

**HUSCH BLACKWELL**

# MICHIGAN STATE UNIVERSITY

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**REPORT 1 OF 2**

Review of Michigan State University's  
Policy on Relationship Violence and  
Sexual Misconduct

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# Executive Summary

# Executive Summary

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Michigan State University has engaged Husch Blackwell to conduct a two-phase Title IX review related to the University's efforts to prevent and address sexual misconduct and comply with applicable legal requirements. This report is the first of two reports that, together, will identify MSU's strengths, as well as some areas for improvement, and shed light on the effectiveness of its broader Title IX program.

This first phase of our work involved a detailed review of MSU's Title IX-related policies and procedures to determine whether these documents, as written, demonstrate compliance with Title IX. As described in more detail in this report, MSU's current Title IX policy and procedures reflect a strong and genuine institutional commitment to combatting sexual misconduct, creating a safe campus environment, as well as compliance with Title IX's legal requirements. MSU's policies and procedures are among the most comprehensive and robust we have seen. They provide detailed guidance to claimants, respondents, investigators, and adjudicators and set forth a fair and equitable process for resolving reports of sexual misconduct. Overall, MSU's policies and procedures comply with current legal requirements and agency guidance, and in several places, reflect leading-edge policy concepts that other institutions might consider replicating in their own policies.

Further, based on our discussions with faculty, staff and students, there is strong evidence that key components of MSU's policies and procedures are permeating the campus community. For instance, students overwhelmingly reported that they believe students understand the concept of "consent;" several were able to quickly recite its definition. Faculty and staff reported that they believe most employees understand that they have an obligation to report sexual misconduct of which they become aware.

In support of MSU's goal for continued improvement and expansion of leading-edge practices, we have identified a few elements of MSU's current practice that are not clearly stated in its policies and procedures. While MSU addresses many of these issues in its Title IX supporting documentation, we recommend that these items be expressly incorporated in its policy. Further, in light of new guidance issued by the Office for Civil Rights last month, we also recommend that MSU consider addressing a few key issues that were highlighted in the new guidance. Finally, there is one component of the policy that we identified which MSU should consider reevaluating. Specifically, we are concerned that MSU's policy requiring all responsible employees to not only notify the Title IX Coordinator of sexual misconduct of which they become aware, but to *also* notify law enforcement may be in tension with applicable legal requirements that vest victims with agency concerning whether to notify law enforcement.

We acknowledge that there continues to be significant media attention around MSU's Title IX efforts that may suggest its policies and procedures are out of compliance. We disagree with this conclusion. Based on our comprehensive review, MSU's Title IX policy and procedures provide for a process that meets applicable legal requirements and agency guidance that—with effective implementation—creates a timely, fair and equitable resolution process for sexual misconduct reports, as required by law.

These issues are discussed in more detail in this report. The second phase of our review will evaluate the effectiveness of MSU's broader Title IX program, including with respect to crisis and advocacy support services, prevention and education programs, and awareness and outreach efforts. We anticipate the delivery of the second report by the end of Spring Semester, 2018.

# Introduction

At its core, Title IX is a civil rights law that was intended to help eliminate sex discrimination and 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 issues related to inequity in athletics, particularly with respect to facilities, scholarships and sporting opportunities for female athletes.

In 2011, a sea change occurred when the primary agency charged with enforcing Title IX, the U.S. Department of Education's Office for Civil Rights ("OCR")<sup>1</sup>, 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. Since that time, the higher education sector has substantially grown its Title IX infrastructure to support prevention, awareness and educational programming, provide resources to impacted parties, and refine institutions' investigation and adjudication processes.

In our experience working with colleges and universities across the country on Title IX policy development, training, investigations and litigation, we have observed a key trend: many institutions' Title IX policies and practices are evolving and improving. With every case, with every training, institutions can improve upon prior practice and enhance their policies to better reflect their institutional values and fit their communities' needs. For this reason, many institutions of higher education have embraced a culture of continuous self-analysis and improvement in this area.

To this end, Michigan State University ("MSU" or "University") has engaged Husch Blackwell to perform a two-phase Title IX review of the University's efforts to prevent and address sexual misconduct and comply with applicable legal requirements, agency guidance and best practices. During this first phase of our review, we conducted a concentrated compliance analysis of MSU's Policy on Relationship Violence and Sexual Misconduct (the "RVSM Policy" or "policy"), together with its appendices<sup>2</sup> and other information published by MSU on its Title IX webpage.<sup>3</sup> In other words, the first phase of this review focused primarily on the documents that serve as the foundation for MSU's broader Title IX program. This included a focused review to determine whether MSU's policies and procedures documents:

- 1. Demonstrate compliance with Title IX of the Education Amendments Act of 1972,<sup>4</sup> as it pertains to institutional response to sexual harassment and sexual violence;**
- 2. Meet the statutory requirements of the Violence Against Women Act reauthorization of 2013 ("VAWA") and its associated amendments to the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act"),<sup>5</sup> and its implementing regulations;**
- 3. Comport with industry best practices and the practices of peer and comparator institutions; and**
- 4. Demonstrate leading-edge practices that should be replicated by other institutions.**

For purposes of this report, it is important to note that our review focuses upon the state of MSU's policies and procedures, as they exist, *at this date*; our review does not include a retrospective review of prior policies, procedures or practices.

The second phase of our review will evaluate the effectiveness of MSU's broader Title IX program, including with respect to crisis and advocacy support services, prevention and education programs, and awareness and outreach efforts. We anticipate the delivery of the second report by the end of Spring Semester, 2018.

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<sup>1</sup> The U.S. Department of Justice shares enforcement authority over Title IX with OCR. See: 2015 Resource Guide, FN 1, page 1.

<sup>2</sup> The policy and related appendices are available at: [https://www.hr.msu.edu/policies-procedures/university-wide/RVSM\\_policy.html](https://www.hr.msu.edu/policies-procedures/university-wide/RVSM_policy.html).

<sup>3</sup> Available at: <http://www.titleix.msu.edu/>.

<sup>4</sup> 20 U.S.C. § 1681 *et seq.*; Title IX also covers other issues such as gender equity in athletics and pregnancy accommodation. These other aspects of Title IX are beyond the scope of this review and are not discussed in this report.

<sup>5</sup> VAWA amended a number of federal laws governing requirements for programs and grants that, for instance: support children and families; provide housing rights for victims of domestic abuse; and seek to eliminate backlogs in rape kit processing; among other things. Our review is limited to the portion of VAWA that amended the Higher Education Act of 1965, 20 U.S.C. 1092(f), also referred to as "the Clery Act."

## Overview of Title IX

Title IX of the Education Amendments of 1972 prohibits institutions that receive federal funds from discriminating on the basis of sex in their education programs and activities. A longstanding principle of Title IX case law and agency interpretation is that the institutional failure to appropriately respond to sexual harassment and sexual violence can result in prohibited sex discrimination. For this reason, it is often said that Title IX prohibits sexual harassment and sexual violence, even though, in the strictest sense, Title IX regulates only institutional action, not the actions of individual persons. In the context of higher education, institutions are required to appropriately respond to all sexual harassment and sexual violence occurring within the context of their education programs and activities, which regulations define broadly as an institution's "operations." For this reason, institutional policies prohibiting sexual harassment and sexual violence govern members of the campus community (such as administrators, faculty, staff and students), as well as other participants in the institution's programs and activities, such as visitors and vendors.

Under the Obama Administration, OCR repeatedly issued sub-regulatory guidance documents (typically, referred to as "Dear Colleague Letters") to establish enforcement standards relating to Title IX compliance, particularly with respect to institutions' responsibilities to prevent and address sexual harassment and sexual violence within their campus communities. While sub-regulatory guidance does not have the force and effect of law, the sweeping impact of these guidance documents—along with a significant increase in OCR's Title IX enforcement activity—resulted in significant changes within institutions of higher education, nationwide. Detailed policies explaining how reports of sexual misconduct should be handled were adopted, adjudication procedures were expanded, and some best practices emerged.

Notably, in the midst of our review, a key source of compliance guidance was withdrawn by OCR. Specifically, on September 22, 2017, OCR withdrew extensive sub-regulatory guidance that had previously advised institutions of the agency's interpretation and application of Title IX in the context of preventing and addressing sexual harassment and sexual violence on college and university campuses.<sup>6</sup>

Given OCR's recent withdrawal of prior guidance, it is important to keep in mind that our analysis of Title IX requirements is rooted in the statute itself, its implementing regulations at 34 C.F.R. Part 106, and **currently** applicable sub-regulatory guidance. The relevant sub-regulatory guidance documents involving sexual harassment and sexual violence include the following:

**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**").<sup>7</sup> This document explains that sexual harassment is covered by Title IX's prohibition of sex discrimination and describes an institution's responsibilities to prevent and address sexual harassment.

**APPLICABLE** | A Dear Colleague Letter published on August 4, 2004 ("**2004 DCL**") on the First Amendment and harassment.<sup>8</sup>

**APPLICABLE** | A Dear Colleague Letter published on August 4, 2004 ("**2004 DCL**") on sexual harassment. This document reminds institutions to designate a Title IX Coordinator, adopt and disseminate a nondiscrimination policy, and put grievance procedures in place to address complaints of sex discrimination. The 2004 DCL also states that the Department is "committed to enforcing Title IX aggressively" and highlights that recent investigations suggest some institutions may not have been vigilant in their compliance efforts.<sup>9</sup>

**APPLICABLE** | A Dear Colleague Letter published on January 25, 2006 ("**2006 DCL**") on sexual harassment. This document reaffirms the 2001 Guidance and restates that sexual harassment can be a form of sex discrimination prohibited by Title IX.<sup>10</sup>

**WITHDRAWN** | A Dear Colleague Letter published in April 2011 ("**Withdrawn 2011 DCL**"). The Withdrawn 2011 DCL substantially expands upon the 2001 Guidance and prescribes specific items that must be included (or are strongly

<sup>6</sup> To date, we are unaware of any institution that has made sweeping changes to its Title IX policies and procedures as a result of OCR's recent withdrawal of previous guidance. To the contrary, it is our understanding that before making significant changes, most institutions are awaiting final guidance from OCR that may result from formal notice and comment rulemaking. To the extent that we become aware of institutions making significant changes to their policies and practices or new guidance or proposed regulations issued by OCR, we will provide an update on these developments in our second report.

<sup>7</sup> The 2001 Guidance can be found at: <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

<sup>8</sup> The 2003 DCL can be found at: <https://www2.ed.gov/about/offices/list/ocr/firstamend.html>.

<sup>9</sup> The 2004 DCL can be found at: [https://www2.ed.gov/about/offices/list/ocr/responsibilities\\_ix\\_ps.html](https://www2.ed.gov/about/offices/list/ocr/responsibilities_ix_ps.html).

<sup>10</sup> The 2006 Guidance can be found at: <https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html>.

recommended to be included) in an institution's policy and procedures related to sexual harassment and sexual violence.<sup>11</sup> This guidance was withdrawn by OCR on September 22, 2017.

**WITHDRAWN** | A guidance document, in Question-and-Answer format, published in April 2014 (“**Withdrawn 2014 Q&A Guidance**”).<sup>12</sup> The Withdrawn 2014 Q&A Guidance supplements the 2011 DCL by summarizing or further clarifying key points discussed in the 2011 DCL. The Withdrawn 2014 Q&A Guidance also provides additional information that an institution must consider when evaluating its Title IX compliance. This guidance was withdrawn by OCR on September 22, 2017.

**APPLICABLE** | A Dear Colleague Letter published in April 2015 (“**2015 DCL**”). The 2015 DCL focuses on the role of an institution's Title IX Coordinator.<sup>13</sup>

**APPLICABLE** | A Title IX Resource Guide published in April 2015 (“**2015 Resource Guide**”). This guide provides high-level information about various aspects of Title IX, including the Title IX Coordinator's responsibilities, grievances procedures, and notices of non-discrimination. The 2015 Resource Guide also discusses Title IX's application to other topics and cites to other available resources.<sup>14</sup>

**APPLICABLE** | A Dear Colleague Letter published September 22, 2017 (“**2017 DCL**”).<sup>15</sup> The 2017 DCL informs the higher education community that OCR intends to engage in rulemaking to develop new Title IX regulations, withdraws the Withdrawn 2011 DCL and Withdrawn 2014 Q&A Guidance, and reaffirms its 2001 Guidance.

**APPLICABLE** | A guidance document, in Question-and-Answer format, published on September 22, 2017 (“**2017 Q&A Guidance**”).<sup>16</sup> In large part, the 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 must consider when evaluating its Title IX compliance.

Although current guidance documents do not have the direct force of a law or regulation, they do reflect OCR's current position regarding Title IX enforcement.

We have also highlighted concepts from the withdrawn guidance as instructive practices, particularly since many institutions' current policies and procedures are aligned with these now-withdrawn standards. These are also relevant practices to consider, since some of the prior concepts could, in theory, be reinstated as part of anticipated proposed regulations that will be subject to notice and public comment. Last, many of the concepts contained within withdrawn guidance are consistent with the spirit of OCR's current position with respect to due process, as well as the fair and equitable treatment of all parties.

## Overview of VAWA

Though this review focuses significantly on Title IX, the 2015 VAWA amendments to the Clery Act are closely related to core Title IX obligations and must also be considered. The VAWA amendments intersect with Title IX because they require procedures for addressing complaints of sexual assault, dating violence, domestic violence and stalking.<sup>17</sup> Sexual assault falls squarely under Title IX's prohibition of sexual violence. Dating violence, domestic violence, and stalking will often also constitute sexual harassment or sexual violence, which also fall under Title IX. The result of the intersection between these laws is that institutions must have procedures in place for complaints of sexual assault, dating violence, domestic violence, and stalking that meets VAWA standards and Title IX standards.

<sup>11</sup> The Withdrawn 2011 DCL can be found in “archived format” at: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

<sup>12</sup> The Withdrawn 2014 Q&A Guidance can be found in “archived format” at: <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

<sup>13</sup> The 2015 DCL can be found at: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf>.

<sup>14</sup> The 2015 Title IX Resource Guide can be found at: <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf>.

<sup>15</sup> The 2017 DCL can be found at: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>.

<sup>16</sup> The 2017 Q&A Guidance can be found at: <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

<sup>17</sup> Clery Act regulations, including the VAWA amendments, which took effect on July 1, 2015, can be found at: <https://www.gpo.gov/fdsys/pkg/FR-2014-10-20/pdf/2014-24284.pdf>.



## Overview of Recent Case Law Trends

This phase of our work was 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 Kentucky, Michigan, Ohio and Tennessee. These cases focus primarily on three trends in Title IX civil claims: (1) deliberate indifference, (2) biased process / erroneous outcome, and (3) 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*, 526 U.S. 629 (1999).<sup>18</sup>

Because each case was decided on its facts, our reference to recent court decisions is only intended to provide instructive themes under each theory and to comment generally on how MSU's policies relate to those themes. In our experience in representing institutions of higher education in Title IX litigation, as well as counseling institutions on how to avoid litigation, 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 MSU would be resolved in light of recent case decisions. Instead, MSU 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.

## Overview of Peer Benchmarking

Our work also included an initial benchmarking analysis of key components of MSU's policy and procedures in comparison to peer institutions and comparator institutions. For purposes of these comparisons, we relied upon two cohorts of peers: (1) the remaining thirteen (13) institutions that make up the Big Ten Conference, of which MSU is a member, and (2) six (6) institutions of similar mission or which have recently been reviewed by OCR as part of an enforcement action or policy review.<sup>19</sup> Due to the degree of variation and nuance within each institution's Title IX-related policies and procedures, 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 MSU will find our comparisons instructive, we have not identified institutions, as those colleges and universities are in the best position to speak to the specifics of their Title IX-related policies and practices.

## Overview of MSU Community Feedback

In an effort to more clearly understand the context relating to MSU's policies and procedures for purposes of this report, and to begin our work to learn more about MSU's broader Title IX program for purposes of the second report, we also met with a number of University officials. These meetings included members of the immediate Title IX team within MSU's Office of Institutional Equity ("OIE"), as well as officials from other administrative offices and institutional committees that support the University's broader Title IX-related program work, including:

**The Committee on Violence Free Communities<sup>20</sup> ("VFC")** | The VFC includes representatives from the Greek Life Office, LGBT Resource Center, MSU Police Department, MSU Safe Place, Office of General Counsel, OIE, Olin Health Center, Recreational Sports – Self Defense Programs, Sexual Assault Program, Sexual Assault and Relationship Violence Prevention

<sup>18</sup> In *Davis*, the Supreme Court recognized a narrowly 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." 526 U.S. at 645. See also: *Williams ex rel. Hart v. Paint Valley Local Sch. Dist.*, 400 F.3d 360, 367 (6th Cir. 2005) (institution may be liable only "where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances."); see also: *Stiles ex rel. D.S. v. Grainger County*, 819 F.3d 834 (6th Cir. 2016), (the Court described the deliberate indifference standard as a "high bar" not to be confused with a "mere reasonableness standard."); see also, *M.D. v. Bowling Green Independent School District*, 2017 WL 4461055 (6th Cir. 2017), (school was not deliberately indifferent where the school responded to a female student's report of sexual assault by promptly investigating the matter (obtaining a confession) and transferring the perpetrator to an alternative school for a period of time).

<sup>19</sup> These schools include: the University of Virginia, University of Notre Dame, Stanford University, Miami University of Ohio, Cornell University and Columbia University.

<sup>20</sup> The VFC's mission statement and information about the VFC is available at: [http://titleix.msu.edu/\\_files/documents/Violence-Free-Communities-2017-Annual-Report-FINAL.pdf](http://titleix.msu.edu/_files/documents/Violence-Free-Communities-2017-Annual-Report-FINAL.pdf).

Program, Student Conduct and Conflict Resolution Office, the Women's Resource Center, and the Title IX Coordinator. The purpose of the organization is to support a campus culture free of relationship violence and sexual misconduct. For the 2016-2017 academic year, the VFC has released reports highlighting recommendations relating to MSU's Title IX-related work as well as key accomplishments. In addition to regular meetings, the organization hosts open meetings each year.

**The Sexual Violence Advisory Committee<sup>21</sup> ("SVAC")** | The SVAC is made up of representatives from faculty, staff and students who are appointed by the President for a one- or two-year term. Student representatives include one representative from the Associated Students of Michigan State University ("ASMSU"), MSU's student government body, as well as one representative from the Council of Graduate Students ("COGS"). The Committee is advised by representatives from the SVAC Prevention Program, the Sexual Assault Program, MSU Safe Place, Residential Education and Housing Services, Student Conduct and Conflict Resolution, OIE, MSU Police Department, and the Office of General Counsel. The Committee is charged with serving as a forum for community engagement and feedback on sexual violence and to provide input on the University programs and initiatives aimed at raising awareness and reducing the prevalence of sexual violence. In addition to regular meetings, SVAC hosts an annual open meeting to gather constituency feedback.

**Women's Council and Advisory Committees<sup>22</sup>** | The Women's Council and advisory committees to the Provost and Vice Presidents serve as a vehicle for women's voices amongst MSU and the greater community. The Women's Council's goal is to enhance the quality of women's lives on campus and provide a safe community, and it participates in a wide range of activities, ranging from rallies to educational events and training and volunteering.

**Appeals Officers** | Appeals officers reviewing cases adjudicated under the RVSM Policy include the Vice President for Student Affairs and Services, who reviews student appeals where separation from the University is recommended, and the Equity Review Officer, who reviews all faculty and staff appeals as well as student appeals where there is no violation or where a sanction less than separation has been determined.

**The Office of General Counsel ("OGC")** | The Office of General Counsel provides legal advice and representation to the University through its President, Board of Trustees, and administration on a broad array of legal issues affecting a modern, public research institution.

**The Policy Work Group<sup>23</sup>** | A multi-disciplinary group comprised of faculty, staff and students, as well as the Title IX Coordinator, who assist in reviewing and updating the RVSM Policy annually. Many of the participants in the Work Group are connected to the RVSM Policy process either directly or through provision of services to students or employees.

**Students** | Meeting invitations were sent to students from a wide range of student groups, including the Associated Students of MSU (ASMSU), Council of Graduate Students (COGS), Residence Hall Association (RHA), Sexual Violence Advisory Committee (SVAC), Women's Council, Greek Councils, Council of Racial Ethnic Students (CORES), Council of Progressive Students (COPS), MSU Bands, Student Athletes, Council of Students with Disabilities, Sexual Assault and Relationship Violence (SARV) Prevention Program Peer Educators, Sexual Assault Crisis Intervention (SACI) Volunteers, International Studies and the Alliance of Queer and Ally Students ("the Alliance").<sup>24</sup> Over the course of our meetings, we had the opportunity to talk with students, including representatives from MSU's athletic program, the Spartan Marching Band, ASMSU student government, students connected to Sexual Assault Crisis Intervention ("SACI"),<sup>25</sup> the Sexual Assault and Relationship Violence Program, International Student Association ("ISA"),<sup>26</sup> and students associated with Greek life.

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<sup>21</sup> SVAC's charge along with additional information about the organization is available at: [http://titleix.msu.edu/\\_files/documents/svac-overview-and-charge.pdf](http://titleix.msu.edu/_files/documents/svac-overview-and-charge.pdf).

<sup>22</sup> Information on the Women's Council and Advisory Committees is available at: <https://msu.edu/~msuwomen/>.

<sup>23</sup> A multi-disciplinary group comprised of faculty, staff and students who assist in review and updating the RVSM Policy each year.

<sup>24</sup> The Alliance is a student organization and one of the groups that forms the Council of Progressive Students under ASMSU. The Alliance has a tradition of campus and community political action and serves as a voice in ASMSU on queer issues.

<sup>25</sup> SACI is a student organization comprised of undergraduate and graduate student volunteers who are trained to provide advocacy to survivors of sexual violence. Members staff a 24-hour crisis line, provide medical advocacy, and serve as peer educators. The group works with the MSU Counseling Center Sexual Assault Program to provide support, empathy, and information to survivors of gendered violence.

<sup>26</sup> ISA is the largest international student organization of MSU, and it works to promote and enhance international awareness, cooperation, cultural diversity and dialogue among international students on campus, and between international and American students on campus and amongst wider communities.

**Faculty and Staff** | Meeting invitations were also sent to a wide range of faculty and staff groups, including Faculty Senate, Center for Gender in a Global Context, Research Consortium for Gender-based Violence, Sexual Violence Advisory Committee (SVAC), Committee for Violence Free Communities (VFC), RVSM Policy Work Group, Women's Advisory Committees (Provost and Vice Presidents). Over the course of our meetings, we had the opportunity to talk with faculty from multiple disciplines and staff members from various University offices.

These meetings occurred over the course of two full days on October 5 and October 11, 2017, as well as one evening session with student groups on October 22, 2017, and one afternoon session with faculty representatives on October 24, 2017.

While our discussions during our on-site meetings occurred in an organic manner, with participants freely volunteering feedback and information on a host of issues relating to MSU's broader Title IX program and the RVSM Policy, we included questions focused on the following topics, among others:

- Awareness, knowledge and perceptions of the RVSM Policy, including specific terms and definitions; reporting options; and the investigation, adjudication and appeals processes;
- Awareness, knowledge and perceptions of the roles and responsibilities of OIE, the Title IX Coordinator, and confidential resources;
- Awareness, knowledge and effectiveness of awareness and training programming;
- Awareness, knowledge and perceptions of the role of responsible employees; and
- Fairness in the investigation and adjudication processes and availability of equitable resources, particularly with respect to individuals accused of policy violations.

During these meetings, we identified a number of key themes from the input we received related to MSU's broader Title IX program:

MSU's Title IX program has gone through a significant evolution in recent years and changes in this area have been positive and welcomed by the campus community;

There is a broad sentiment among staff, faculty and the student groups involved in Title IX issues that MSU's Office of Institutional Equity has been infused with a strong team of staff members and a new Title IX Coordinator who actively facilitate community input and participation in the development and improvement of the broader Title IX program;

Although there have been substantial changes resulting in an improved Title IX policy and procedures, there is a concern from the faculty, staff and students that skepticism from previous years relating to MSU's Title IX policies and procedures persists and continues to impact the campus community's perception of MSU's Title IX improvement efforts; and

Many within the campus community continue to desire additional improvements and enhanced communication on Title IX issues, particularly with respect to MSU's implementation of the Title IX adjudication process. The vast majority of participants expressed appreciation for being given an opportunity to present feedback and felt this review demonstrated a meaningful commitment to continuous improvement.

To the extent that we received specific feedback on substantive issues relating to MSU's policy and procedures, we have included that within this report. However, campus community members, including faculty and students, offered very little feedback relating to this topic, even when prompted for input on key elements including as they relate to fairness in the investigation and adjudication processes, investigation and adjudication models and reasons for or against utilizing a hearing model. Instead, the overwhelming majority of feedback from participants relates to topics that will be covered in our second report, which we will address there.

# Compliance with Title IX and VAWA

During the first phase of our review, we found that MSU's policy and procedures documents are the result of an ongoing and continuous improvement effort focused on preventing and addressing sexual misconduct in its campus community. For context, it is worth noting that MSU's Title IX program has evolved significantly over the last few years. Specifically, MSU's recent work in this area has included:

- Changes in its RVSM Policy and procedures, as articulated by OIE in its August, 2017 update on such changes<sup>27</sup> as well as a two-minute video that describes the changes;<sup>28</sup>
- Enhanced collaboration and communication between administrative offices and committees working on the development and implementation of the RVSM Policy through the expansion and clarification of missions and goals of the entities that provide input on Title IX-related issues;
- Increases in staffing and resources among the immediate and broader Title IX teams;
- Efforts to support stronger alignment in messaging and training, as demonstrated by MSU's active search for a position within OIE related to communications; and
- An expansion of Title IX-related resource documents, including "Quick Reference Guides" for claimants and respondents, by category of student, employees and individuals not affiliated with the University and "Information Forms" for claimants and respondents.<sup>29</sup>

In many respects, MSU's Title IX program is "in a constant state of motion," as additional improvements and enhancements to policy, procedures, training, staffing and communications are continually being considered and implemented. This work—as demonstrated by MSU's revised policies and procedures—reflects a strong and genuine institutional commitment to combatting sexual misconduct, creating a safe campus environment, as well as compliance with Title IX and VAWA requirements. MSU's efforts, as demonstrated in its policy and procedures and related resources available on its website, in several respects, exceed those we have seen at other institutions, including large and complex organizations like MSU. They provide detailed guidance to claimants, respondents, investigators, and adjudicators and set forth a fair and equitable process for resolving reports of sexual misconduct. Overall, MSU's policies and procedures comply with current legal requirements and agency guidance.

In support of MSU's goal for continued improvement and expansion of leading-edge practices, we have identified a few components of MSU's current policies and procedures that could benefit from clarification, simplification, removal of redundant content, and the addition of provisions to cover compliance areas that may be addressed in supporting documentation, but that are currently unaddressed within the policy itself. Further, we have identified a few areas that could be expanded upon in order to address key issues that were highlighted in OCR's new guidance.

Notwithstanding our recommendations, we recognize that institutions make policy decisions in light of several factors that go beyond compliance and legal risk, including alignment with institutional values, cultures and business needs, and that MSU may choose not to prioritize certain items for such reasons, among others.

The following subsections address these key compliance requirement areas:

- |   |                                    |
|---|------------------------------------|
| <b>1. Notice of Nondiscrimination</b>     | <b>4. Key Statements of Policy</b> |
| <b>2. Title IX Coordinator</b>            | <b>5. Key Procedural Elements</b>  |
| <b>3. Training and Education Programs</b> | <b>6. VAWA</b>                     |

<sup>27</sup> OIE's summary of updates to the RVSM Policy and resources for the 2017-2018 academic year—including new sanctioning guidelines, a glossary of terms, student conduct sanction and appeals procedures, and employee responsibilities—is available at: <http://titleix.msu.edu/news-events/news/2017-2018-rvsm-policy-updates.html>.

<sup>28</sup> MSU's video explaining changes to the RVSM Policy, as well as information on MSU's Title IX website is available at: <https://www.youtube.com/watch?v=I4T6xD-Vaql&feature=youtu.be>.

<sup>29</sup> Resources are available at: <http://titleix.msu.edu/find-resources/index.html>.

## Notice of Nondiscrimination

Title IX and other OCR-enforced statutes require institutions to publish a notice of nondiscrimination.<sup>30</sup> 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 with respect to employment and admissions;
- Title IX prohibits the institution from discriminating on the basis of sex in its educational programs and activities;
- The name or title, office address, and telephone number of the designated Title IX Coordinator; and
- Inquiries concerning Title IX can be referred to the institution's designated Title IX Coordinator or to OCR.

MSU's Notice of Non-Discrimination<sup>31</sup> covers the standards outlined above.

## Title IX Coordinator

Title IX requires institutions to designate at least one individual to coordinate its Title IX compliance efforts and to receive complaints of sex discrimination.<sup>32</sup> MSU has done this.

## Training and Education Programs

OCR has continually conveyed the importance of training and educational programming in the realm of Title IX.<sup>33</sup> These expectations overlap with training and educational programming requirements imposed by VAWA. While this phase of our review is not intended to analyze these training and educational programming requirements, we have provided an outline of the obligations imposed by both laws in Appendix A of this report for MSU's reference. This requirement will be evaluated in the second phase of our review.

## Key Statements of Policy

After considering the currently applicable guidance, and based on our experience, the items below outline information that we believe should be covered in MSU's RVSM Policy in order to demonstrate compliance with Title IX requirements, and our analysis of MSU's efforts in satisfying these requirements. For some items, we provide further explanation in bullet points following the policy statement.

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<sup>30</sup> See 34 C.F.R. § 106.9; see also: "Notice of Non-Discrimination" (August, 2010), available at: <https://www2.ed.gov/about/offices/list/ocr/docs/nondisc.pdf>.

<sup>31</sup> Available at: [https://oie.msu.edu/\\_assets/documents/2017-01-06-non-discrimination-notice-final-v-2.pdf](https://oie.msu.edu/_assets/documents/2017-01-06-non-discrimination-notice-final-v-2.pdf).

<sup>32</sup> 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.

<sup>33</sup> See 2015 DCL, (discussion of training for Title IX Coordinators); see also 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.)

### An adequate definition of sexual harassment.<sup>34</sup>

*The RVSM Policy satisfies this requirement.*

- We only have one minor point on this definition. The RVSM Policy provides that “A person’s subjective belief alone that behavior is offensive does not necessarily make that behavior sexual harassment. The behavior must also be objectively offensive.” While we understand what is intended, we believe this language could benefit from some clarification. Specifically, we recommend MSU consider the following modification: “A person’s subjective belief alone that behavior is offensive does not necessarily mean the conduct rises to the level of a policy violation. The behavior must also objectively meet the definition of prohibited sexual harassment.”

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### An explanation as to when sexual harassment creates a hostile environment.<sup>35</sup>

*The RVSM Policy satisfies this requirement.*

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### Examples of the types of conduct that constitute sexual harassment.<sup>36</sup>

*The RVSM Policy satisfies this requirement.*

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### An adequate definition of sexual violence.<sup>37</sup>

*The RVSM Policy satisfies this requirement.*

- We only note one suggested modification to an example of the term “rape,” which includes this example: “Non-consensual penetration, no matter how slight, of the victim’s genital opening, anus, or mouth with any body part or object.” While we are aware that in practice this has never occurred, this definition, technically speaking, would include the act of inserting food without consent into another person’s mouth. While that may violate some other conduct policy, we recommend this example be modified to eliminate this unintended interpretation.

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**An adequate definition of consent (as it relates to sexual violence).<sup>38</sup> We note that during our onsite discussions, students unanimously and confidently reported that consent is a concept that has pierced the student awareness bubble and is understood amongst the campus community. One student offered that a majority of students would be able to articulate the key components of this definition, if asked.**

*The RVSM Policy satisfies this requirement.*

Many institutions’ policies emphasize the point that consent can be withdrawn at any time during a sexual encounter. Indeed, this language appears in the RVSM Policy. However, as a point of practice, we find that this language is vague and could be misinterpreted to mean consent can be retroactively withdrawn. We suggest that MSU consider revising this language to specify that consent can be withdrawn at any time during the sexual encounter, at which point any **further** sexual activity becomes non-consensual.

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### An explanation that prohibited sex discrimination covers sexual harassment, including sexual violence.<sup>39</sup>

*The RVSM Policy satisfies this requirement.*

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<sup>34</sup> 2001 Guidance, discussion on the definition of harassment, p. v.

<sup>35</sup> 2001 Guidance, discussion on the definition of harassment, p. v.

<sup>36</sup> 2001 Guidance, discussion on *quid pro quo* and hostile environment and accompanying examples, pp. 5-7.

<sup>37</sup> 2015 Resource Guide, discussion on sex-based harassment, p. 15.

<sup>38</sup> 2015 Resource Guide, discussion on sex-based harassment, p. 15.

<sup>39</sup> 2015 Resource Guide, discussion on sex-based harassment, p. 15.

### Title IX covers sexual misconduct when the claimant and alleged perpetrator are members of the same sex.<sup>40</sup>

- Section II of the RVSM Policy specifically explains that the policy applies to individuals, “regardless of gender, sexual orientation, or gender identity.” While this language broadly applies to individuals of the same sex, we recommend that the RVSM Policy be revised to specifically include this language.

### Title IX covers claims of harassment based on failure to conform to stereotypical notions of masculinity or femininity (i.e., gender stereotyping).<sup>41</sup>

- MSU’s Anti-Discrimination Policy (ADP) and its main Title IX webpage both address the point that Title IX prohibits discrimination based on gender stereotyping. However, while discrimination based on gender stereotyping is prohibited by the ADP, the RVSM Policy does not explicitly include gender *stereotyping* harassment as a basis for a policy violation. OCR has long taken the position that gender stereotyping is a form of sex discrimination, and courts have generally agreed with this view.<sup>42</sup> Accordingly, we recommend that institutions include within their examples of sexual harassment at least one example that illustrates the concept of gender stereotyping. One such example is as follows: “Sexual harassment includes harassing a male because he allegedly ‘isn’t manly enough’ or a female because she allegedly ‘is too manly.’”
- On a related issue, an outstanding legal question in the Sixth Circuit and many other federal circuits is whether Title IX’s prohibition on sex discrimination extends to “gender identity.”<sup>43</sup> To be clear, OCR is currently not enforcing—and withdrew—prior guidance that interpreted Title IX to prohibit gender identity discrimination.<sup>44</sup> However, while Michigan law does not currently speak *explicitly* to this issue,<sup>45</sup> an applicable executive directive, issued in 2007 by then-Governor Jennifer Granholm, prevents public employers from engaging in discrimination on the basis of gender identity or expression.<sup>46</sup> Under this executive directive, gender identity or expression is a protected class for public employees, but students are not explicitly mentioned. That said, the University is under no compliance obligation to extend the RVSM Policy to claims based on gender identity discrimination, but it may be inconsistent with the spirit of the law for a Michigan public employer to permit discrimination on the basis of gender identity against students. Further, we note that gender identity is a protected category listed in MSU’s broader Anti-Discrimination Policy (“ADP”).<sup>47</sup> For these reasons, MSU may want to also consider including harassment based on gender identity or expression in the RVSM Policy.<sup>48</sup>

### Title IX protects all students regardless of national origin.

- The 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

<sup>40</sup> 2001 Guidance, discussion of harassment by parties of the same sex as the victim, pp. 25-26, FN 11.

<sup>41</sup> 2001 Guidance, discussion of harassment based on gender stereotypes, p. v, and pp. 25-26, FN 11; *see also, Dodds v. United States Dep’t of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016) (“Under settled law in this Circuit, gender nonconformity, as defined in *Smith v. City of Salem*, is an individual’s ‘fail[ure] to act and/or identify with his or her gender.... Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination.’ 378 F.3d 566, 575 (6th Cir. 2004)”).

<sup>42</sup> 2001 Guidance, p. 25, FN 11.

<sup>43</sup> The Supreme Court was potentially set to resolve in its 2016-2017 term the issue of whether gender identity discrimination is included within Title IX’s prohibition on sex discrimination, but it remanded the operative case, *Grimm v. Gloucester Co. School Board*, 654 F. App’x 606 (4th Cir. 2016), when OCR withdrew its relevant guidance in early 2017. Since *Grimm* was remanded, in the summer of 2017, the Seventh Circuit issued a decision in *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, 858 F.3d 1034 (7th Cir. 2017), holding that discrimination on the basis of gender identity is included in Title IX’s prohibition on sex discrimination. A petition for certiorari in *Kenosha* is pending before the Supreme Court. The Sixth Circuit is currently considering the issue in the pending appeal of the decision in *Board of Education of the Highland School District v. United States Department of Education*, 208 F. Supp.3d 850 (S.D. Ohio 2016).

<sup>44</sup> Under the Obama Administration, DOJ and OCR issued a joint DCL on May 13, 2016 explaining that prohibitions on sex discrimination under Title IX require access to sex-segregated facilities based on gender identity. This joint DCL was withdrawn by the current Administration on February 22, 2017. The prior guidance is available at: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>. The DCL withdrawing this guidance is available at: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

<sup>45</sup> We understand that in September of 2017, some Michigan citizens engaged in advocacy efforts in an effort to persuade the Michigan Civil Rights Commission to interpret Michigan’s Civil Rights Act, MCL 37.2101, et seq., to include broader protections for the LGBT community, including with respect to gender identity. However, we understand that Commission requested a formal Attorney General opinion on the Commission’s ability to expand the interpretation of the Civil Rights Act’s protection and that this request is, to date, still pending.

<sup>46</sup> Executive Directive 2007-24 is available at: <http://www.michigan.gov/formergovernors/0,4584.7-212-57648-36898-180697--00.html>.

<sup>47</sup> MSU’s Anti-Discrimination Policy is available at: [https://www.hr.msu.edu/policies-procedures/university-wide/ADP\\_policy.html/](https://www.hr.msu.edu/policies-procedures/university-wide/ADP_policy.html/).

<sup>48</sup> Available at: [https://www.hr.msu.edu/policies-procedures/university-wide/ADP\\_policy.html](https://www.hr.msu.edu/policies-procedures/university-wide/ADP_policy.html).



citizenship. While this guidance has been withdrawn, an individual's immigration status and citizenship also has no impact on Title IX's application to them. Specifically, the statute itself provides that, "No person in the United States shall, on the basis of sex, be excluded from... be denied the benefits of... be subjected to discrimination under any education program or activity receiving Federal financial assistance..." The law, therefore, applies to anyone in the U.S. Immigration status and citizenship are, therefore, also concepts that could be included in the RVSM Policy relating to national origin.

- Even though MSU's ADP already prohibits discrimination on the basis of national origin, we recommend, at a minimum, that MSU also add a short statement to the RVSM Policy explicitly covering this standard.

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**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.<sup>49</sup>**

*The RVSM Policy satisfies this requirement.*

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**Retaliation is prohibited.<sup>50</sup>**

*The RVSM Policy satisfies this requirement.*

- We note that the term "retaliation" is defined in Appendix A, the Glossary, but is not defined in the policy itself. We understand that the Glossary of terms was developed in response to a specific recommendation from campus community members. We have no concern with the definition of retaliation appearing in the Glossary of terms, but given the importance and significance of this term and its prevalence in the RVSM Policy, we recommend that MSU consider moving this definition into the RVSM Policy.

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**Include the name or title, office address, telephone number, and email address of the Title IX Coordinator.<sup>51</sup>**

*The RVSM Policy satisfies this requirement.*

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**Title IX Coordinator's responsibilities include: (1) overseeing all Title IX complaints and (2) identifying and addressing any patterns or systemic problems that arise during the review of such complaints (i.e., include a statement regarding the Title IX Coordinator's responsibilities that, at minimum, cover these concepts).<sup>52</sup>**

*The RVSM Policy satisfies this requirement.*

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**A school should make clear to all of its employees and students which employees are "responsible employees" so that students can make informed decisions about whether to disclose information to those employees and so the employees know of their reporting obligations.<sup>53</sup>**

*The RVSM Policy satisfies this requirement.*

- Under Title IX, a school has notice of sexual misconduct if a responsible employee "knew or, in the exercise of reasonable care should have known." The 2001 Resource Guide specifies that responsible employees are 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.<sup>54</sup> The Withdrawn 2014 Q&A Guidance expanded this duty to extend to reports of sexual violence.<sup>55</sup> In lieu of designating "responsible employees," some institutions choose to require, as a matter of institutional policy, that all of their employees (except specifically designated confidential resources) report

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<sup>49</sup> 2017 Q&A Guidance, discussion at FN 3.

<sup>50</sup> 34 C.F.R. § 106.71 (incorporating by reference 34 C.F.R. § 100.7(e)); and 2015 Resource Guide, p. 24.

<sup>51</sup> 34 C.F.R. § 106.8(a); 2015 Resource Guide, p. 6.

<sup>52</sup> 2015 Resource Guide, p. 16.

<sup>53</sup> 2001 Guidance, discussion on notice of harassment, p. 13.

<sup>54</sup> 2001 Guidance, p. 13.

<sup>55</sup> Withdrawn 2014 Q&A Guidance, A-4 and D-1.

information about all forms of sexual misconduct. Both approaches are appropriate.

- MSU requires all University employees (except for certain designated confidential resources) to make reports under the RVSM Policy.

## Key Procedural Elements

Title IX requires that a school adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints of sex discrimination,<sup>56</sup> including sexual harassment and sexual violence.<sup>57</sup> The following procedural elements are necessary for an institution's sexual misconduct policies and procedures to align with Title IX guidance:

### A statement of the school's jurisdiction over Title IX complaints.

- The 2017 Q&A Guidance restates OCR's previous interpretation of Title IX under the 2001 Guidance 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."
- Irrespective of where MSU falls on this issue from a policy perspective, we feel the RVSM Policy could benefit from additional clarity on this point. Section II of the RVSM Policy, beginning on page 4, contains a discussion of the University's jurisdiction over Title IX complaints. Based on the language as written, it is unclear if the University's jurisdiction extends to incidents involving members of the University community that occur prior to the individual being enrolled or employed by MSU when the conduct occurred off-campus and outside the context of a University program or activity but which has continuing adverse effects on campus or in any University program or activity (e.g., incident occurred between two current students prior to their enrollment at MSU, off-campus, and unrelated to MSU; in this scenario it is unclear whether a claimant's fear alone or a respondent's presence alone is covered). We also believe the language continuing on page 5 creates confusion as to whether the policy extends to non-community members in off-campus locations that are unrelated to an educational program or activity. For this reason, we suggest that MSU consider clarifying this language to indicate that when an alleged violation occurs outside of a program or activity, by a non-community member, the institution will focus on remediation and assistance, but not undertake an investigation.
- While we strongly recommend that any revisions to this section of the RVSM Policy be carefully developed in consideration of the unique circumstances and environment within the MSU campus environment, we have provided some examples below.

## JURISDICTION EXAMPLES

"This policy applies to misconduct that occurs: (1) on University property; or (2) off University property, if: (a) the conduct occurred in connection with a University or University-sponsored or -recognized program or activity; or (b) the conduct has or reasonably may have the effect of creating a hostile educational or work environment for a member of the University community. For example, this policy applies to misconduct that occurs between students during an off-campus party in a private residence, during a University-sponsored study abroad program, or during research- or conference-based University-supported travel. Also, misconduct that occurs off-campus and involves an alleged student perpetrator and an unaffiliated complainant is subject to investigation and adjudication, although the circumstances may be such that the inquiry is limited to assessing whether the student poses a threat to campus safety."

"This [Policy] applies to conduct that occurs on campus. It also applies to off campus conduct, including on-line or electronic conduct, if the conduct (1) occurred in the context of an employment or education program or activity of the University or (2) has continuing adverse effects on campus. The University takes prompt and effective steps reasonably intended to stop any form of sexual misconduct, eliminate any hostile environment, prevent its recurrence and as appropriate, remedy its effects."

"The Policy covers [discrimination and sexual misconduct] occurring on campus, or otherwise within the context of University-sponsored programs and activities, whether those are on campus or off campus. It applies to persons who are on campus or who otherwise participate in University-sponsored programs and activities, such as employees, students, applicants for employment or admission, contractors, vendors, visitors, and guests. Conduct that occurs off campus and outside the context of University-sponsored programs and activities is covered by this Policy only to the extent such conduct relates to discrimination, harassment, domestic violence, dating violence, stalking, or retaliation that is alleged to have occurred on-campus or in the context of a University-sponsored program or activity."

<sup>56</sup> 34 C.F.R. § 106.8.

<sup>57</sup> 2015 DCL, discussion on sex-based harassment, p. 15.

**Notice must be given to campus community members of the grievance procedures and where complaints can be filed.<sup>58</sup>**

*The RVSM Policy satisfies this requirement.*

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**Must have procedures that apply to complaints against students, employees, and third parties.<sup>59</sup>**

*The RVSM Policy satisfies this requirement.*

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**Schools should provide an assurance that they will take steps to prevent the recurrence of any harassment and to prevent recurrence of sexual misconduct and to remedy its discriminatory effects, as appropriate.<sup>60</sup>**

*The RVSM Policy satisfies this requirement.*

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**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.**

- The recent 2017 Q&A Guidance highlighted regulatory requirements and OCR's longstanding guidance relating to the provision of interim measures. OCR notes that interim measures are services offered as appropriate to either party, prior or during an investigation of alleged sexual misconduct. OCR also notes that institutions, "may not rely on fixed rules or operating assumptions that favor one party over another, nor... make such measures available to only one party."
  - MSU's Policy contains a discussion of interim measures on pages 39-41. This language appears to have been designed with the Withdrawn 2014 Q&A Guidance in mind, as it indicates that "[t]he University will notify claimants ... that interim measures are available..." "[i]nterim measures will not disproportionately negatively impact the claimant," and "[t]he Title IX Coordinator will take steps to ensure ... that such interim measures ... minimize the burden on the claimant." MSU should reevaluate the discussion on interim measures with the 2017 Q&A Guidance in mind.
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**Throughout the investigation, both parties must have an equal opportunity to present relevant witnesses and other evidence.<sup>61</sup>**

*The RVSM Policy satisfies this requirement.*

- 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. Constitution<sup>62</sup> and uniquely asserted against public institutions because private institutions are not subject to constitutional constraints.<sup>63</sup> See *Faparusi v. Case Western Reserve Univ.*, \_\_\_ F. App'x \_\_\_, 2017 WL 4417677, at \*4 (6th Cir. 2017). For instance, 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." *Id.* at 401. Applying that rule, the court held that, where a female student accused a male student of sexual assault, and the institution's determination of responsibility rested solely<sup>64</sup> on finding the claimant's account more credible than the respondent's, due process likely required<sup>65</sup> the institution to provide some form of cross-examination to test the claimant's credibility. *Id.* Consistent with its prior ruling in *Doe v. Cummins*,

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<sup>58</sup> 34 C.F.R. § 106.8.

<sup>59</sup> 2001 Guidance, p. 19.

<sup>60</sup> 2011 Guidance, discussion of enduring principles from 1997 guidance, p. iii.

<sup>61</sup> 2017 Q&A Guidance, p. 5, Q8.

<sup>62</sup> 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.

<sup>63</sup> 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 *Faparusi*, 2017 WL 4417677, at \*6.

<sup>64</sup> 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.

<sup>65</sup> 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.

662 F. App'x 437, 448 (6th Cir. 2016), 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. *Id.* at 404 (citing *Cummins*, 662 F. App'x at 448). However, because the claimant in *Doe* was not present at the hearing, the court concluded the absence of any form of cross-examination likely violated the respondent's due process rights.

- MSU's Policy does not provide a right of direct cross-examination. However, the policy permits the parties to provide questions to the investigator to be posed to the other party during the investigation and adjudication process. This form of **effective** cross-examination appears to satisfy *Doe* and *Cummins*, assuming each party is adequately advised of the substance of the other's testimony such that he or she is able to formulate questions to be posed.<sup>66</sup>

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**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.<sup>67</sup>**

*The RVSM Policy satisfies this requirement.*

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**Both parties must be notified in writing of the outcome of the complaint and any appeal options.<sup>68</sup>**

*The RVSM Policy satisfies this requirement.*

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

*The RVSM Policy satisfies this requirement.*

- The Withdrawn 2011 DCL and Withdrawn 2014 Q&A Guidance indicated that grievance procedures should specify timeframes within which the school will conduct a full investigation, parties will receive notice of the outcome, and the parties may file an appeal, as well as giving a 60-day timeframe for investigations. However, the 2017 Q&A Guidance indicates that there is no fixed time frame under which a school can provide a “prompt” Title IX investigation; instead, “OCR will evaluate a school's good faith effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution.”<sup>69</sup>

## VAWA

Below, we provide a list of VAWA's procedural requirements. We note that these requirements specifically require the institution to address these issues in its Annual Security Report (ASR); however, because these requirements speak to issues addressed in the RVSM Policy, we extend our analysis and recommendations to that document. Please note that due to the overlap with Title IX, some of the topics covered above will also be discussed in this section.

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

*The RVSM Policy satisfies this requirement.*

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

*The RVSM Policy satisfies this requirement.*

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<sup>66</sup> The policy provides that questions “may not be used to harass or intimidate the other party.” *Doe* makes clear, however, that, by its very nature, direct cross-examination may result in further trauma or intimidation. See *Doe*, 872 F.3d at 403. Therefore, in practice, this policy language should not be invoked simply on the basis that questions are likely to discomfort or cause a claimant to revisit the episode.

<sup>67</sup> 2017 Q&A Guidance, p. 5, Q8.

<sup>68</sup> 2017 Q&A Guidance, p. 6.

<sup>69</sup> 2017 Q&A Guidance, p. 3.

**The standard of evidence that will be used during an institutional conduct proceeding arising from such a report (due to the overlap with Title IX, this should be the preponderance of the evidence standard).**

*The RVSM Policy satisfies this requirement.*

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

*The RVSM Policy satisfies this requirement.*

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**The proceedings will be prompt, fair, and impartial from the initial investigation to the final result.<sup>70</sup>**

*The RVSM Policy satisfies this requirement.*

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**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.**

*The RVSM Policy satisfies this requirement.*

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**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.<sup>71</sup>**

*The RVSM Policy satisfies this requirement.*

- The “Advisors or Support Persons” section on page 41 of the policy adequately covers this standard. For MSU’s consideration, and as a matter of best practice which clearly provides full notice of the role and expectations for advisors and support persons, we suggest explicitly stating that an advisor can be dismissed if he/she attempts to directly participate in the proceedings or is otherwise disruptive, in the judgment of the investigator.
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**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.**

- While the policy provides for written notification to the parties of the outcome of the investigation and appeals, we recommend explicitly stating that such notifications will be issued concurrently. We understand that this is already current practice at MSU.
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**The importance of preserving evidence that may assist in proving that the alleged criminal offense occurred or may be helpful in obtaining a protection order.**

*The RVSM Policy satisfies this requirement.*

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

*The RVSM Policy satisfies this requirement.*

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<sup>70</sup> VAWA regulations indicate that a prompt, fair, and impartial proceeding: (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. 34 C.F.R. § 668.46(k)(3).

<sup>71</sup> 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.

- Options regarding law enforcement and campus authorities and 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.
- We note that nearly all of this information is appropriately covered on pages 20-21 of the policy, and the resource documents provided to claimants. However, MSU's policy is that all responsible employees must report incidents of sexual violence, sexual exploitation, or stalking report not only to the Title IX Coordinator, but also to the MSU police department. While some institutions' policies do encourage all employees to call the police immediately in an emergency or situation that involves a serious or ongoing threat, among all institutions surveyed as part of our benchmarking analysis, no other institution requires responsible employees to report to law enforcement as a matter of policy. Indeed, we are unaware of any other institution that imposes such a requirement. Notably, Clery regulations provide that institutions must have a statement of policy that explains, "Options about the involvement of law enforcement and campus authorities including notification of the victim's option to— (3) decline to notify such authorities."<sup>72</sup> We are concerned that MSU's policy requiring all responsible employees to not only notify the Title IX Coordinator of sexual misconduct of which they become aware, but to also notify law enforcement, may be in tension with applicable legal requirements that vest victims with agency concerning whether to notify law enforcement. For this reason, we recommend that MSU consider this issue against this compliance standard. We also recommend that MSU consider clarifying this component of the policy because, as written, the duty to report specific offenses to law enforcement is not clear in each section that it is addressed.

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**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 note that these issues are covered in the Claimant Information Form. Nonetheless, we recommend that the institution's sexual misconduct policies and procedures also include general information regarding these points.
- The University may have intended to cover this standard with the following statement on page 31 of the policy: "Both [the MSU Sexual Assault Program and MSU Safe Place] programs offer a variety of services, including counseling, safety planning, and information about legal options and protections through the criminal and civil courts." While this information is appropriate, we also recommend the inclusion of a statement similar to the following in the policy: "If a claimant has obtained an order of protection, civil no-contact order, restraining order, or similar order from a criminal, civil, or tribal court against the alleged perpetrator, the claimant may provide such information to the Title IX Coordinator. If provided, the Title IX Coordinator, in conjunction with MSU Police and other University officials, as needed, will take all reasonable and legal action to implement the order."

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**Information about options for, available assistance in, and how to request changes to academic, living, transportation, and working situations or protective measures. This statement should also explain that 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. In addition, the statement should indicate that the institution will maintain as confidential any accommodations or protective measures provided to the victim, to the extent that maintaining such confidentiality would not impair the ability of the institution to provide the accommodations or protective measures.**

- The section of the policy regarding interim measures begins on page 39 and is largely appropriate. However, we noted the following:
  - It does not mention "transportation" accommodations.
  - It states that MSU "will maintain privacy of any interim measures provided under this policy to the extent practicable..." We believe this could be clarified to explain that interim measures will be maintained as confidential to the extent this would not impair the ability to provide them.

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<sup>72</sup> 34 C.F.R. § 11(b)(ii)(C)(3).

**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.**

- Page 19 of the policy discusses campus and community resources and provides several links to such resources. This information is appropriate and thorough. However, we were unable to find any mention of the “student financial” aid piece and only limited information on visa and immigration assistance. With that in mind, we recommend:
  - Adding some information regarding student financial aid in the resources provided. Note that we believe this element of VAWA compliance can be confusing without some discussion, as it is not intuitive how financial aid relates to sexual misconduct. We interpret it to mean that the institution should put individuals who are considering a leave of absence on notice that there may be financial aid implications in taking such a leave and that this should be discussed with financial aid personnel (with facilitation by the appropriate University official—e.g., the Title IX Coordinator—if necessary). As such, the University may want provide a link to its financial aid office with an introductory statement similar to the following:
    - “If you are considering taking a leave of absence from the University because of the circumstances surrounding a case of sexual misconduct or relationship violence, please keep in mind that there may be financial aid implications. Financial aid offices are listed below, and the Title IX Coordinator can assist you in contacting the appropriate personnel in those offices in order to ensure you have an understanding of any financial aid related issues that may arise.”
  - Incorporating the following information related to visa and immigration assistance:
    - Immigration Advocates Network (<https://www.immigrationadvocates.org/nonprofit/legaldirectory/search?state=MI>).
    - U.S. Citizenship and Immigration Services (<https://www.uscis.gov/about-us/find-uscis-office/field-offices/michigan-detroit-field-office>).

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**A statement that the institution will complete publicly-available recordkeeping, including Clery Act reporting and disclosures, without inclusion of personally identifying information about the victim.**

*The RVSM Policy satisfies this requirement.*

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

*The RVSM Policy satisfies this requirement.*

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# Alignment with Policy and Procedure Best Practice



In addition to evaluating specific compliance requirements, our review included a detailed assessment of key policy statements that, in our experience, support compliance. These policy statements generally involve topics that ensure fair and equitable practices for addressing allegations of sexual misconduct and due process for both parties. These items are discussed in more detail below.

## Fair and Equitable Policy Statements

In order to ensure that investigations are fair and equitable—as well as adequate, reliable, and impartial—we often advise schools to include the points noted below in their sexual misconduct policies and procedures. As noted below, MSU has already covered several of these standards in its RVSM Policy.

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### **Parties are to have equal procedural rights during the investigation and resolution of a complaint of sexual misconduct.<sup>73</sup>**

- Though this point is not explicitly stated in the RVSM Policy, it can be inferred from other information contained within it (e.g., both parties have the right to provide evidence, witnesses, and other relevant information during the investigation, appeal the outcome, etc.). Nonetheless, given OCR's emphasis on equity in its 2017 DCL and 2017 Q&A Guidance, we recommend that a statement to this effect be included in MSU's Policy.

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### **A school's investigation is separate from a criminal investigation (school can find policy violation even though criminal standard for a conviction cannot be met, if there was a decision to not invoke a criminal investigation or prosecute, etc.).<sup>74</sup>**

*The RVSM Policy does this.*

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### **Pending law enforcement investigation will not be a reason for delay in resolving complaints promptly and equitably. Schools should not wait for the conclusion of a criminal investigation or criminal proceeding to bring their own Title IX investigation (but, a temporary delay during the fact-finding portion of an investigation while police are gathering evidence may be appropriate).<sup>75</sup>**

*The RVSM Policy does this.*

- The 2001 Resource Guide addresses the intersection between criminal and University investigations by explaining that, "[Be]cause legal standards for criminal investigations are different, police investigations or reports may not be determinative of whether harassment occurred under Title IX *and do not relieve the school of its duty to respond promptly and effectively.*"<sup>76</sup> The Withdrawn 2014 Q&A Guidance emphasized this point and directed institutions to not delay an investigation while a criminal investigation is occurring. Although that guidance has been withdrawn, the 2001 Guide's reference to two OCR cases where this issue was considered is still applicable. Further, we are unaware of any institution that has recently changed its policy to delay its investigations pending the outcome of a criminal investigation, and find that the vast majority of institutions conduct a parallel investigation, and work to cooperate with law enforcement, to ensure that neither process infringes upon the other.

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### **Any real or perceived conflicts of interest between the fact-finder or decision-maker and the parties should be disclosed.<sup>77</sup>**

*The RVSM Policy does this.*

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<sup>73</sup> 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).

<sup>74</sup> 2001 Resource Guide, discussion on differences in legal standards for criminal investigations, p. 21.

<sup>75</sup> 2001 Resource Guide, discussion on differences in legal standards for criminal investigations, p. 21.

<sup>76</sup> 2001 Resource Guide, p. 21, citing *Academy School Dist.* No 20, OCR Case No. 08-93-1023 (school's response determined to be insufficient in a case in which it stopped its investigation after complaint filed with police); *Mills Public School Dist.*, OCR Case No. 01-93-1123, (not sufficient for school to wait until end of police investigation).

<sup>77</sup> 2017 Q&A Guidance, discussion on real and perceived conflicts, p. 4 and p. 5.

**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.**

*The RVSM Policy does this.*

- This aspect of Title IX is encompassed 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. In other words, though allowing lawyers to participate is an institutional decision, VAWA requires that advisors (including attorneys) be allowed in cases of sexual assault, dating/domestic violence, and stalking.

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**Questioning about the claimant's sexual history should be appropriately limited.**

*The RVSM Policy does this.*

- Sexual history is discussed on page 36 of MSU's RVSM Policy and this language seems to provide flexibility in allowing such information to be considered in limited circumstances. From our perspective, this is appropriate. While the Withdrawn 2014 Q&A Guidance<sup>78</sup> strongly advised against questioning on prior sexual history, our view is that there are times when discussing the claimant's past sexual history with others may be relevant. In these instances, there is a competing concern about depriving the respondent of relevant information and, as a reference point, the Federal Rules of Evidence, Rule 412, acknowledge 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 claimant's own allegations.

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**Respondents may submit a reciprocal complaint if they feel they have experienced sexual misconduct.**

- We have seen an increase in reciprocal complaints from respondents, particularly in cases involving the use of drugs or alcohol. Given the increase in these complaints, it is prudent for institutions to be prepared to address these complaints when they arise. To further this goal, we recommend that institutions consider adding this statement to their policies.

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

*The RVSM Policy does this.*

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**School must maintain documentation of all proceedings.<sup>79</sup>**

*The RVSM Policy does this.*

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**Institutions may use voluntary informal resolution methods, including mediation, to address allegations of sexual misconduct.<sup>80</sup>**

*The RVSM Policy does this.*

- Footnote 7 of the University's Anti-Discrimination Policy<sup>81</sup> provides the following: "The availability and appropriateness of informal resolution involving claims of gender discrimination, including sexual and gender-based harassment, assault, and violence, is governed by the Relationship Violence & Sexual Misconduct (RVSM) Policy." The RVSM Policy addresses the concept of informal resolution, which it refers to as "Administrative Action." Such informal resolution methods must meet the following standards:
  - Informal resolution will only be used after the parties have received a full disclosure of the allegations and their options for formal resolution.

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<sup>78</sup> 2014 Q&A Guidance, p. 31, F-7.

<sup>79</sup> 2015 Resource Guide, discussion on maintaining grievance and compliance records and files, p. 5.

<sup>80</sup> 2017 Q&A Guidance.

<sup>81</sup> Available at: [https://www.hr.msu.edu/policies-procedures/university-wide/ADP\\_policy.html](https://www.hr.msu.edu/policies-procedures/university-wide/ADP_policy.html).

- The Title IX Coordinator will determine if informal resolution is appropriate and will assist the parties in reaching a voluntary resolution.
- During an informal process, either party is entitled to end the informal process at any time and use the formal process.

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

*The RVSM Policy does this.*

- 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.

## Policy Clarifications

We also identified a few elements within the RVSM Policy that we feel would benefit from further clarification. These are addressed herein:

**Witness participation:** MSU's RVSM Policy specifies that witness participation in the OIE investigatory process is voluntary. However, later in the policy on page 40, the policy states that members of the University community are expected to participate in investigations of alleged violations. As an initial matter, this appears inconsistent. Furthermore, while we can appreciate that the University is reluctant to force a witness to participate in its disciplinary process, we are concerned that this may undermine the credibility and integrity of this process in certain cases and the reliability of its investigations. This is a particular concern where the witness is an employee who would, as a general matter, be expected to effectuate institutional policies. For instance, if a witness to a sexual assault is unwilling to participate, does the case simply proceed without the benefit of this witness statement? This is a policy decision, but we might suggest that MSU simply state that all members of the campus community who witness sexual misconduct are expected to participate.

**Investigator role:** The RVSM Policy explaining the OIE investigation process does not clearly delineate the precise party who makes a determination or finding. The policy describes that this decision is made by OIE, but it is unclear which party is specifically responsible for that finding, the investigator or the Title IX Coordinator. The appendices are also not clear on this point. Further there is some ambiguity in the definition of the term "investigator" as to their role. Specifically, the policy states, "The investigator reviews all of the information and applies the preponderance of the evidence standard to determine if the respondent violated the RVSM Policy." We believe that the investigator's role is slightly more nuanced than described and suggest that the institution consider modifying this language slightly to explain that the investigator reviews all of the information and applies the preponderance of the evidence standard to determine what conduct occurred and, thereafter, if applicable, determines whether that conduct constitutes a violation of the policy.

**Sexual exploitation:** We note that the RVSM Policy's definition of "sexual exploitation" includes a reference to non-consensual recording or distribution of sexual activity or nudity without knowledge. We suggest that MSU consider limiting this language to places where an individual has a legitimate expectation of privacy. We are concerned that, as written, this may unintentionally apply to recording of conduct occurring in public places where no such expectation is reasonable (e.g., streaking or other nudity in a public place; engaging in sexual activity in a public place).

**Incapacitation:** We note that the RVSM Policy specifically addresses incapacitation in terms of a situation where someone is more than intoxicated, but unable to make an informed and rational decision to consent because she/he lacks conscious knowledge of the nature of the act. This is aligned with definitions we see in other institutions' policies and, in our view, is an objective standard. However, this section also describes a "phenomenon" of an alcohol-induced blackout and makes a distinction between this and incapacitation. We are concerned that this description is vague, and may create unnecessary confusion. To the extent MSU wishes to describe this issue in its policy, we recommend that this be reexamined for clarity and purpose.

## Ease of Access and Use of Policy

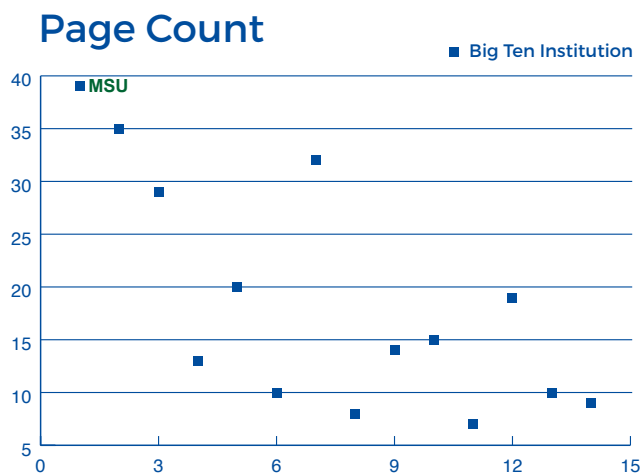
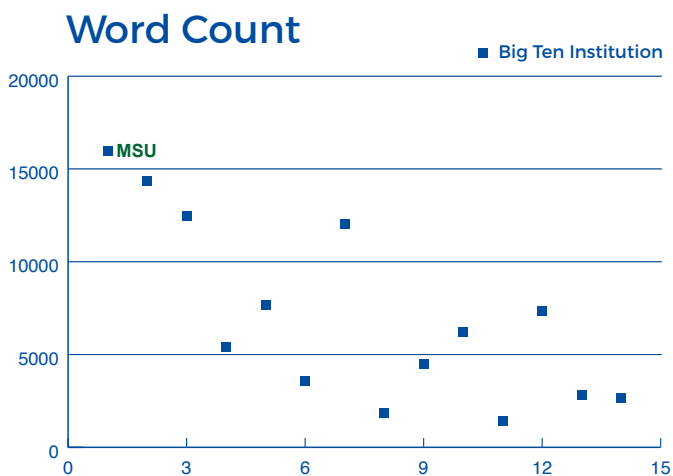
OCR has historically advised that institutions must ensure their policies and procedures related to sexual misconduct are simple to understand and easy to access—particularly for students. For instance, in the 2001 Guidance, OCR states, “A grievance procedure applicable to sexual harassment complaints cannot be prompt or equitable unless students know it exists, how it works, and how to file a complaint. Thus, the procedures should be written in language appropriate to the age of the school’s students, easily understood, and widely disseminated.”<sup>82</sup>

Likewise, in a 2013 findings letter, OCR heavily criticized the University of Montana for having a proliferation of policy documents that covered various aspects of Title IX compliance, stating “their sheer number and the lack of clear cross references among them leaves unclear which should be used to report sexual harassment or sexual assault and when circumstances support using one policy or procedure over another.”<sup>83</sup>

While the recent 2017 Q&A Guidance does not specifically address the issue of ease of access and use, it reaffirms the 2001 Guidance, which mentions this point and emphasizes that institutions must adopt and publish grievance procedures that provide for “a prompt and equitable resolution of complaints.” In our view, policies and procedures that are clearly written, well organized, and as simple as possible best support OCR’s continued focus on prompt and equitable resolutions.

We have little concern about the “ease of access” of MSU’s RVSM Policy and related information. Indeed, the information is readily available and accessible via the University’s Title IX webpage. In addition, we were taken to relevant and appropriate information when we utilized the University website’s search function and inserted terms like “sexual misconduct,” “sexual assault,” “Title IX,” “sexual harassment,” etc. As a general matter, we suggest considering the extent to which campus community members are actively informed of the sexual misconduct-related information that is available on the University’s website (e.g., email with a link to the information, summary information in handbooks and catalogs, etc.).

From a “simplicity” perspective, however, we note that this concept is something most institutions struggle with due to the complexity and volume of relevant information, as well as the vast number of compliance obligations. MSU’s RVSM Policy is lengthy (48 pages not including appendices) and incorporates some 14 appendices. For purposes of comparison, we evaluated the word and page count of the policies and procedures of other Big Ten institutions, after controlling for variables such as lists of resources, contacts, and unessential appendices. Admittedly, this is a blunt and imprecise measure, but this review demonstrates that MSU’s RVSM Policy is the largest among Big Ten schools, by at least 4 pages and 10,000 words. It is also considerably lengthier than most policies we have encountered across the country. In addition, while the investigation process is outlined within the policy, we note that the subsequent adjudication process is not described within the RVSM Policy itself, but in one of its 14 appendices. In other words, some of the most relevant information for students asserting and facing a complaint under the policy is not as clearly highlighted as it could be.



<sup>82</sup> 2001 Guidance, p. 20.

<sup>83</sup> May 9, 2013 Findings Letter Re: University of Montana—Missoula, available at <http://www2.ed.gov/documents/press-releases/montana-missoula-letter.pdf>.

We appreciate that the RVSM Policy has been reviewed and accepted by OCR as part of an ongoing Title IX compliance review. We also appreciate that the RVSM Policy was developed as part of a collaborative group effort among a wide range of University-affiliated representatives. We are familiar with this “community-based” policy-drafting process, as it is a process some institutions utilize in an effort to develop a final policy that incorporates meaningful community input.

Undoubtedly, institutions like MSU have a perplexing challenge to develop a policy that adequately describes its conduct expectations, penalties for violations, reporting options, available resources and adjudication process, while balancing ease of access and presenting the information in a user-friendly manner. This goal is complicated even more for MSU, due to specific policy language requirements contained in its 2015 Resolution Agreement with OCR.<sup>84</sup>

Nonetheless, we believe the length and complexity of MSU’s RVSM Policy is still concerning. In our discussions with students, including students who are directly involved in providing feedback and support for the broader Title IX program—including training on the policy itself—few students were familiar with its various components. Further, none of the students we spoke with had read or attempted to read through it. Many expressed that its length alone would be a deterrent from students reviewing it. In our view, while the policy and its appendices are understandable to attorneys or those versed in Title IX and VAWA compliance, we believe their length and complexity would be daunting and intimidating to a student encountering the policy for the first time. For this reason, we recommend eliminating redundancies, removing non-essential language, and condensing where possible.

A few examples of this are as follows:

- Section I on page 4 of the policy provides that the University will respond to complaints in order “to stop the prohibited conduct, eliminate any hostile environment, take steps to prevent the recurrence of the prohibited conduct...” Some variation of this statement is also used seven other times throughout the policy.
- In the explanations of the roles of the Appeal Officers on pages 9-10 of the policy, information is provided about the appeal process itself (e.g., listing the bases for appeals) which is also discussed in the applicable appeal procedures.
- Section VII on page 10 of the policy is titled “Relationship Violence and Sexual Misconduct” and includes a very brief statement about what these terms mean. This section is then followed by Section VIII, Relationship Violence, and Section IX, Sexual Misconduct, which both include the same information contained in Section VII (as well as additional information).
- Section VIII indicates that, “‘Relationship violence’ is a broad term that encompasses domestic violence, dating violence, and **stalking**.” (Emphasis added). However, throughout the policy there are many references to “relationship violence, stalking, and sexual misconduct” (e.g., from page 4 of the policy, “Members of the University community shall not engage in relationship violence, stalking, or sexual misconduct against employees, students, or third parties.”). If stalking falls within the University’s definition of “relationship violence,” it does not also need to be mentioned when there are references to relationship violence elsewhere in the policy.
- Appendix A of the policy is a Glossary of terms. This Glossary contains definitions of some items that are also fully defined in the body of the policy.

With these things in mind, MSU may want to consider reducing redundancies and finding other opportunities to make the policy and related appendices more “user-friendly.”

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<sup>84</sup> Resolution Agreement, OCR Docket Numbers 15-11-2098 and 15-14-2113, page 4, paragraph 7, available at: <https://www2.ed.gov/documents/press-releases/michigan-state-agreement.pdf>. Notably, the OCR Resolution Agreement contains 30 requirements—not including subparts—relating to what MSU must include in its policy and procedure documents.

# Alignment with Peers

MSU has identified a number of areas within the RVSM Policy that it wishes to compare against the policies, procedures and practices adopted by peer institutions. To the extent these issues could be readily benchmarked from other institutions' policies and procedures, these issues are addressed in turn:

## Designation of Responsible Employees

As mentioned above, MSU requires *all* University employees (except for certain designated confidential resources) to make reports of sexual misconduct to the Title IX Coordinator. In our experience, many institutions use this approach for a number of policy reasons, although it is used more prevalently by smaller institutions where all staff members are more likely to have a high degree of contact with students.

Some institutions may find this approach provides the institution with the greatest degree of confidence that students and employees alike understand this reporting obligation and which individuals within the campus community are designated responsible employees (e.g., every employee, except a small few serving in a confidential role). This approach may also reduce confusion for employees about whether they are responsible employees with a reporting duty, particularly for employees who serve in multiple positions within the institution. Similarly, some institutions find this approach to be a more administratively manageable option that allows them to uniformly communicate with responsible employees about their duties and provide and track education and training opportunities and participation. Additionally, some institutions may feel having a broader population of responsible employees is in alignment with their interest in encouraging the reporting of alleged sexual misconduct to allow the institution to work towards evaluating patterns and addressing it as it occurs on campus. This approach, if effectively implemented, can also serve as a critical risk mitigation strategy that a "report" of sexual misconduct was not properly addressed because it was not brought forward to the appropriate official.

In our review of the Big Ten, we determined that nine of the 14 schools, including MSU, clearly designate *all* employees (except for confidential resources) as responsible employees with responsibility for reporting incidents of sexual misconduct of which they become aware. Four of the 14 institutions take a somewhat different approach by designating certain employees identified by position or position category—generally including senior leaders, officials with significant responsibility over students, supervisors, and faculty who serve as advisors to student groups or who manage study abroad programs—(except for confidential resources), as responsible employees. Notably, institutions in this category generally include a relatively broad list of employees. From our evaluation, it appears only one Big Ten institution limits its responsible employee designation to a smaller group of employee positions within the institution. Comparator institutions *all* designated all employees as responsible employees.

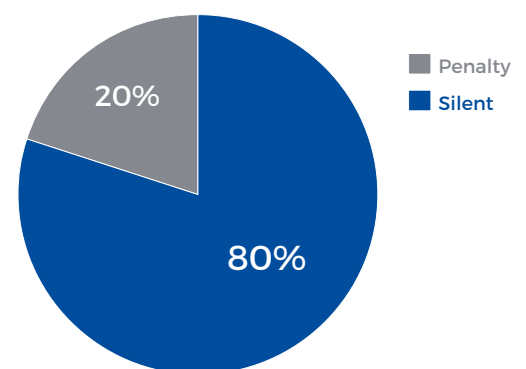
Thus, MSU's approach in designating all of its employees, except confidential resources, is in alignment with current and common practice amongst peer and comparator institutions.

## Clear Penalty for Failure to Report

MSU's RVSM Policy specifically provides that failure to adhere to a responsible employee's reporting obligations can result in disciplinary action, including termination. MSU has expressed interest in understanding whether this is a common approach among peer and comparator schools.

Based on our review, MSU is one of only four schools among the total 20 peer and comparator schools surveyed with a policy that specifically identify a possible penalty for responsible employees who fail to report sexual misconduct of which they become aware. Notably, these penalties vary from corrective action, disciplinary action including removal or termination, and prosecution (presumably by the state, not the institution, for failure to comply with state legal reporting obligations). That is not to say that the other 16 institutions would not impose penalties upon a responsible employee for failing to report sexual misconduct; this concept is simply not included explicitly within their Title IX-related policies. In our experience, it is common for institutions to discipline employees for a failure to meet mandatory reporting obligations, even if policy language does not explicitly reference the possibility of discipline.

Failure for Penalty to Report



## Standard of Evidence

The recent 2017 Q&A Guidance specifies that institutions may utilize either the preponderance or clear and convincing standard of evidence in sexual misconduct cases, so long as the standard is uniformly applied in other student misconduct cases. This is a significant departure from the Withdrawn 2011 DCL, which prescribed that institutions must utilize a preponderance of the evidence standard. Critically, this question around whether one standard of evidence is more appropriate in the context of institutional disciplinary proceedings has received significant national attention in recent years.

Notably, the 2017 Q&A Guidance cites to a federal district court decision in Massachusetts involving a sexual misconduct investigation conducted by Brandeis University, where the court found that the school denied “basic fairness” to a responding party by applying a lower standard of evidence in sexual misconduct cases than it did other student misconduct matters.<sup>85</sup> We agree that a disparity in evidentiary standards for sexual and non-sexual student misconduct cases, without some rational explanation, could create—at a minimum—a perception that sexual misconduct cases are treated arbitrarily different than other forms of misconduct.

We are unaware of any underlying policy reason for which an institution of higher education might examine a violent assault under the preponderance of the evidence standard (more likely than not), but evaluate a sexual harassment claim under a clear and convincing standard. In so doing, such an approach may send an unintended message that the institution is more skeptical of allegations of sexual violence than violence without a sexual component. In our experience, most public and private institutions of higher education utilize a preponderance of the evidence standard in non-sexual misconduct student cases. Given OCR’s instruction that an institution must have a uniform standard of evidence for all student conduct cases, raising the standard of evidence to clear and convincing for sexual misconduct cases would result in the institution having to meet a heightened burden for all manner of student misconduct, including, for example, misconduct cases involving drug and alcohol violations, racial harassment, stalking, assault and battery, and theft, among others. As such, elevating the standard to clear and convincing evidence could have the adverse effect of making it more difficult for the institution to police a whole range of student conduct matters.

Some underlying policy reasons for utilizing a preponderance standard in student misconduct cases are as follows:

- *Provides institutions with the greatest degree of autonomy and flexibility in enforcing the values, ideals, and principles that define what it means to be a student at their institution;*
- *Because access to higher education is a privilege, not a legal right, engaging in conduct that more likely than not violates the institution’s conduct expectations is a sufficient basis for disciplining a student by imposing a sanction, up to and including expulsion;*
- *The preponderance standard inherently prioritizes the safety, security, and undisrupted learning environment of the broader campus community, over an individualized interest.*

Some underlying policy reasons for utilizing a clear and convincing standard in student misconduct cases are as follows:

- *Because this standard requires that evidence support a finding that the policy violation is “substantially more likely than not to be true” or that there is a “high probability” that the policy violation occurred, this standard helps ensure that no student faces disciplinary action without substantial evidence in support of such a finding.*
- *This standard is a middle ground approach between the preponderance of the evidence standard and the beyond reasonable doubt standard that is utilized in criminal proceedings.*
- *A clear and convincing standard gives the benefit of the doubt to the accused student, such that, without substantial evidence, the accused student will not be subject to disciplinary action.*
- *While the clear and convincing standard is higher than a preponderance of the evidence standard, utilizing this standard does not preclude an institution from imposing non-punitive measures, such as educational or training programming, upon an accused student in cases where the evidentiary standard is not reached.*

<sup>85</sup> 2017 Q&A Guidance, quoting to *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 607 (D. Mass. 2016).



To date, all institutions that we evaluated are continuing to use a preponderance of the evidence standard for sexual harassment and sexual violence cases and have not increased the standard to clear and convincing, in light of the 2017 Q&A Guidance. Our analysis indicates that all institutions surveyed are using a preponderance of the evidence standard for sexual misconduct cases. Of the 20 schools we considered, only two Big Ten institutions clearly rely on a clear and convincing standard for all other student misconduct cases; one Big Ten institution applies the clear and convincing standard for cases resulting in suspension or expulsion. One of six comparator schools use the clear and convincing standard for non-sexual misconduct cases and two use a beyond a reasonable doubt standard.

## Investigation and Adjudication Models

As an initial matter, a public institution must provide minimum due process protections to respondents before issuing “significant disciplinary decisions.” *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399 (6th Cir. 2017). What minimal process is due varies from case to case, depending on “(1) the nature of the private interest subject to official action; (2) the risk of erroneous deprivation under the current procedures used, and the value of any additional or substitute procedural safeguards, and (3) the governmental interest, including the burden any additional or substitute procedures might entail.” *Id.* At a minimum, a student facing a serious sanction such as a suspension or expulsion is entitled to the “opportunity to be heard at a meaningful time and in a meaningful manner.” *Id.*

Institutions are generally afforded flexibility and discretion in designing their investigation and adjudication process for resolving student conduct matters. “While the exact outlines of process may vary,” institutions “must at least provide notice of the charges, an explanation of the evidence against the student, and an opportunity to present his side of the story before an unbiased decision maker.” *Id.* at 400 (internal quotations omitted). A “student’s opportunity to share his version of events must occur at some kind of hearing, though the hearing need not take on the formalities of a criminal trial.” *Id.* (internal quotations omitted).

As a general proposition, MSU’s policy sets forth a robust process that includes provisions requiring written notice, an opportunity for both parties to review and comment on information developed during the investigation, an equal opportunity to present their account to the investigator in an investigative hearing, and the right to appeal. MSU’s investigation process is a hybrid between a single investigator model and a hearing panel model. A single investigator model relies on one investigator to investigate and adjudicate the complaint, while a hearing panel model involves a panel of at least three members to determine findings and/or issue or recommend sanctions, and often involves an in-person event.<sup>86</sup> The policy also includes provisions requiring impartiality on the part of the investigator and allowing the parties to challenge conflicts of interest. In our view, these provisions, if followed, should satisfy the minimal due process standards expected by the Sixth Circuit.

### Options for consideration

While there are three classic investigation models institutions utilize in addressing sexual misconduct complaints, it is our experience that these are not easily comparable, as each institution’s process includes a number of permutations and nuances to best fit its culture and the expectations of its campus communities. For this reason, we have provided an overview of these models as a comparator to MSU’s existing process.

**CLASSIC CIVIL RIGHTS MODEL:** A civil rights model of investigation is one where a single investigator (or sometimes a pair of investigators) interviews all witnesses, collects other evidence, and then prepare a written report that summarizes the investigation, analyzes the evidence—including determinations of facts in dispute and not in dispute and credibility determinations relating to the evidence presented—and determines whether a violation of the policy has been committed. The investigator’s decision is final, subject to appeal to on limited grounds. In such cases, the investigator, Title IX coordinator or a sanctioning agent will determine the sanction. An appeal is often to the Title IX Coordinator, provost or a senior student affairs administrator. There is no hearing panel used under this model.

<sup>86</sup> See: Association of Student Conduct Administration, “Student Conduct Administration & Title IX: Gold Standard Practices for Resolution of Allegations of Sexual Misconduct on College Campuses,” Bennett, Laura, Gregory, D. Matt, Lochiavo, Chris, Waller, Jennifer, 2014 p. 15, available at: <http://www.theasca.org/files/Publications/ASCA%202014%20Gold%20Standard.pdf>.

## Classic Civil Rights Model: Pros v. Cons

### PROS

- Generally quicker investigations and determinations than other models
- Allows for use of highly trained investigators such as attorneys or former policy investigators
- No need to train dozens of hearing panel members
- Single investigator can become intimately familiar with policy and gain experience working on repeated cases
- Decision is made by person who is in best position to assess credibility, having heard testimony directly during the investigation
- Relieves both parties from the burden and responsibility of gathering and presenting all evidence

### CONS

- Provides minimal amount of due process and may be subject to attack for inability of respondent to directly cross-examine
- Increased risk of bias or prejudice of single investigator influencing the outcome
- Magnifies risk to the institution of an incompetent or poorly trained investigator when compared to the risk of a poorly trained or incompetent hearing panel member
- Other demands on investigator's time may delay investigation
- Susceptible to charges that investigator is pursuing an agenda (particularly if investigator has a background in advocacy or another field that is viewed as favoring claimants)

**CLASSIC HEARING PANEL MODEL:** A panel of three or more persons (usually drawn from a pool of trained panel members) is convened and conducts an in-person hearing. The hearing is typically led by a chair who may be a student conduct officer. The panel hears testimony from the claimant, respondent, and other witnesses and may pose questions to the various participants. After receiving evidence, the panel deliberates, renders a decision, and then delivers the decision in writing to the parties, which includes both a determination as to whether a policy violation occurred and discipline to be imposed. An appeal may or may not be allowed to a high-level administrator, such as the president, provost or vice-president of student affairs. One notable permutation that exists at some institutions is where the panel is replaced by a single, trained administrator.

## Classic Hearing Panel Model: Pros v. Cons

### PROS

- Provides substantial process that includes cross examination or an effective substitute
- Allows for trusted and responsible students to be members of the hearing panel making the decision rendered that of the "community" rather than administration
- If hearing pool is chosen wisely, allows for panel members with a mix of experiences and backgrounds, reducing the risk of systematic bias and stereotyping
- Most like civil or criminal justice system and therefore less subject to criticism about providing adequate due process

### CONS

- Absence of a professional investigator leaves the respective parties to effectively prosecute or defend a case
- Logistical difficulties of identifying panel members and working around schedules often results in lengthy or delayed outcomes
- Increased training burden for pool of panel members
- Ever-changing composition of panels makes it difficult to leverage experience as compared to civil rights model
- Overall training of panel members is often not as substantial as that of an investigator, increasing the risk of process failures and erroneous outcomes
- With increased number of persons aware of case and privy to evidence, increases the risk of chatter and gossip
- Potential for reduced reports and participation due to stress and anxiety relating to process
- Places the burden and responsibility of gathering and presenting all evidence upon the parties

**INVESTIGATOR/HEARING HYBRID:** Under this model, when a report of misconduct is received, a trained investigator interviews the parties and witnesses, collects evidence, and prepares a report summarizing the results of the investigation, including determinations of facts in dispute and not in dispute and credibility determinations relating to the evidence presented. While the investigator's report may include a recommendation as to whether the evidence supports a finding of responsibility, the investigator does *not* make a determination. Instead, the investigator's report and evidence collected during the investigation is transmitted to a hearing panel (typically, three or more persons), which reviews the material in advance of a hearing. One permutation of this option is where the institution replaces the panel with a trained student affairs administrator to provide an administrative hearing, which usually involves one-on-one meetings with the parties. A simplified hearing is then conducted where the panel (or administrator) allows the parties to make brief statements, asks questions of the parties, and may or may not call other witnesses. The panel

then deliberates and renders a written decision that makes a determination as to whether the policy has been violated and what discipline should be imposed. An appeal may or may not be allowed to a high-level administrator, such as the president, provost or vice-president of student affairs.

### Investigator/Hearing Hybrid Model: Pros v. Cons

#### PROS

- Allows institution to leverage the expertise of an investigator and the due process benefits of a hearing panel making the actual determination
- Provides parties with at least two opportunities to tell their stories, minimizing the risk a party feels that one has not been heard
- Allows for involvement of persons with broad array of experiences and backgrounds, if hearing panel is chosen wisely
- Allows for student involvement in panel phase
- Hearing panel can be constructed of highly trained panelists

#### CONS

- Most logistically complex of all models; tends to result in longest amount of time between report and determination
- Requires parties to give their accounts at least twice, which may increase stress and anxiety
- Heavy training burden; must have highly trained investigators and a competently trained panel
- Exposes more persons to information about the case than other models, increasing the risk of chatter and gossip
- If investigator makes a recommendation and panel disagrees, invites litigation over panel competence and/or bias, and risks of claims that panel members are too far removed from direct interaction with parties and evidence to serve as decision-makers

Under MSU's Policy, an investigator within MSU's OIE investigates the case, analyzes the party and witness statements and evidence, and assesses credibility. OIE then makes a finding of responsibility based on a preponderance of the evidence standard. This finding determination is generally the investigator's final role in the case. For student cases, the case follows one of two paths, depending upon whether a finding of responsibility is made.

In the event no finding is made, OIE's investigator will send a final investigation report concurrently to both parties, as well as to an Equity Review Officer, defined by the policy as a neutral individual designated by the Provost to adjudicate the appeal. Both parties then have an opportunity to appeal the decision within ten days; however, such an appeal is generally only submitted by a claimant since no finding was reached. If the matter is appealed, the non-appealing party—generally the respondent in this case—may submit a response to the appeal within 10 days. The Equity Review Officer will then issue a decision on the appeal within 14 days.

On the other hand, in the event that OIE makes a finding that the policy was violated, OIE will forward the investigation report to both parties as well as the Office of Student Conduct and Conflict Resolution ("SCCR")—an office within Student Affairs that handles student sanctions—for further action. Specifically, SCCR will request voluntary statements from both parties within 7 days and convene a "sanction panel" that has standing weekly meetings to address such cases. Generally speaking, SCCR's sanction panels are formed from a pool of pre-identified and trained panel members, and will include one student, one faculty member and one staff member.<sup>87</sup> The panel will hold a panel meeting to consider the report, and any written statements provided by the parties, as well as the respondent's disciplinary record. Notably, the sanction panel does not meet with the parties. The sanction panel will issue a sanction for the violation in writing, along with a notice of appeal rights to both parties simultaneously. This sanction decision is also provided to the Title IX Coordinator and OIE.<sup>88</sup>

In our view, the hybrid approach followed by MSU is substantially comparable to many hybrid models utilized by the institutions surveyed, as well as many public institutions across the country.<sup>89</sup>

Likewise, MSU's process for adjudicating complaints against faculty and staff is also in line with models utilized by other institutions. Specifically, after OIE completes its investigation, the report is forwarded to MSU's Academic Human Resources Office for sanctions decisions by the appropriate unit administrator, in consultation with Academic Human Resources.

<sup>87</sup> MSU Anti-Discrimination Policy / Relationship Violence & Sexual Misconduct Policy Student Conduct Sanction and Appeals Procedures, available at: <https://www.hr.msu.edu/policies-procedures/university-wide/documents/AppI-ADP-RVSMP-student-conduct-sanction-appeal-process.pdf>.

<sup>88</sup> MSU's Anti-Discrimination Policy/ Relationship Violence & Sexual Misconduct Policy, Student Conduct Sanction and Appeal Procedures, Section II(D); available at: <https://www.hr.msu.edu/policies-procedures/university-wide/documents/AppI-ADP-RVSMP-student-conduct-sanction-appeal-process.pdf>.

<sup>89</sup> Because each institution's investigative process is extremely nuanced and varied, we do not believe that benchmarking these approaches would result in useful comparisons.

## Appeals Process and Factors

Most institutional policies allow the determination and sanction to be appealed at least once. The appeal is usually in writing. Because the appeal officer is one level removed from the primary evidence and thus not in the ideal position to assess credibility, the appeal officer should give substantial deference to the investigator or hearing panel's decision. Typically, this deference is codified in the policy by limiting the appeal to certain narrow grounds, such as the existence of newly discovered evidence, a determination that is contrary to the substantial weight of the evidence, or discipline that is disproportionate to the misconduct found.

There is no commonly accepted standard for who at an institution should serve as an appeal officer. Some institutions utilize a senior student affairs administrator for the role. Others use a provost. Small institutions may allow appeal directly to the president. In some cases, schools have decided to allow multiple levels of appeal due to state law requirements or to provide an abundance of process. However, having multiple levels of appeal dramatically increases the length of cases, the risk of second guessing, imposes increased administrative burden, and is generally unnecessary from a due process perspective.

As described above, MSU has a robust appeals process, and provides both parties an opportunity to appeal a final decision. Of the Big Ten schools surveyed, all institutions provide appeals in cases involving sexual misconduct claims. Of comparator schools, five of six schools offer appeals. All schools that provide an appeal option extend that opportunity to *both* parties. MSU's process for allowing for appeals from both parties is squarely in line with the schools surveyed.

In our practice with institutions, as well as through our survey of the Big Ten and comparator schools, we also see a general trend that most institutions limit appeals to a set of narrow reasons for submitting the appeal. In other words, institutions do not intend for appeals to be a full rehearing of a case or a "*de novo*" review, by which the appeals agent may reconsider the facts and circumstances of the case and render his or her own decision. Instead, appeals are often intended to be for the purpose of addressing a narrow set of circumstances that might warrant a different outcome. Generally speaking, these appeals circumstances include the following:

- 1. The availability of new information, not previously available, that would likely impact the outcome;**
- 2. Significant procedural errors / material deviation from procedures affecting the outcome; and**
- 3. Sanction is significantly / grossly disproportionate to the conduct.**

We determined that the vast majority of Big Ten and comparator schools limited appeals to these issues, or some variation of these issues. We also note the following:

- One Big Ten school includes an appeal basis where "the outcome is contrary to the weight of information presented." Likewise, one comparator school includes an appeal basis where there is "insufficient evidence to support the finding." These are the only two instances in which we find an appeals standard that is considerably broader than the general categories mentioned above.
- One Big Ten school allows for appeals, but does not clearly define the basis for appeals or limit the availability of such appeals by identifying any specific factors for those appeals.

MSU's bases for appeals for OIE decisions are: (1) arbitrary and capricious and/or resulted from procedural error; (2) clearly inappropriate; or (3) sanction not commensurate with the seriousness of the offense. While we believe these appeals bases are intended to be aligned with the trend of limiting appeals to prescribed circumstances, we believe that MSU's language is too legalistic, not adequately explained, and may be misinterpreted by students and employees, as well as those applying that standard. Indeed, we found only one other school surveyed that used the term "arbitrary or capricious."

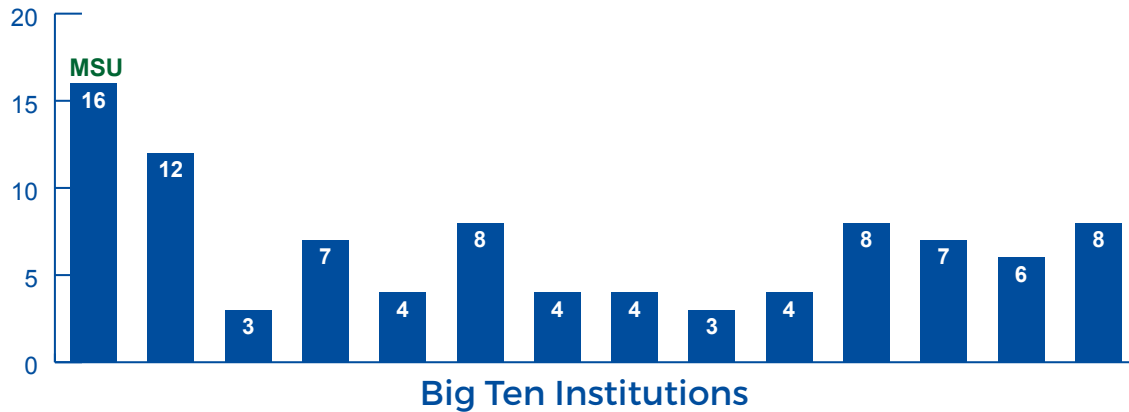
The majority of surveyed schools include a narrow set of circumstances for which an appeal may result in a changed outcome. We believe this is not only a common practice, but also a best practice. For this reason, we would recommend that MSU consider aligning its appeals process to this trend by adopting three basis for appeals delineated above.

## Designated Title IX Staff Resources

MSU’s Title IX team partners with representatives from a multi-disciplinary collaborative, which includes a number of key administrators and officials within other offices within the University, including Student Affairs, the Provost’s Office, Student Health and Wellness, and the Office of General Counsel. However, its core team within the Office of Institution Equity includes 16 staff members, which includes 9 investigators.

Of the institutions surveyed within the Big Ten we found the following results:

### Reported Title IX Staff



MSU leads this comparison, with 16 reported staff members working on Title IX-related issues. We would note that staffing is an ever-changing dynamic, so it is possible that institutions may have more or less staff than currently reported due to vacancies or recent staffing increases. Further, it is common for institutions to have additional staffing resources from other offices that also have responsibility for supporting the Title IX team; it is possible that each institution’s reported head count is therefore not precisely accurate.

## Definition of Coercion

Although the RVSM Policy refers to the term “coercive tactics” and “coercion,” this term is not defined in the policy itself. However, “coercion” is described in the “Glossary” as,

“The use of an unreasonable amount of pressure to gain sexual access. Coercion goes beyond efforts to persuade, entice, or attract another person. When a person makes it clear that they have decided not to participate in or continue participating in a particular sexual act or engage in sexual contact or that they do not wish to go beyond a particular sexual act or type of sexual contact, continued pressure can be coercive.”

At least ten of the 20 schools surveyed use, without defining, the terms “coerce” or “coercion” in their policies to describe what is, and what is not, consent. However, only seven schools, including MSU, define this term, despite what is, in our view, an increased prevalence of claims alleging a lack of consent due to coercion.

It is important to note that the standard for coercion in a legal context is exceptionally high.<sup>90</sup> MSU's explanation of coercion in its policy does not have to be aligned with such a standard, though given the degree of subjectivity around this term we believe this is a good practice. Of those institutions surveyed, we have provided four examples of other schools' definitions of this term:

## COERCION EXAMPLES

"Verbal and/or physical conduct, including intimidation and explicit or implied threats of physical, emotional, or other harm, that would reasonably place an individual in fear of immediate or future harm and that is used to compel someone to engage in sexual conduct against their will."

"Severe or persistent pressure causing fear of significant consequences from respondent if one does not engage in sexual activity."

"Conduct, including intimidation and express or implied threats of immediate or future physical, emotional, reputational, financial, or other harm to the Claimant or others, that would reasonably place an individual in fear, and that is employed to compel someone to engage in sexual activity."

"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."

## Other Key Policy and Procedures Benchmarking

**Retaliation Against Respondents:** Only one institution, of the 20 schools surveyed, specifically includes in its policy "respondents" as being protected from retaliation. The majority of other institutions, including MSU, generally extend their retaliation protections to reporters of sexual misconduct and/or those "participating" or "cooperating" in an investigation or adjudication process, which would, in theory, extend to a respondent who is cooperating with the process.

**Interim Measures:** Of the 20 schools surveyed, five specifically extend interim measures, accommodations or resources to respondents. The remaining institutions' policies and procedures discussion about interim measures and accommodations are generally claimant-centric or silent. MSU's approach described in its Policy also appears to be claimant-centric. While this is in line with other institutions, as noted above, we recommend that MSU consider, as a leading-edge practice, balancing this language to make clear that such measures and accommodations, including resources, are available to both parties and, in compliance with the 2017 Q&A Guidance, will be made on an individualized basis.

**Informal Resolution:** Of the 20 schools surveyed, two institutions do not allow for informal resolution of sexual misconduct complaints, and four, including MSU, are silent as to informal resolution options. The remaining 14 institutions all permit some form of informal resolution, though nearly all institutions clearly prohibit informal resolution for allegations of sexual violence. Notably, the RVSM Policy addresses the concept of informal resolution, which it refers to as "Administrative Action."

<sup>90</sup> For reference, Section 750.520e of the Michigan Penal Code defines "force or coercion." The components of the definition that most clearly relate to "coercion" includes:

"(ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute that threat. (iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute that threat. As used in this subparagraph, "to retaliate" includes threats of physical punishment, kidnapping, or extortion. (iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable. (v) When the actor achieves the sexual contact through concealment or by the element of surprise."

# Leading-Edge Practices

We identified several leading-edge practices that MSU has implemented to enhance its Title IX program that other institutions may consider as models of best practice worth replicating.

## Collaborative Policy Work Group

As described above, MSU's OIE and Title IX team partners with representatives from a multi-disciplinary collaborative, which includes a number of key administrators and officials from other offices in the University, including Student Affairs, the Provost's Office, Student Health and Wellness, faculty, staff and student governance groups, and the Office of General Counsel, among others. Further, the OIE utilizes a Policy Work Group, comprised of faculty, staff and students, to assist in reviewing and updating the RVSM Policy.

On one hand, the practice of drafting policy language by committee can be a tedious and time-consuming process that has potential to result in overbroad policy statements that, while well-intentioned, may not work in practice. On the other hand, this effort, if done well, can result in a policy that reflects input of a wide variety of stakeholders and interested parties, can clearly explain actual practice, and can address key issues of significant importance among a diverse group of individuals within the campus community. Moreover, a group policy-writing approach can lay the foundation for building buy-in for the policy which may be perceived to be a policy written by and for the community, and not one that is simply imposed by an institution's leadership.

During our onsite visits, we repeatedly heard from participants that they felt that they had a hand in crafting the changes to the RVSM Policy and had a "seat at the table" during this process. Some participants commented that this approach was significantly more positive than approaches utilized in prior years, and that they felt they could meaningfully influence the RVSM Policy in a positive way. Further, we heard that this collaboration has not been limited to the RVSM Policy itself, but that participants felt collaboration is now welcomed in the development of resource and other supplemental materials.

We also learned from speaking with OIE staff members that upon the conclusion of challenging cases or cases that present novel issues, the Title IX Coordinator and others within the Title IX team may conduct a subsequent "case review" analysis in order to identify practices that work and practices that can be improved upon.

As reflected by the comments provided during our onsite meetings, we believe MSU's investment in a multi-disciplinary collaboration to improve upon its RVSM Policy and practices, along with the OIE's effort to self-assess its work is a leading-edge practice, particularly among institutions of MSU's size and complexity. When executed well, this approach can result in improved practices, buy-in amongst the broader campus community, and greater understanding and acceptance of the institution's role and responsibilities in this area.

## Separating Duties for Investigation and Interim Measures Requests

As noted by OCR in its 2017 Q&A Guidance, it may be appropriate for a school to provide interim measures during the investigation of a complaint of sexual misconduct. OCR considers interim measures to be individualized services that are available to either or both of the reporting and responding parties involved in an alleged incident of sexual misconduct, prior to an investigation or while an investigation is pending. Interim measures typically include counseling, extensions of time or other course-related adjustments, modifications of work or class schedules, restrictions on contact between the parties, changes in work or housing locations, leaves of absence, and increased security.

In order to better manage the process for evaluating requests for interim measures, MSU has created a role within its OIE for an "Interim Measures and Training Specialist." This individual is responsible for, among other things, responding to requests for such services and support and making determinations with respect to reasonable interim measures and accommodations. Although MSU's Policy does not specifically speak to this, we understand that, in practice, MSU offers interim measures, accommodations and referrals for other services to claimants and respondents. The Interim Measures and Training Specialist is responsible for not only ensuring that requests are fairly considered, but for communicating with students to ensure that the measures are effective and necessary, even in changing circumstances.

MSU is the one of the few institutions that we are aware of that has a dedicated staff member for this purpose. In addition to reducing the workload on the Title IX Coordinator and Deputy Coordinators, this staffing structure allows MSU to create some separation between OIE's role in adjudicating reports of sexual misconduct and the Specialist's role in providing interim measures



and accommodations. We do not believe that these duties need to be separated in order to avoid an inherent conflict or bias. Indeed, we anticipate that many schools, particularly those of much smaller student enrollment, would not have the resources, demand, or need for this structure. Nevertheless, because there may be some *perception* of bias where the same person is providing interim measures and also overseeing an investigation of sexual misconduct, we believe this is a leading-edge practice with intrinsic value that few institutions have implemented.

## Sanctioning Guidelines

Under the RVSM Policy, a sanction panel considers a wide array of potential sanctions, ranging from a warning to suspension or dismissal. Notably, this process is governed by a series of sanctioning guidelines for students, as well as for faculty and academic staff.

Of note, the guidelines both provide that sanctions should be based on a consideration of all circumstances of a case, and that sanctions decisions should take into consideration factors such as:

- The nature and severity of the misconduct
- The need to stop the misconduct and prevent its recurrence
- The need to remedy and address the impact of the effects of the conduct on the claimant or other members of the campus community
- The respondent's prior record of misconduct
- The level of ongoing threat to the safety and security of the claimant or campus community
- Aggravating or mitigating factors, including those articulated by the parties.

Both guidelines also list a number of aggravating factors that may lead to more severe sanctions, including: the number of perpetrators and victims, whether the respondent is in a position of authority or influence, use of force or past violence, use or display of a weapon, use of substances to incapacitate or coerce consent, and when the victim is under the age of 18. Further, both documents specify that the length of a suspension should also consider the nature and severity of injury to the claimant, the enrollment status of the parties, the respondent's conduct during the investigation and compliance with any interim measures. Finally, both guidelines specify that absent exceptional circumstances, acts of rape generally result in dismissal.

We have highlighted these sanctioning guidelines in detail, as we believe these guidelines are a leading-edge practice. While we are aware of a number of institutions that are formulating such guidelines, we rarely see a comprehensive and specific set of public-facing guidelines relating to sanctions decisions is uncommon, particularly which apply to faculty and academic staff members. We believe this practice has significant promise in resulting in measured, proportionate and defensible sanctioning decisions that are formulated on rational considerations and meet the institution's developmental, educational and punitive goals.

Our experience was validated by our survey. Indeed, among Big Ten schools, we found that four of the 14 have specific sanctioning guidance, including MSU, and only five have explicit references to aggravating or mitigating factors in their Title IX-related policies, also including MSU. Likewise, with respect to the comparator schools we surveyed, three of the six have implemented detailed sanctioning guidelines, and only two specifically reference aggravating or mitigating factors. Furthermore, some comparator schools, in lieu of sanctioning guidelines instead imposed "expected" or "recommended" sanctions for sexual misconduct. Overall, the majority of schools considered, at a minimum, generally suggest that sanctioning decisions take into consideration: the nature of the misconduct; severity of the conduct; and a respondent's prior disciplinary history. This is true regardless of whether the institution's policy has specific sanctioning guidelines in place.

## Intersection of Title IX and the First Amendment

A key area of concern for many institutions of higher education, particularly public institutions subject to the First Amendment, is the intersection between Title IX and free speech. Indeed, free expression and academic freedom are two bedrock principles on which institutions of higher learning are founded. Institutions and faculty often view these protections as sacrosanct. For this reason, Title IX complaints based on speech often draw scrutiny.

As an initial matter, the two areas of Title IX protections where this intersection may arise relates to allegations of sexual harassment, which can result in a hostile environment based on a perpetrator's actions or speech. Of course, other forms of sexual misconduct—sexual exploitation, sexual assault, dating and domestic violence and stalking—do not generally result in such intersection, as they all involve some form of *conduct* in the form of unwanted touching or violence.

Because Title IX is a federal law (which must not conflict with the Constitution's protection of freedom of speech), OCR has instructed that institutions should interpret their policies implementing Title IX in such a way as to preserve academic freedom and freedom of speech.<sup>91</sup> In this respect, OCR has specifically advised, "the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment under the statutes enforced by OCR."<sup>92</sup>

The rationale for protecting the expression of controversial viewpoints from charges of hostile environment harassment was explained by the panel (which included retired Justice O'Connor) in *Rodriguez*:

The right to provoke, offend and shock lies at the core of the First Amendment. This is particularly so on college campuses. Intellectual advancement has traditionally progressed through discord and dissent, as a diversity of views ensures that ideas survive because they are correct, not because they are popular. Colleges and universities—sheltered from the currents of popular opinion by tradition, geography, tenure and monetary endowments—have historically fostered that exchange. But that role in our society will not survive if certain points of view may be declared beyond the pale. 'Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.' We have therefore said that 'the desire to maintain a sedate academic environment does not justify limitations on a teacher's freedom to express himself on political issues in vigorous, argumentative, unmeasured, and even distinctly unpleasant terms.'

*Id.* at 708-09 (internal quotations and citations omitted).

In an effort to balance Title IX with the First Amendment, MSU's policy speaks to First Amendment protections and academic freedom, and also provides direction to decision-makers on this issue. Specifically, the policy provides that First Amendment protections "must be carefully considered in all complaints involving speech or expressive conduct." Further the policy explains that, "[t]he fact that speech or a particular expression is offensive is not, standing alone, a legally sufficient basis to establish a violation of this policy." Instead, the policy explains that "[s]peech or expressive conduct that constitutes sexual harassment is neither legally protected expression nor the proper exercise of academic freedom."<sup>93</sup>

While we are seeing more institutions adopt provisions similar to MSU's in an effort to address this intersecting issue, it is noteworthy that MSU has included this provision in the RVSM Policy. Further, we understand that in practice, complaints that raise First Amendment or academic freedom concerns are considered on a case-by-case basis at the intake stage of the case. Such cases that clearly do not involve a hostile environment are not submitted through a formal process, though that can occur when there may be insufficient information available, particularly in fact-specific scenarios, to formulate a clear decision upon intake. We believe this is a leading-edge practice that institutions should consider.

<sup>91</sup> See 2003 DCL at 1 ("[I]n regulating the conduct of its students and its faculty to prevent or redress discrimination prohibited by Title IX . . . a school must formulate, interpret, and apply its rules so as to protect academic freedom and free speech rights."); see also Withdrawn 2014 Q&A, at L-1 ("Therefore, when a school works to prevent and redress discrimination, it must respect the free-speech rights of students, faculty, and other speakers.") (Emphasis added).

<sup>92</sup> 2003 DCL at 1; *Rodriguez v. Maricopa County Community Coll. Dist.*, 605 F.3d 703, 710 (9th Cir. 2010) ("We therefore doubt that a college professor's expression on a matter of public concern, directed to the college community, could ever constitute unlawful harassment and justify the judicial intervention that plaintiffs seek.")

<sup>93</sup> MSU RVSM Policy, Section X(G).

# Conclusion

As described above, MSU's current Title IX policy and procedures reflect a strong and genuine institutional commitment to combatting sexual misconduct, creating a safe campus environment, as well as compliance with Title IX's legal requirements. They provide detailed guidance and set forth a fair and equitable process for resolving reports of sexual misconduct. Overall, MSU's policies and procedures comply with current legal requirements and agency guidance, and in several places, reflect leading-edge policy concepts. While we have identified places where MSU's policies and procedures could benefit from further clarification and improvement, we believe that the RVSM Policy, as written, is in line with applicable legal requirements.

The second phase of our review will focus on the effectiveness of MSU's broader Title IX program, including its crisis and advocacy support services, prevention and education programs, and awareness and outreach efforts. This report is anticipated by the end of Spring Semester, 2018.

# Appendix A

## Training and Education Programs

Title IX and VAWA impose a variety of training and educational programming obligations on institutions of higher education. Below is an outline of these obligations.

## Title IX

The Guidance Documents discuss education and training programs that schools are required to implement. There is no minimum number of hours of training required, though it should be provided on a regular basis.<sup>94</sup> Other training-related obligations that a school must meet include:

- Implementing training and awareness programs for all campus community members regarding Title IX's prohibition of sexual harassment and violence, including the institution's policies, procedures, and sanctions related to these matters.
- Providing training for employees with authority to take action (i.e., responsible employees) so they respond properly and are aware of Title IX issues, the school's procedures, etc.
- Ensuring that the Title IX Coordinator and any Deputy Title IX Coordinators have adequate training.
- Ensuring that professional counselors, pastoral counselors, and non-professional counselors or advocates understand the extent to which they may keep a report confidential.
- Providing training to all employees likely to witness or receive reports of sexual violence, including teachers, professors, school law enforcement unit employees, school administrators, school counselors, general counsels, athletic coaches, health personnel, and resident advisors. Training for employees should include:
  - Practical information about how to prevent and identify sexual violence, including same-sex sexual violence.
  - The attitudes of bystanders that may allow conduct to continue.
  - The potential for re-victimization by responders and its effect on students.
  - Appropriate methods for responding to a student who may have experienced sexual violence, including the use of nonjudgmental language.
  - The impact of trauma on victims.
  - As applicable, the person(s) to whom such misconduct must be reported.
- Ensuring that all persons implementing the grievance procedures (e.g., Title IX Coordinators, investigators, adjudicators) have training or experience in handling complaints of sexual harassment and sexual violence and in the institution's grievance procedures. This training should include:
  - Information on working with and interviewing persons subjected to sexual violence.
  - Information on particular types of conduct that would constitute sexual violence, including same-sex sexual violence.
  - The proper standard of review for sexual violence complaints.
  - Information on consent and the role drugs or alcohol can play in the ability to consent.
  - The importance of accountability for individuals found to have committed sexual violence.
  - The need for remedial actions for the perpetrator, claimant, and school community.

<sup>94</sup> The Q&A Guidance also states that “[a] school should...have methods for verifying that the training was effective.”

- How to determine credibility.
- How to evaluate evidence and weigh it in an impartial manner.
- How to conduct investigations.
- Confidentiality.
- The effects of trauma, including neurobiological change.
- Cultural awareness training regarding how sexual violence may impact students differently depending on their cultural backgrounds.
- Providing educational programming to students regarding sexual violence that covers, at a minimum, the following topics:
  - Title IX and what constitutes sexual violence, including same-sex sexual violence, under the school's policies.
  - The school's definition of consent applicable to sexual conduct, including examples.
  - How the school analyzes whether conduct was unwelcome under Title IX.
  - How the school analyzes whether unwelcome sexual conduct creates a hostile environment.
  - Reporting options, including formal reporting and confidential disclosure options and any timeframes set by the school for reporting.
  - The school's grievance procedures used to process sexual violence complaints.
  - Disciplinary code provisions relating to sexual violence and the consequences of violating those provisions.
  - Effects of trauma, including neurobiological changes.
  - The role alcohol and drugs often play in sexual violence incidents, including the deliberate use of alcohol and/or other drugs to perpetrate sexual violence.
  - Strategies and skills for bystanders to intervene to prevent possible sexual violence.
  - How to report sexual violence to campus or local law enforcement and the ability to pursue law enforcement proceedings simultaneously with a Title IX grievance.
  - Title IX's protections against retaliation.
  - Encouragement to report incidents of sexual violence to appropriate school officials and law enforcement authorities.

## VAWA

VAWA also imposes a variety of training obligations on institutions. The requirements are outlined below, and the University should ensure that it is developing and providing this programming.

- Comprehensive, intentional, and integrated programming, initiatives, strategies, and campaigns intended to end dating violence, domestic violence, sexual assault and stalking that:
  - Are culturally relevant, inclusive of diverse communities and identities, sustainable, responsive to community needs, and informed by research or assessed for value, effectiveness, or outcome; and
  - Consider environmental risk and protective factors as they occur on the individual, relationship, institutional, community, and societal levels.
- Primary prevention and awareness programs for all incoming students and new employees,<sup>95 96</sup> including:
  - A statement that the institution prohibits the offenses of domestic violence, dating violence, sexual assault, and stalking.
  - The definitions of domestic violence, dating violence, sexual assault, and stalking in the applicable jurisdiction.
  - The definition of consent, in reference to sexual activity, in the applicable jurisdiction.
  - Safe and positive options for bystander intervention that may be carried out by an individual to prevent harm or intervene when there is a risk of domestic violence, dating violence, sexual assault, or stalking against a person other than the individual.
  - Information on risk reduction to recognize warning signs of abusive behavior and how to avoid potential attacks.
  - Other relevant VAWA information, including procedures for investigations and resolutions, the standard of evidence that will be used, possible sanctions and protective measures, reporting options, the importance of preserving evidence, the right to have an advisor during any part of the proceedings, protecting confidentiality, accommodations, available resources for victims, etc.
- Ongoing prevention and awareness campaigns<sup>97</sup> for students and employees, including the information described in the bullet points just above.
- Annual training to institutional officials involved in implementing [the institution's VAWA-related] procedures 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.

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<sup>95</sup> According to VAWA's regulations "primary prevention programs" means "programming, initiatives, and strategies informed by research or assessed for value, effectiveness, or outcome that are intended to stop dating violence, domestic violence, sexual assault and stalking before they occur through the promotion of positive and healthy behaviors that foster healthy, mutually respectful relationships and sexuality, encourage safe bystander intervention, and seek to change behavior and social norms in healthy and safe directions."

<sup>96</sup> According to VAWA's regulations, "awareness programs" means "community-wide or audience-specific programming, initiatives, and strategies that increase audience knowledge and share information and resources to prevent violence, promote safety, and reduce perpetration."

<sup>97</sup> According to VAWA's regulations, "ongoing prevention and awareness campaigns" means "programming, initiatives, and strategies that are sustained over time and focus on increasing understanding of topics relevant to and skills for addressing dating violence, domestic violence, sexual assault, and stalking, using a range of strategies with audiences throughout the institution..."