sexual Misconduct Policy). While we anticipate that the intent of the reporting provisions is to require employees to report all claims of any form of sexual misconduct, including other defined terms, the policy documents should be revised to use consistent terminology and include all such policy offenses.

Although the Responsible Employee Policy asks that Responsible Employees make every attempt to ensure the reporting individual recognizes the option to request confidentiality and other policy documents state that Responsible Employees shall remind complainants of the availability of resources for confidential reporting, we advise Ferris State to consider explaining to students in advance the implications of faculty, housing staff, and other designated employees being required to report. With that in mind, we recommend that the institution consider adding a sentence to its Code of Student Community Standards (or other primary student resource document) to the effect: “Students should be aware that sharing information regarding sex discrimination, sexual harassment, or related retaliation with an employee of the University, other than a designated confidential resource, will result in that employee sharing the information with an appropriate University official for review and investigation.” Many schools also consider including such language in course syllabi, which we note was a best practice identified in the 2018 Task Force Report.

Benchmarking Note: Of the 8 comparator schools evaluated, 5 designate all employees as responsible employees, while 3 schools designate broad categories of positions as responsible employees (e.g., academic administrators, supervisors, police, student affairs, human resources, athletics, academic advisors, housing and residence life, faculty and other instructors, Campus Security Authorities.)

NPRM Note: The Proposed Regulations limit the range of employees for whom knowledge of sexual harassment constitutes actual knowledge on behalf of the institution and triggers the institution's obligations to initiate its formal grievance process.

KEY PROCEDURAL ELEMENTS

Title IX requires that schools adopt and publish grievance procedures providing for prompt and equitable resolution of student and employees complaints of sex discrimination,³⁰ including sexual harassment and sexual violence.³¹ In this section, we identify procedural elements required for the University's policies and procedures to align with Title IX guidance.

*A statement of the school's jurisdiction over sexual misconduct complaints. The school will take steps to respond to sexual misconduct that initially occurred off school grounds if such conduct occurred in the context of an educational program or activity, and redress a hostile environment that occurs on campus, even if it relates to off-campus activities.*³²

The statements of jurisdiction contained in the Non-Discrimination Policy and Code of Student Community Standards meet the primary elements of the above requirement. The Non-Discrimination Policy prohibits unlawful discrimination in connection with any aspect of programs or opportunities, services to the public, or employment and contains no geographic limitation.

The Code of Student Community Standards has a similarly broad reach. Section II of the Code states that the Standards apply to conduct that occurs on Ferris State University property, at Ferris State University sponsored activities, and to off campus conduct that adversely affects the health and safety of the Ferris State University community and/or the pursuit of its objectives. Section IV of the Code permits the University to discipline a student for the enumerated acts of misconduct that occur off

campus if the misconduct (a) undermines the security of the University community, (b) adversely affects the health and safety of Ferris University community and/or the pursuit of its objectives; or (c) compromises the integrity of the educational process. The enumerated acts of misconduct include dating violence, domestic violence, explicit images, harassment, sexual misconduct/harassment/assault, and stalking.

The 2017 Guidance emphasizes the "programs and activities" analysis when considering whether off campus conduct falls under Title IX's discrimination prohibition. The Guidance restates OCR's previous interpretation of Title IX jurisdiction that "a university does not have a duty under Title IX to address an incident of alleged harassment where the incident occurs off-campus and does not involve a program or activity of the recipient."³³ The Guidance goes on to note, however, that schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off campus activities.

Although the University has provided jurisdictional statements that meet the minimum requirements in the Code of Community Standards and Non-Discrimination Grievance Procedures, we note that there is no statement of jurisdiction in either the Relationship Violence & Sexual Misconduct Policy or Sexual Assault Policy. We recommend that the University include an explicit jurisdictional statement about off campus sexual misconduct in these policies so that the information is easily accessible to employees and other members of the campus community.

NPRM Note: The Proposed Regulations address jurisdiction for responding to conduct that occurs outside of its educational programs or activities.

³⁰ 34 C.F.R. § 106.8.

³¹ 2015 DCL, discussion on sex-based harassment, p.15.

³² 2017 Q&A Guidance, discussion at FN 3.

³³ 2017 Q&A Guidance, discussion at FN3.

Notice must be given to campus community members of the grievance procedures and where complaints can be filed.³⁴ Must have procedures that apply to complaints against students, employees, and third parties.³⁵

While the policies and procedures that we reviewed relating to sexual discrimination, sexual harassment and sexual misconduct address where complaints can be directed and what procedures apply for employees, students and third parties, the topic of submitting a complaint is spread across multiple policies. In our view, the current structure can be difficult to navigate and challenging for a lay person—particularly a student—to understand. In general, we recommend the University consider ways to centralize the prohibitions related to sexual misconduct applied to all University community members. For example, the University could create an omnibus sexual misconduct policy applicable to all campus community members that contains a common set of reporting information and definitions of prohibited conduct, while maintaining its existing grievance procedures that do a thorough job of explaining the investigation procedures. The omnibus policy would have one uniform set of definitions and uniform discussion of reporting sexual misconduct, confidentiality, retaliation, and interim measures. The University could maintain its separate grievance procedures applicable to all discrimination complaints, but would have a single policy that outlines the critical information that needs to be consistently communicated to all community members regarding sexual misconduct.

In addition to our recommendation for an omnibus policy, we refer to our earlier comments about reporting structure and where reports must be filed. Having multiple individuals designated to receive reports, other than the Title IX Coordinator, raises questions about the role the Title IX Coordinator is fulfilling in overseeing all reports and investigations of sexual misconduct. Interviews conducted during our on campus visit demonstrate that there is communication with the Title IX Coordinator. However, in our experience, the best practice suggests that complaints be overseen centrally by the Title IX Coordinator, with communication and delegation coming

from the Title IX Office to the various administrators and other delegated individuals to carry out investigative and resolution functions, as opposed to the reverse.

Finally, we have two specific observations about the existing grievance procedures. The Code of Student Community Standards sets forth confidential support options for students. We were unable to find any references to confidential support and assistance for employees and recommend that a policy reference be included if such resources exist. Second, we note that the Non-Discrimination Grievance Procedures state that they are designed to provide a mechanism to grieve discrimination carried out by other University community members. On first glance, this appears to create a gap regarding complaints against third parties. Although the definition of University community contained in the appendix is expansive and encompasses vendors, guests, visitors, and others, we recommend that the University consider clarifying in the body of the policy that these procedures cover complaints against third parties.

NPRM Note: The Proposed Rules seek to address the circumstances when a school must initiate its grievance procedures to respond to allegations of sexual harassment. This includes the definition of a “formal complaint” and safe harbor provisions if a formal complaint is not filed. The Proposed Rules also articulate when a school must terminate its grievance process due to lack of jurisdiction.

Schools should provide an assurance that they will take steps to prevent the recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.³⁶

This requirement is met. The Non-Discrimination Grievance Procedures articulate which offices are responsible for taking “appropriate corrective and/or disciplinary action and/or other remediation to prevent reoccurrence, retaliation, and/or to redress prohibited conduct.” Similarly, the Code of Student Community Standards allows the flexibility of sanctioning to include a range from administrative warning to permanent dismissal

³⁴ 34 C.F.R. § 106.8

³⁵ 2001 Guidance, p. 19.

³⁶ 2011 Guidance, discussion of principles from 1997 guidance, p. iii.

from the institution. As stated in the Code: “Ultimately the goal is to eliminate the hostile environment, address the effects of the behavior and seek to prevent any recurrence.”

We recommend the University consider supplementing its current policy statements with additional information about broader action that may be taken in response to Title IX violations in addition to individual sanctions. The Relationship Violence & Sexual Misconduct Policy has a strong statement about disciplinary action and sanctions. This would be a natural place to include language assuring that the University will take remedial and preventative steps to correct discriminatory effects and prevent the recurrence of harassment.

There should be a statement that the school will take steps to provide interim measures to the reporting or responding party, as necessary, including taking interim steps before the final outcome of the investigation; this may involve changing academic or living situations, as appropriate.

This requirement is met. Both the Non-Discrimination Grievance Procedures and the Code of Student Community Standards have a comprehensive section on interim measures.

We note that the Relationship Violence and Sexual Misconduct Policy contains a section titled “Accommodations” which is different and more abbreviated than the other policy documents on the same subject. This section indicates that accommodations regarding alternate living, working, and class schedules will be made, as available and appropriate, through the Office of Academic Affairs, the Office of Human Resources, the Office of Student Employment and the Office of Residential Life and Housing. There is no mention of the Title IX Coordinator. We recommend that the policy language be aligned with other policies on this topic and revised to reinforce the role of the Title IX Coordinator in providing or overseeing interim measures.

The recent Guidance from OCR highlights the importance of making interim measure determinations on a case-by-case basis and applying them fairly to both parties. Schools should not make interim measures available to only one party, or rely on operating assumptions that favor one

party or another. The University’s policies appear fair and uniform with respect to the parties. We note that there is no information in the policy about how to request interim measures, nor is there anything on the Title IX website. We recommend that the process to request an interim measure be included within one of the primary policy documents.

NPRM Note: The Proposed Regulations include a definition of “supportive measures” and also address administrative leave for non-students and requirements that would be required to be followed to remove students on an emergency basis.

Throughout the investigation, both parties must have an equal opportunity to present relevant witnesses and other evidence.³⁷

The University satisfies this requirement. Such a statement is found in both the Code of Student Community Standards and the Non-Discrimination Grievance Procedures.

NPRM Note: The Proposed Rules contain a list of numerous required elements for grievance procedures.

Explanation of the standard of evidence used to evaluate allegations of sexual misconduct, by either a “preponderance of the evidence standard” (more likely than not that the alleged conduct occurred) or “clear and convincing standard.” The standard which is utilized in sexual misconduct cases must be consistently applied to all student misconduct cases.³⁸

The University satisfies this requirement. The Code of Student Community Standards provides that findings of responsibility for all student code violations are based on a preponderance of the evidence standard and explains that as “more likely to have occurred than not.” Similarly, the Non-Discrimination Grievance Procedures state that a preponderance of the evidence standard will be used when determining if the respondent engaged in conduct in violation of University policy. This is explained as follows: “the investigator must conclude that it is more likely than

³⁷ 2017 Q&A Guidance, p. 5, Q8.

³⁸ 2017 Q&A Guidance, p. 5, Q8.

not that the totality of facts and circumstances found reveal that one or more violations of University policy have occurred.”

NPRM Note: The Proposed Regulations permit a school to use either a “preponderance of the evidence” or “clear and convincing” standard, provided that the same standard is used for other conduct code violations that carry the same maximum disciplinary sanction and the same standard is used for complaints against students as for employees, including faculty.

*Both parties must be notified in writing of the outcome of the complaint and any appeal.*³⁹

The University satisfies this requirement. Both the Code of Student Community Standards and Non-Discrimination Grievance Procedures assure that both parties are notified in writing of the outcome of the complaint and any appeal.

In addition, new OCR guidance states that “[t]he parties should have the opportunity to respond to the report in writing *in advance* of the decision of responsibility and/or a live hearing to decide responsibility.” This is not addressed in any of the policy documents. We recommend as a best practice and a method to protect against due process claims—particularly given the degree of scrutiny on such issues in relevant litigation within the Sixth Circuit—that the University’s procedures be updated to address this new guidance.

NPRM Note: The Proposed Regulations impose new requirements on sharing evidence obtained during the investigation with the parties and providing an opportunity to comment on the evidence. The Proposed Regulations also impose requirements for sharing the investigation report with the parties for review and comment prior to a hearing or determination of responsibility and for the written determination regarding responsibility.

Appropriation Requirement Note: The annual certification to the State of Michigan requires that for Title IX investigations of alleged sexual misconduct, the University prohibits the issuance of different reports to complainants, respondents, and administration and instead requires that identical reports be issued to them.

There must be reasonably prompt timeframes for major stages of the complaint process.

Grievance procedures should specify time frames within which: (1) the school will conduct a full investigation of the complaint, (2) both parties receive a response regarding the outcome of the complaint, and (3) the parties may file an appeal (if applicable). The 2017 OCR guidance states that there is “no fixed timeframe under which a school must complete a Title IX investigation.” It does, however, include a provision that schools designate and follow reasonably prompt time frames for major stages of the complaint process.

The University’s policies discuss timeframes for the major stages of the process, although not all within the same policy document. The Code of Student Community Standards contains timeframes for the investigation process and submitting appeals. The Non-Discrimination Grievance Procedures contain a timeframe for investigation; timeframe for submitting appeals (which is different than the timeline in the Code of Student Community Standards); and a timeframe for receiving an appeal response. We recommend that these policy documents be aligned and made consistent with one another.

We also note that the investigation timeframe outlined in the policy documents is different than what is articulated in the Victim Booklet. Both the Code of Student Community Standards and Non-Discrimination Grievance Procedures state that the investigator will attempt to conclude the investigation process within 60 days when the parties, witnesses, and evidence needed by the investigator are readily available. The 60 day goal does not include any appeal processes or dates by which support services, educational responses, and/or final corrective or disciplinary actions or other dispositions must be completed. In contrast, the Victim Booklet states that the University will make every reasonable effort to conclude its investigation and subsequent resolution within 60 days of notice provided to the University. These descriptions of the timelines should be made consistent.

NPRM Note: The Proposed Rules contain requirements for reasonably prompt timeframes, as well as written notification to the parties of extensions for good cause.

³⁹ 2017 Q&A Guidance, p. 6.

VAWA REQUIREMENTS

Here, we examine VAWA's procedural requirements. Please note that due to the overlap with Title IX, some of the topics covered above will also be discussed in this section. For example, both Title IX and VAWA require a discussion of sanctions that may be imposed. Given the overlap between issues addressed by Title IX's prohibition against sex discrimination and VAWA's requirements related to sexual assault, domestic violence, dating violence, and stalking, the University must meet the following requirements to ensure that it has effective response and prevention efforts in place with regard to these issues.

*The institution must have procedures that it will follow once an incident of domestic violence, dating violence, sexual assault, or stalking has been reported.*⁴⁰

The University meets this standard. However, some confusion is created by the multiple sources of information and documents, each involving some, but not all, aspects of the University's Title IX procedure. Further adding to this confusion is that there are both redundancies and inconsistencies across the various documents.

Section III of the Code of Student Community Standards covers sexual violence and other prohibited gender based offenses, including stalking and relationship violence based on gender and provides a detailed explanation of procedures that will be followed once a report is made. Although Section III does not use the terms domestic violence and dating violence, those terms are explicitly referenced later in the document. The terms dating violence, domestic violence, sexual misconduct/harassment/assault, and stalking are all included and defined as forms of individual misconduct in Section IV: General University Conduct Policies. Consent is defined in both sections III and IV; sexual misconduct is included in Section IV; and sexual violence is included in section III.

The Non-Discrimination Grievance Procedures also provide a detailed explanation of the procedures that will be followed once a report of sexual violence or other misconduct is made. The Procedures include definitions

of sexual violence; stalking, dating violence and domestic violence. This definition of sexual violence is the same as in the Code of Student Community Standards but the definition of dating violence is different: the Code of Student Community Standards references Michigan criminal law, while the Non-Discrimination Grievance Procedures references the Michigan Department of Human Services.

The Title IX website contains definitions for dating violence, domestic violence and stalking which are different than those in the other policy documents. Notably, the Relationship Violence & Sexual Misconduct Policy contains no definition of the terms. In contrast, the Victim Booklet contains definitions of domestic violence, dating violence, sexual assault, and stalking, along with explanatory information about each concept. We recommend that all definitions be aligned within the policy documents and that the definitions appear prominently in a Title IX-specific policy.

Finally, we question why the University has a separate Sexual Assault Policy. This policy prohibits sexual assault, domestic violence, dating violence, and stalking, which is duplicative of the Relationship Violence & Sexual Misconduct Policy. Consideration should be given to whether both policies are necessary.

*A description of the steps, anticipated timelines, and decision-making process.*⁴¹

The University meets this standard.

The Code of Student Community Standards includes the range of possible sanctions that might be imposed following a final determination. These are the range of possible sanctions for all student conduct cases not just Title IX.

The Non-Discrimination Grievance Procedures state: "The Code of Student Community Standards, applicable collective bargaining agreements, and University policies regarding corrective or disciplinary action allow for a range of appropriate responses to conclusions of policy violation, including but not limited to, written or verbal counseling, written or verbal sanction, warning, assignment of educational programming, financial and/or service in

⁴⁰ 34 C.F.R. § 668.46(k).

⁴¹ 34 C.F.R. § 668.46(k)(1)(i).

restitution, paid or unpaid leave or suspension, expulsion, termination, and/or other restriction to access, use, and/or other institutional services, privileges, or resources.”

*The standard of evidence that will be used during an institutional conduct proceeding arising from such a report.*⁴²

The University meets this standard.

*The possible sanctions or protective measures that an institution may impose following a final determination.*⁴³

The University meets this standard.

The Code of Student Community Standards includes the range of possible sanctions that might be imposed following a final determination. These are the range of possible sanctions for all student conduct cases not just Title IX.

The Non-Discrimination Grievance Procedures state: “The Code of Student Community Standards, applicable collective bargaining agreements, and University policies regarding corrective or disciplinary action allow for a range of appropriate responses to conclusions of policy violation, including but not limited to, written or verbal counseling, written or verbal sanction, warning, assignment of educational programming, financial and/or service in restitution, paid or unpaid leave or suspension, expulsion, termination, and/or other restriction to access, use, and/or other institutional services, privileges, or resources.”

*The proceedings will be prompt, fair, and impartial from the initial investigation to the final result.*⁴⁴

While much of this point contemplates how the process is carried out (rather than information that should be provided in a written policy), our opinion is that there should be a direct statement that the proceedings will be prompt, fair, and impartial. Both the Code of Student Community Standards and the Non-Discrimination

Grievance Procedures contain the following statement within the investigation process section: “In all cases, the University’s investigation shall be prompt, fair, and impartial.”

While this language aligns with Title IX guidance, we recommend including an expanded statement to cover all stages of the proceedings that includes an explicit reference to prompt, fair and impartial proceedings.

*The proceedings will be conducted by officials who receive annual training on the issues related to domestic violence, dating violence, sexual assault, and stalking and how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability.*⁴⁵

It is not clear whether each official involved in implementing any aspect of the procedures is appropriately trained on Title IX/VAWA issues as well as on how to execute their particular roles in the process. The Non-Discrimination Grievance Procedures state: “Individuals conducting investigations on behalf of the University shall receive annual training on issues related to discrimination and appropriate investigation techniques and processes which promote safety and accountability for the University community. University officials who are involved in the discrimination process, including reporting officials, designated investigators, supervisors, managers, Deans, Directors, Student Affairs administrators, and other University leadership, will receive appropriate training on recognizing and appropriately responding to allegations of conduct in violation of University policies.” We understand that this standard may be met in practice, but nonetheless recommend that the policies contain a more explicit explanation covering this VAWA standard.

⁴² 34 C.F.R. § 668.46(k)(1)(ii).

⁴³ 34 C.F.R. § 668.46(k)(1)(iii).

⁴⁴ The VAWA regulations indicate that a prompt, fair, and impartial proceeding includes a proceeding that: (A) is completed within reasonably prompt timeframes designated by an institution’s policy, including a process that allows for the extension of timeframes for good cause with written notice to the accuser and the accused of the delay and the reason for the delay; (B) is conducted in a manner that is consistent with the institution’s policies and transparent to the accuser and accused, includes timely notice of meetings at which the accuser or accused, or both, may be present, and provides timely and equal access to the accuser, the accused, and appropriate officials to any information that will be used during informal and formal disciplinary meetings and hearings; and (C) is conducted by officials who do not have a conflict of interest or bias for or against the accuser or the accused.

⁴⁵ 34 C.F.R. § 668.46(k)(2)(ii).

Task Force Note: The 2018 Task Force Report identified the need for more consistent training for those working with Title IX investigations and those who adjudicate cases. The Task Force also identified the need to better document this training. We recommend both items be addressed.

*The accuser and the accused are entitled to the same opportunities to have others present during institutional disciplinary proceedings, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice.*⁴⁶

The University meets this standard.

Under VAWA, an institution may not limit the choice of the advisor or presence for either the accuser or the accused in any meeting or institutional disciplinary proceeding; however, the institution may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties. Both the Code of Student Community Standards and the Non-Discrimination Grievance Procedures contain equal rights for parties to be accompanied by an advisor during the investigation. The Code of Student Community Standards also contains equal rights for parties to be accompanied by an advisor throughout disciplinary proceedings. We are concerned that the Standards, as drafted, may be too narrow, as the parties are entitled to an advisor at any meeting related to resolution of the complaint, *as well as* the preceding investigation of it. The current policy language should be revised to align to this standard.

We note that the Non-Discrimination Grievance Procedures are clear that the advisor must be “non-participatory” and the Code of Student Community Standards has additional language regarding the role of the advisor which is helpful. To add clarity for the parties involved, the University may wish to also include that the advisor may not directly address an investigator or hearing panel member or advocate on behalf of the party. We also recommend adding that the advisor may be removed for not abiding by the restrictions imposed or otherwise becoming disruptive. The University may also want to

consider having advisors sign a document at the outset affirming their understanding of their role in the process, which we believe is a best practice utilized by many institutions to ensure that the expectations for the advisor role is clear.

Finally, we note that the Relationship Violence & Sexual Misconduct Policy has a section titled “Victim’s Rights.” In this section, it states: “Victims have the same right as the accused to have the support of an advocate during disciplinary and criminal processes and to be notified of hearings.” This section should be revised to address the rights of both parties and align the language regarding advisors (as opposed to advocates) with language in other policy documents.

*Both the accuser and the accused shall be simultaneously notified in writing of: (a) the result of any institutional disciplinary proceeding that arises from an allegation of sexual assault, dating violence, domestic violence, or stalking; (b) the institution’s procedures for the accused and the victim to appeal the result of the disciplinary proceedings, if such procedures are available; (c) any change to the result; and (d) when such results become final.*⁴⁷

The Universities policies contain most of the required elements but should be refined to capture several nuances.

- › The Code of Student Community Standards provides both parties with the right to be notified in writing concurrently of the outcome of the conduct conference. The complainant is notified that the respondent may appeal the initial decision. The respondent is notified that the complainant may appeal the initial decision. Presumably both parties are also notified of their own appeal rights but that should be clarified, as well as the procedures to appeal.

⁴⁶ 34 C.F.R. § 668.46(k)(2)(iii).

⁴⁷ 34 C.F.R. § 668.46(k)(2)(iv).

- ▶ The Code of Student Community Standards states that both parties will be notified if an appeal is received, if the appeal has been accepted, and if applicable, any amendment to the charges or sanctions. Presumably this contemplates simultaneous notice, but that should be clarified, as well as notice as to when the decision becomes final.
- ▶ The Non-Discrimination Grievance Procedures provide that the investigator's finding and conclusions shall be simultaneously distributed in writing to the parties. They also provide that notice of University factual findings, discipline, corrective action, and/or other remediation along with notice of any opportunity to appeal shall be simultaneously made available, in writing, to the complainant(s) and respondent(s). The procedures to appeal should be included in the notice.
- ▶ The Non-Discrimination Grievance Procedures state that when an appeal is filed, notice of the appeal determination will be provided to the parties. Presumably this is simultaneous, but this should be clarified. The policy should also clarify that when being notified of the outcome, the notification will include any change to the prior decision and when such results become final.

Regarding point (d) of the requirement (when results become final), policy language regarding notification at the outcome of the appeal helps meet this compliance point. However, parties should also be notified that the matter is closed when the timeline for filing an appeal has passed and no appeal has been filed.

Finally, we note that the Relationship Violence & Sexual Misconduct Policy has a section titled "Victim's Rights." This section states: "The right to be notified of the outcome of the proceeding, to the extent allowed under law, is also a right afforded to the victim." This language should be revised to address the rights of both parties and to align the language regarding notifications with language in the other policy documents.

*The importance of preserving evidence that may assist in proving that the alleged criminal offense occurred or may be helpful in obtaining an order of protection.*⁴⁸

The University's policy documents do not meet this requirement. Although there is a brief question & answer document titled "What should I do about preserving evidence of a sexual assault" in the Code of Student Community Standards, it does not satisfy the above requirement. There is nothing regarding the topic in the Non-Discrimination Grievance Procedures, Relationship Violence & Sexual Misconduct Policy, or Sexual Assault Policy. There is also nothing on this point on the Title IX website other than a link to the "Victim Booklet." The Victim Booklet contains the most comprehensive section on preserving evidence. This should be updated to include reference to obtaining an order of protection. We recommend this requirement be addressed in the body of a Title IX policy itself and not only within the Victim Booklet.

*How and to whom the alleged offense should be reported.*⁴⁹

As discussed earlier, we recommend that information regarding reporting options be centralized and made consistent. Having numerous reporting options depending on the identity of the reporter can be confusing. We recommend that all reports be directed to the Title IX Coordinator who may then refer them to other offices where appropriate.

We also recommend that all of the University's policies be updated to include contact and other information about reporting to law enforcement. For example, the Code of Student Community Standards includes a reference to victims being made aware of their right to report to law enforcement, but no contact information or information about how to report to law enforcement is provided. In contrast, the Non-Discrimination Grievance Procedures contact information for law enforcement.

When providing law enforcement contact information, the policies should identify local police in addition to

⁴⁸ 34 C.F.R. § 668.46(b)(11)(ii)(A).

⁴⁹ 34 C.F.R. § 668.46(b)(11)(ii)(B).

the Ferris State police. We note that this is done for the KCAD campus in both the Non-Discrimination Grievance Procedures and the Victim Booklet.

Options regarding law enforcement and campus authorities, including notification of the victim's option to: notify proper law enforcement authorities, including on-campus and local police; be assisted by campus authorities in notifying law enforcement authorities if the victim so chooses; and decline to notify such authorities.⁵⁰

Law enforcement contact information is provided in the primary policy documents but in our assessment it is not clear that reporting to law enforcement is not required. Moreover, the language regarding reporting to law enforcement differs between policies. The Non-Discrimination Grievance Procedures state that criminal behavior should be reported to Public Safety or other local law enforcement authorities; the Code of Student Community Standards states that victims will be made aware of their right to report the incident to law enforcement; and the Relationship Violence & Sexual Misconduct Policy states that individuals reporting incidents of sexual misconduct may be encouraged but shall not be required to report criminal conduct to law enforcement authorities. The policy language amongst these documents should be aligned and consistent.

In contrast, the Victim Booklet contains a clear explanation of options about involvement of law enforcement activities that meets the above standards; this should be incorporated into the policy documents.

Task Force Note: The 2018 Task Force Report states that the current process in Housing and Athletics is to automatically report Title IX cases to law enforcement without input from the complainant. We recommend this practice be aligned with the University's policy language encouraging, but not requiring, reports to law enforcement.

Appropriation Requirement Note: The annual certification requirement to the State of Michigan mandates that the University notify each individual who reports having experienced assault by a student, faculty, or staff member of the University that the individual has the option to report the matter to law enforcement, to the university, to both, or to neither, as the individual may choose.

Where applicable, the rights of victims and the institution's responsibilities regarding orders of protection, no contact orders, restraining orders, or similar lawful orders issued by a criminal, civil, or tribal court.

We recommend incorporating the following language into University's policies to meet this standard:

- ▶ "If a complainant has obtained an order of protection, full order of protection, or any other temporary restraining order or no contact order against the accused student from a criminal, civil, or tribal court, the complainant may provide such information to the Title IX Coordinator. If provided, the Title IX Coordinator, in conjunction with the Ferris State Police Department, will take all reasonable and legal action to implement the order. Forms and instructions for filling out the forms necessary to obtain a protection order in the state of Michigan can be found online at: <https://courts.michigan.gov/Administration/SCAO/Forms/Pages/Personal-Protection.aspx>."

Information about options for, available assistance in, and how to request changes to academic, living, transportation, and working situations or protective measures. The institution must make such accommodations or provide such protective measures if the victim requests them and if they are reasonably available, regardless of whether the victim chooses to report the crime to campus police or local law enforcement.⁵¹

Both the Code of Student Community Standards and the Non-Discrimination Grievance Procedures address

⁵⁰ 34 C.F.R. § 668.46(b)(ii)(D).

⁵¹ 34 C.F.R. § 668.46(b)(11)(v).

interim measures, although neither policy specifies how an individual may request such a measure. Although the policy language states that notice will be provided to all affected individuals of options for requesting assistance, it would be preferable to provide those options in the policy language itself. Currently, the only document that specifies who can be contacted to provide assistance is the Victim Booklet which contains contact information for the Title IX Coordinator. (We note this should be updated to identify the new Title IX Coordinator.)

The Relationship Violence & Sexual Misconduct Policy contains language regarding “accommodations” which is less comprehensive in scope than the other policy documents and states that such accommodations will be made through the listed offices. Notably, there is no mention of the Title IX Coordinator. The language should be aligned between policies.

In addition to providing consistent language between policies, we recommend that the University add a statement regarding the confidentiality of accommodations and protective measures. In updating its information regarding interim measures available to complainants, the University should also make sure it is providing equal or equivalent interim measures for respondents and informing respondents of the availability of such measures. This information should be centralized in the main policy.

*Information about existing counseling, health, mental health, victim advocacy, legal assistance, visa and immigration assistance, student financial aid, and other services available for victims, both on-campus and in the community.*⁵²

The Code of Student Community Standards and Non-Discrimination Grievance Procedures both state the University will notify the complainant, respondent, and other affected parties of resources available to provide academic and personal support available on and off campus, including counseling services, academic advising, and resources for pursuing complaint resolution. Appendix 2 of the Non-Discrimination Grievance Procedures contains a link to the “Support Resource

Center” tab on the Title IX webpage. This tab contains lists of local and national resources but does not include resources for all categories in the VAWA standard.

The Relationship Violence & Sexual Misconduct Policy includes a general reference to medical and counseling assistance without providing details. In contrast, the Victim Booklet contains contact information for all of the above categories of resources in both the Big Rapids and Grand Rapids areas, both on campus and in the community. We recommend the information contained within the Victim Booklet be included on the Title IX website. We also recommend that the University provide information to students about the potential financial aid consequences of a leave of absence related to a sexual misconduct issue.

*A statement that a complainant will receive a written explanation of rights and options when a complaint is made.*⁵³

There is a statement in both the Code of Student Community Standards and the Non-Discrimination Grievance Procedures that “a copy of these procedures, including notification of the rights articulated therein, shall be provided to complainants, respondents, and others affected by discrimination within the University community.” It is contained under the heading “Interim Measures.” We recommend that the University consider moving the statement to a more prominent section of the policy.

We also recommend that the policy language include a statement that the institution will maintain its publicly-available records, including Clery Act reporting and disclosures, without the inclusion of personally identifying information about the victim.

Finally, we recommend that the University assess the written information it provides to both parties when a complaint is made, both for students and employees. We received several comments during our campus visit regarding the need for additional brochures or other informational documents to educate and support employees involved in the Title IX process or who may

⁵² 34 C.F.R. § 668.46(b)(11)(iv).

⁵³ 34 C.F.R. § 668.46(b)(11)(vii).

serve as Responsible Employees. The 2018 Task Force also recommended the development of resource documents for non-students.

FAIR AND EQUITABLE POLICY STATEMENTS

The following components, when carried out in practice, ensure that investigations are fair and equitable, as well as adequate, reliable and impartial as required by the Guidance. While these components do not necessarily need to be included in an institution's written policies, including these points is a reflection of an institution's overall effective and consistent handling of sexual misconduct reports. Including this information furthers the goal of providing clear and detailed information to the campus community.

*Parties are to have equal procedural rights during the investigation and resolution of a complaint of sexual misconduct.*⁵⁴

The Code of Student Community Standards and the Non-Discrimination Grievance Procedures provide both the complainant and respondent with the same opportunities to participate in the investigatory process, defined broadly to encompass all stages of the process to review and respond to allegations. The Code of Student Community Standards provides further elaboration, containing a list of rights for both the complainant and respondent in the student conduct process.

Those rights are equivalent with some exceptions:

- ▶ If the complainant chooses not to be present at the student conduct conference, the complainant may submit a list of questions to be asked during the conference if they are deemed relevant; the respondent does not have the same right.
- ▶ The complainant may submit an impact statement but not the respondent.

Policy provisions which provide unequal rights during the process should be revised to assure parity of treatment.

Benchmarking Note: Of the 8 comparator schools evaluated, only 3 permit an impact statement to be submitted. Of those 3 schools, all accept an impact statement from both the complainant and respondent and the statements are used solely during the sanctioning phase.

NPRM Note: The Proposed Rules contain a lengthy list of procedural elements that would need to be included within a school's grievance procedures.

A school's investigation is separate from a criminal investigation (a school can find violation even though criminal standard for a conviction cannot be met).⁵⁵ Law enforcement investigation does not relieve institution of its duty to resolve complaints promptly and equitably. Schools should not wait for the conclusion of a criminal investigation or criminal proceeding to bring their sexual misconduct investigation.⁵⁶

The Withdrawn 2014 Q&A Guidance emphasized institutions' obligations to respond promptly and effectively to sexual misconduct complaints regarding an accompanying criminal investigation. Although this guidance has been withdrawn, the 2001 Resource Guide also addresses the standard and remains in effect. Both the Code of Student Community Standards and the Non-Discrimination Grievance Procedures state that the University will appropriately coordinate with any other ongoing University or criminal investigations of the matter: "The University recognizes its obligation to promptly and thoroughly review allegations of conduct under these procedures and at no time shall investigations conducted under these procedures be unreasonable impeded, disrupted, or delayed by any other investigatory processes occurring with regard to the matters alleged."

⁵⁴ 2017 Q&A Guidance, p. 4. This concept is reflected more specifically in other compliance points in this section (e.g., the parties must be given similar and timely access to any information that will be used at a hearing).

⁵⁵ 2001 Resource Guide, discussion on differences in legal standards for criminal investigations, p. 21.

⁵⁶ 2001 Resource Guide, discussion on differences in legal standards for criminal investigations, p. 21.

NPRM Note: The Proposed Rules and accompanying commentary contain examples of “good cause” for extension of investigation timelines, including concurrent law enforcement activity.

Any real or perceived conflicts of interest between the fact-finder or decision-maker and the parties should be disclosed (and should be eliminated to the extent possible).⁵⁷

The Code of Student Community Standards and Non-Discrimination Grievance Procedures assure that the investigation process will be impartial and state: “University officials who are involved in the discrimination grievance process shall promptly disclose any potential conflict of interest they might have in a particular case to the investigator and Director of Equal Opportunity/Staff Attorney.” Moreover, the Code of Student Community Standards provides both the complainant and respondent with the right to challenge any individual serving as a Conduct Case Manager or University Committee on Discipline on the basis of bias.

Other policy provisions regarding the process to challenge a conflict are less clear. The Non-Discrimination Grievance Procedures states that an appeal may be based upon bias of the investigator, provided that the person appealing raised the issue of bias in writing to the Office for Equal Opportunity and/or Dean of Student Life prior to the investigator’s distribution of written findings and conclusions or the bias was unknown prior to receipt of the investigator’s written report. This does not, however, appear in the Code of Student Community Standards as a basis for appeal. More notable, there is nothing in either policy that alerts parties to this obligation or provides instructions regarding where to file concerns regarding bias. Finally, the policy documents contain no definition for conflict of interest or who would decide the issue if a conflict is disclosed or raised.

We recommend the University revise its policies consistently to explicitly state the University’s definition of a conflict of interest and its practice for considering and eliminating potential conflicts of interest.

NPRM Note: The Proposed Rules contain prohibitions against conflicts of interest and bias for or against complainants or respondents generally or an individual complainant or respondent.

Appropriation Requirement Note: The State of Michigan appropriation requirements mandate that for Title IX investigations of alleged sexual misconduct, the University prohibits the use of medical experts that have an actual or apparent conflict of interest. We recommend including explicit language to address this point for the use of any type of expert in the relevant policies.

If a school chooses to allow the parties to have their lawyers participate in the proceedings, it must do so equally for both parties; any school-imposed restrictions on the ability of lawyers to speak or otherwise participate in the proceedings should apply equally.

This principle is covered by VAWA’s requirement that the parties be allowed to have an “advisor of their choice” (including attorneys) attend meetings and other proceedings with them. This point is addressed in the VAWA discussion earlier in this report.

NPRM Note: The Proposed Regulations align with the VAWA requirements regarding advisor of choice, including the ability of schools to place restrictions on the advisor’s participation.

Questioning about the complainant’s sexual history should be appropriately limited.

It appears that the Title IX Rights of the Complainant in the Code of Student Community Standards is intended to cover this compliance standard where it states: “The right not to have irrelevant past conduct discussed during the conduct conference.” Similarly, the Relationship Violence & Sexual Misconduct Policy states that “A victim’s past irrelevant sexual conduct will not be discussed during the process.”

⁵⁷ 2017 Q&A Guidance, discussion on real and perceived conflicts, p. 4 and p. 5.

We have recommendations related to this language, and, also, generally recommend that Ferris State address this point in the other Title IX-related policies.

While the withdrawn 2014 Q&A Guidance⁵⁸ strongly advised against questioning on prior sexual history, our view is that there are times when discussing the complainant's past sexual history with others may be relevant. In these instances, there is a competing concern about depriving the respondent of relevant information. As a reference point, Federal Rules of Evidence 412 acknowledges that there are times when allowing discussion of a victim's past sexual history is permissible. For example, it may be appropriate to do so when sexual history is put into dispute by the complainant's own allegations.

We recommend the following student-applicable language for the University's consideration. This language can be modified for the other Title IX-related policies. "As a general matter, the complainant's past behavioral history (including sexual history) is irrelevant and will not be discussed in the conduct conference. However, the Conduct Case Manager may permit evidence of past behavioral history in rare circumstances where such evidence is highly probative and its value is not substantially outweighed by concerns of unfair prejudice and/or confusion."

NPRM Note: The Proposed Rules contain restrictions on the ability to cross-examine the complainant about sexual behavior or predisposition unless certain parameters are met.

Both parties should be given periodic status updates throughout the investigation process, including delays in an investigation.

The University's Title IX-related policies state that extensions of investigation timelines may be required, but they do not address periodic communications to the parties or notice to the parties of extensions. While we recognize that in practice the University may be providing periodic updates to all parties—students, faculty and

staff—we recommend that the University revise its policies to clearly indicate its expectation that the parties will be apprised of the progress of the investigation.

*Schools must maintain documentation of all proceedings.*⁵⁹

We recommend revisions to the primary policies to explicitly identify the University's practices related to document retention in sexual misconduct investigations and proceedings. Additionally, as a best practice point, the University should assess the Title IX Coordinator's maintenance of sexual misconduct reporting, investigation and resolution University-wide.

The University should be maintaining files of all sexual misconduct investigations—regardless of the outcome of an investigation. The University should have a record of the investigation it conducted for purposes of review by the Title IX Coordinator as she reviews case processing for overall compliance, patterns of allegations, and to demonstrate compliance with OCR. In addition, the University should maintain records of such investigations to demonstrate prompt and equitable resolution of complaints, compliance with its own policies and Guidance from the Department. Likewise, the University should also maintain documentation of proceedings involving faculty and staff and clearly state this requirement in the applicable policies.

NPRM Note: The Proposed Regulations would mandate a three year retention period for certain categories of records, including investigations, appeals, informal resolution, supportive measures, and training.

*Institutions may use voluntary informal resolution methods, including mediation, to address complaints of sexual misconduct.*⁶⁰

Both the Code of Student Community Standards and the Non-Discrimination Grievance Procedures contemplate the use of informal resolution, but we recommend revisions to clarify Ferris State's practice.

⁵⁸ 2014 Q&A Guidance, p. 31, F-7.

⁵⁹ 2015 Resource Guide, discussion on maintaining grievance and compliance records and files, p. 5.

⁶⁰ 2017 Q&A Guidance.

First, we recommend clarifying that informal resolution will only be used after the parties have received a full disclosure of the allegations and their options for formal resolution. Second, we recommend a revision to clarify that *either* party is entitled to end the informal process at any time and use the formal process.

NPRM Note: The Proposed Regulations provide guidance for when a school may utilize an informal resolution process to resolve a complaint of sexual harassment rather than complete a full investigation and adjudication.

If there is an opportunity for an appeal it should be made available to both parties and the type of review applied should be the same regardless of which party files the appeal.

The Non-Discrimination Grievance Procedures and the Code of Student Community Standards provide equal appeal rights to the complainant and respondent. For the reasons articulated below, we recommend the University preserve these equal appeal rights in its policies.

The 2017 Q&A Guidance contemplates that schools may utilize appeal procedures, and specifies that if a school chooses to allow appeals, the appeal may be available to (1) only respondents or (2) both parties, in which case any appeal must be equally available. Although currently permissible under the Guidance, we do not recommend adopting an unequal appeal framework. This approach may inadvertently undermine the institution's practice of treating the parties fairly and equitably. Further, it is not consistent with common practice. Finally, the Proposed Regulations differ from the 2017 Q&A Guidance and require that if a school chooses to allow appeals, it must allow both parties equal rights to appeal.

CASE LAW TRENDS

Since OCR issued its 2011 DCL, there have been dozens of judicial decisions from various federal courts resolving civil claims brought by one or more of the parties involved in institutional sexual misconduct investigations and

proceedings. Relevant to public institutions like Ferris State, these claims can generally be divided into three categories:

- ▶ Claims brought by victims of sexual misconduct who allege a “deliberate indifference” theory of Title IX liability premised on the implied cause of action recognized in *Davis v. Monroe County Board of Education*;⁶¹
- ▶ Claims brought by respondents who allege institutional policies and procedures are biased against one sex (typically) male and result in an erroneous outcome;
- ▶ Claims brought by respondents that the institution failed to provide minimum due process as required by the Constitution.

Generally speaking, these court decisions resolve injunctive or money damages claims asserted by a plaintiff against an institution. In many cases, the standard for *civil liability* under one or more of these theories is not the same as the standard for *regulatory* compliance (i.e., compliance with Title IX regulations or guidance). For example, courts have often held that a failure to comply with Title IX regulations does not necessarily establish deliberate indifference sufficient to recover money damages under *Davis*. Nonetheless, case law sets the standard for when an institution may be made to pay money damages to a successful plaintiff and/or enjoined by a court from taking certain actions (typically, disciplinary actions against a respondent). Given the rise in the number of lawsuits asserting Title IX and/or attendant constitutional claims, complying with the standards set in these court decisions has become increasingly important.

Below, we describe some general legal principles relating to these various theories as articulated by U.S. Court of Appeals for the Sixth Circuit, which sets federal precedent for Michigan and several other states. Because each case was decided on its facts, our analysis is intended to provide instructive themes under each theory and to comment generally on how the University's policy relates to those themes. We do not render any opinion regarding how a hypothetical claim against the University would be resolved. Because all lawsuits are fact specific,

⁶¹ 526 U.S. 629 (1999).

the University should work with its litigation counsel to carefully analyze the facts of any given dispute and the likely outcome of a lawsuit arising from such facts.

DELIBERATE INDIFFERENCE

In *Davis*, the Supreme Court recognized a narrow implied cause of action arising from student-on-student sexual misconduct. While an institution is not vicariously liable under Title IX for a student's harassment or assault of another student, an institution can be liable for its own misconduct that results in sex discrimination. Such discriminatory conduct can take the form of deliberate indifference, that is, where an institution has: (1) actual knowledge of sexual harassment; (2) is deliberately indifferent to the sexual harassment; and (3) where that deliberate indifference "cause[s] [students] to undergo harassment or make[s] them liable or vulnerable to it."⁶²

While there is a great deal of case law discussing each element of a deliberate indifference claim, and further nuances to liability, courts have often summarized the *Davis* standard as resulting in institutional liability only "where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances."⁶³

In *Stiles ex rel. D.S. v. Grainger County*,⁶⁴ the Sixth Circuit described the deliberate indifference standard as a "high bar" not to be confused with a "mere reasonableness standard."⁶⁵ The court noted that "Title IX does not give victims a right to make particular remedial demands" and that courts should avoid "second-guessing school administrators' disciplinary actions."⁶⁶

As discussed above, Ferris State's policies and procedures set a default standard whereby the institution will promptly respond to each report of sexual misconduct by, among other things: (i) providing support and assistance

to the claimant; (ii) imposing interim measures, as needed, to prevent the immediate recurrence of harassment, (iii) fairly and impartially investigating the report, and (iv) if sexual misconduct is found, imposing discipline for the perpetrator, and remedial measures for the victim, intended to prevent the recurrence of the conduct in the future. This process, if followed, should serve as a strong defense to a deliberate indifference challenge.

Indeed, in *Stiles*, the Sixth Circuit affirmed a grant of summary judgment in favor of the institution where there was evidence the plaintiff's reports of sexual harassment were promptly and thoroughly investigated and discipline of some sort was imposed against students found to have committed harassment.⁶⁷

Similarly, in the recent case *M.D. v. Bowling Green Independent School District*, the Sixth Circuit held that a school was not deliberately indifferent where the school responded to a female student's report of sexual assault by another student by promptly investigating the matter, and transferring the perpetrator to an alternative school for a period of time.⁶⁸ Although the female student was upset when the perpetrator was allowed to return to campus and subsequent interaction between the two made the female student uncomfortable, the court held there was no deliberate indifference as a matter of law.⁶⁹ The court noted that courts must "refrain from second-guessing the disciplinary decisions made by school administrators," and that schools are "not required to engage in any particular disciplinary actions in response to reported harassment."⁷⁰

While abiding by its policies should mean a school is not deliberately indifferent under Title IX, the converse is not true. The failure on Ferris State's part to follow its policies (or a failure to comply with relevant OCR Title IX guidance for that matter) does not, in and of itself, establish deliberate indifference.⁷¹ Rather, liability for deliberate indifference requires objectively unreasonable actions,

⁶² 526 U.S. at 645.

⁶³ *Fennell v. Marion Independent School Dist.*, 804 F.3d 398, 410 (5th Cir. 2015); *Williams ex rel. Hart v. Paint Valley Local Sch. Dist.*, 400 F.3d 360, 367 (6th Cir. 2005).

⁶⁴ 819 F.3d 834 (6th Cir. 2016)

⁶⁵ *Id.* at 848.

⁶⁶ *Id.* at 848.

⁶⁷ 819 F.3d 834 (6th Cir. 2016)

⁶⁸ 709 Fed.Appx. 775, 776 (6th Cir. 2017).

⁶⁹ *Id.*

⁷⁰ *Id.* at 777.

⁷¹ See *K.S. v. Northwest Independent School District*, 689 Fed.Appx. 780, 786 (5th Cir. 2017) ("The Court has never held that the implied private right of action under Title IX allows recovery in damages for violation of those sorts of administrative requirements.") (internal quotations omitted).

such as repeatedly implementing trivial measures (such as mere verbal reprimands) that are ineffective or continuing to use remedial methods that are known to be inadequate in ending harassment against a particular student.⁷²

BIASED PROCESS

Separate and apart from a deliberate indifference theory—typically utilized by aggrieved sexual assault victims—courts within the Second and Sixth Circuits (among others) have recognized that a party to a sexual misconduct investigation may also assert a claim of sex discrimination under Title IX based on alleged sex discrimination resulting from gender bias inherent in the investigation policy and practice itself, or where there is an erroneous outcome resulting from gender bias.⁷³

Policy and practice bias could be demonstrated through explicitly biased policy provisions, through selective enforcement, or through the employment of archaic and discriminatory stereotypes.⁷⁴ Respondents have increasingly brought claims alleging that aggressive enforcement by the U.S. Department of Education, increased litigation, intense media scrutiny, and public criticism have resulted in gender bias in institutional proceedings. Courts have rejected such claims where the Respondent has been unable to produce anything beyond mere conclusory allegations.⁷⁵ Deviation from policy, procedural abnormalities, and a party's disagreement with the outcome are also not sufficient bases to state a claim under any of these theories; rather, a plaintiff must be able to identify and ultimately prove that the procedural issues complained of, or the alleged erroneous outcome, were motivated by gender bias—that is, an intent to favor one sex over the other.⁷⁶

As a general matter, Ferris State's policies are drafted in a gender-neutral manner. There is no language or provisions that explicitly favor one sex over the other and we have identified the few places where language should be revised to show balance between the rights of both parties.

Thus, in our view, Ferris State's Policy and related procedural documents do not, on their face, suggest the potential for liability under a biased process or erroneous outcome theory of liability. Of course, this does not mean that a plaintiff could not adequately plead a discrimination claim based on how the policy is *applied* in a given case. Such an as-applied challenge, should it ever arise, could only be analyzed in light of its facts.

DUE PROCESS

In recent years, there has been a rise in the number of cases filed by respondents alleging that institutions failed to provide the respondent with minimal due process during the course of a sexual misconduct investigation and adjudication. These claims are premised on the Due Process clause of the Fourteenth Amendment to the U.S. Constitution⁷⁷ and are uniquely asserted against public institutions because private institutions are not subject to constitutional constraints.⁷⁸

While there are myriad due process cases with varying claims and theories, two recent decisions from the Sixth Circuit merit further comment and examination. In the *Doe v. University of Cincinnati* case decided in September 2017, the Sixth Circuit held that, “in the most serious of cases” an accused student “must have the right to cross-examine adverse witnesses.”⁷⁹ Applying that rule, the court held that, where a female student accused a male student of sexual assault, and the institution's

⁷² *Stiles* at 849-850.

⁷³ See, e.g., *Doe v. Case Western Reserve Univ.*, 2017 WL 3840418, at *4 (N.D. Ohio 2017) (articulating different theories of Title IX liability); *Yousuf v. Vassar College*, 35 F.3d 709 (2nd Cir. 1994).

⁷⁴ See *Doe v. Univ. of the South*, 687 F. Supp.2d 744, 756 (E.D. Tenn. 2009) (recognizing selective enforcement theory where parties of a given sex are treated more favorably than parties of another sex and “archaic assumptions” theory predicated on gender stereotypes).

⁷⁵ See *Doe v. Cummins*, 662 Fed.Appx. 437 (6th Cir. 2016). But see *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018) (reversing the district court's dismissal of the respondent's erroneous outcome claim, finding his allegation of adjudicator bias combined with external pressure facing the university to be plausible); *Doe v. Miami University*, 882 F.3d 579 (6th Cir. 2018) (finding statistical evidence and external pressure on the university sufficient to create a reasonable inference of gender discrimination at the motion to dismiss stage).

⁷⁶ See, e.g., *Doe v. Baum*, 227 F. Supp.3d 784, 821 (E.D. Mich. 2017) (rejecting as insufficient a variety of Title IX claims where plaintiff pleaded no facts giving rise to a plausible inference that gender bias motivated the complained of actions).

⁷⁷ Technically, the claims are brought pursuant to 42 U.S.C. § 1983, which allows private plaintiffs to sue state actors for the violation of constitutional rights.

⁷⁸ See *Plummer v. Univ. of Houston*, 860 F.3d 767 (5th Cir. 2017), as revised (June 26, 2017). A private institution may, however, face an analogous claim for breach of contract if it has promised its students certain process rights as a matter of contract. See *David v. Neumann Univ.*, 177 F. Supp. 3d 920, 925 (E.D. Pa. 2016). See also *Heineke v. Santa Clara University*, 2017 WL 3368455 (N.D. Cal. 2018); *Doe v. University of Denver*, 2018 WL 1304530 (D. Colo. 2018) (appeal filed to the 10th Cir.).

⁷⁹ 872 F.3d 393, 401 (6th Cir. 2017).

determination of responsibility rested solely⁸⁰ on finding the claimant's account more credible than the respondent's, due process likely required⁸¹ the institution to provide some form of cross-examination to test the claimant's credibility.⁸² Consistent with its prior ruling in *Doe v. Cummins*, the court held that a circumscribed form of cross-examination, where a respondent supplied cross-examination questions to a panel, which then posed them to the claimant, is acceptable in a case where the claimant actually appears at the hearing.⁸³

One year later, the Sixth Circuit expanded its reasoning and pronounced its precedent to have established two clear principles regarding the constitutional minimums for due process: "(1) if a student is accused of misconduct, the university must hold some sort of hearing before imposing a sanction as serious as expulsion or suspension, and (2) when the university's determination turns on the credibility of the accuser, the accused, or witnesses, that hearing must include an opportunity for cross-examination."⁸⁴ In discussing the requirement of cross-examination, the Court explained:

If a public University has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder.⁸⁵

Most institutions provide for some form of indirect cross-examination of the parties (e.g., asking questions through a questioner, exchange of witness and party statements or summaries, and through cross-examination effectuated through technology to create separation for the parties). However, the Court specifically rejected these alternatives, stating:

Without the back-and-forth of adversarial questioning, the accused cannot probe the

witness's story to test her memory, intelligence, or potential ulterior motives... Nor can the fact-finder observe the witness's demeanor under that questioning. For that reason, written statements cannot substitute for cross-examination... Instead, the university must allow for some form of live questioning *in front of the fact-finder*.⁸⁶

The Sixth Circuit decision mandates a hearing and an opportunity for cross-examination in Title IX cases where: (a) the sanction could result in an expulsion or suspension, and (b) when a determination turns on credibility of the accuser, the accused, or witnesses. In recognition of an institution's "legitimate interest in avoiding procedures that may subject an alleged victim to further harm or harassment," the Court stated that the institution could allow the accused's agent to conduct the cross-examination on his behalf rather than permitting personal confrontation between an accused and the witness.⁸⁷

In addition to the Sixth Circuit decision, we would be remiss not to point out that the Proposed Regulations would also impose significant requirements regarding due process and cross-examination. The Proposed Regulations require that a school's grievance procedures include a live hearing during which each party is permitted to ask the other party and any witnesses all relevant questions and follow-up question, including those challenging credibility. Notwithstanding any rules limiting participation by advisors, such cross-examination would be conducted by the party's advisor rather than the party directly. If the party does not have an advisor, the school must provide an advisor aligned with the party to conduct the cross-examination. At the request of either party, cross-examination must be done in separate rooms with technology that enables the decision-maker to simultaneously see and hear the individual answering questions. If a party or witness does

⁸⁰ The court noted that a form of cross-examination may not be required in cases where a lesser punishment is at stake, where the respondent has admitted to conduct, or where there is corroborating evidence of the claimant's account.

⁸¹ The case was postured as an appeal of the grant of a preliminary injunction barring the respondent's suspension. Thus, the Sixth Circuit technically affirmed the district court's holding that the respondent was likely to prevail on his due process challenge. In practical terms, however, this distinction is irrelevant; the court's legal analysis will control future cases.

⁸² *Doe v. University of Cincinnati*, 872 F.3d, at 401.

⁸³ *Id.*, at 404 (citing *Doe v. Cummins*, 662 F.Appx. 437, 448 (6th Cir. 2016)).

⁸⁴ *Doe v. Baum*, 903 F.3d 575, 578 (6th Cir. 2018).

⁸⁵ *Id.*

⁸⁶ *Id.* at 582.

⁸⁷ *Id.* at 583.

not submit to the cross-examination, the decision-maker may not rely on any statements by that party or witness in reaching a determination regarding responsibility. Once the Proposed Rules are final, the University will need to carefully consider how the regulatory requirements impact the due process provisions within its policies.

Benchmarking Note: Of the 8 comparator schools evaluated, 6 provide the parties with an option to request a hearing, 3 of which limit the option to students. Of the 6 schools that offer hearings, all permit direct cross-examination, although one school requires the parties to submit a list of questions in advance of the hearing to be reviewed and approved for relevance and materiality. The hearing bodies are uniformly comprised of employees (ranging from 1-3 members) and do not contain student members.

CONCLUSION

The 2018 Task Force concluded that the University has developed strong policies, procedures, prevention programs and responses to address sexual misconduct and continues to strive to maintain an environment that is safe and free from obstacles that hinder the success of students, faculty, staff, and visitors. Our review affirms the substantial work that the University has already done to build a compliant and effective Title IX program.

We appreciate that our recommendations for improvements to Ferris State's Title IX-related policies include both substantive changes, as well as what may appear to be some pedantic suggestions. Together, both sets of recommendations will provide helpful clarity around the institution's policies and procedures, as well as help the University demonstrate its compliance with applicable guidance and legal requirements. They will also help the University build on the substantial progress it has made over the last several years, including the following items that were explicitly praised during our campus visit:

- ▶ Regular messaging from the President and administration, including strong support on Title IX issues from the Board;
- ▶ Enhancement of the bystander intervention campaign which is more robust and reaching more students than in the past;
- ▶ Improved collaboration and communication between campus units that respond to incidents of sexual violence and misconduct;
- ▶ Effective provision of interim measures;
- ▶ Development and utilization of a campus climate survey; and
- ▶ Regular meetings between the Title IX Coordinator and deputy coordinators to better organize activities and responsibilities.

In the short term, we believe that Ferris State can fine-tune its existing policies to expeditiously address a number of the issues we have identified in this report. However, we also recommend that Ferris State consider these recommendations in the context of a longer-range strategy that may include:

- ▶ Overhauling the structure of Ferris State's Title IX-related policies by consolidating all relevant provisions in an omnibus policy in effort to improve clarity and ease of access for faculty, staff and students; all other related documents (e.g., guides, brochures, websites, etc.) must be revised to be consistent with these policies;
- ▶ Expanding campus climate assessments to include feedback from employees;
- ▶ Streamlining reporting obligations for responsible employees; and
- ▶ Redefining the role of the Title IX Coordinator and clarifying the resources and authority available to ensure compliance and execution of the critical functions of the role.

By approaching our recommendations in the short-term, Ferris State can provide immediate and meaningful improvements in its policies and processes that will benefit its community in the current semester, while working towards broader policy changes that can be implemented after thoughtful consideration and development. Ultimately, it is these latter changes that will help the University meet its goal, but elevating its Title IX program to one that not only better serves its own community, but raises the bar for other institutions.



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