

December 16, 2013

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Vice President for Student Affairs
University of Oregon
220 Johnson Hall
Eugene, OR 97403-6203

Re: **Summary of Independent Review of Student Sexual
Misconduct/Harassment/Assault Policies and Procedures**

Dear Dr. Holmes:

This letter summarizes my review of the policies, procedures and practices for response to reports of sexual misconduct (broadly defined to include sexual assault, sexual harassment, and other forms of sexual exploitation) utilized by staff at the University of Oregon ("UO"). It is based upon my review of web and hard copy materials provided to me prior to, during, and shortly after my visit to campus on September 30 and October 1, 2013, as well as my interviews of key staff involved in the University's response to sexual misconduct.

I have not reviewed any files of actual cases of sexual misconduct that have been handled by UO; nor have I reviewed any investigation reports, hearing transcripts, or other materials of any actual cases.¹ Rather, as noted, I have been tasked with reviewing UO's written policy and practice/protocols, speaking with key staff involved in carrying out those practices/protocols, and reviewing outward facing materials (primarily websites) in order to suggest opportunities for enhancement or revision in line with current knowledge around the recent pronouncements of the U.S. Department of Education's Office for Civil Rights ("OCR") on Title IX, as well as best practices at peer institutions.

UO is to be commended for the significant effort recently devoted to addressing the issue of sexual misconduct. The "2012 Campus Report on Sexual Misconduct" is a thorough self-study that highlights many of the ongoing efforts to reduce sexual misconduct and address it effectively when it occurs. The creation of three new positions dedicated to this issue (in the Office of the Dean of Students, the Office of Affirmative Action and Equal Opportunity, and the University Police Department, respectively) represents a significant investment by UO, despite the challenging budgetary climate. During my two day site visit, I was impressed by the dedication of UO staff in multiple offices and units to create an optimal environment for students. There appears to be a very clear institutional commitment.

¹ Such case materials, if un-redacted, are protected from disclosure under federal law (FERPA).

A. Policy and Procedure

I have reviewed the Student Conduct Code sections pertaining to claims of sexual misconduct (hereinafter “policy”), in particular the relevant definitions and jurisdictional limitations. My review focused on evaluating these key elements in the policy as written.

1. Definition of Significant Terms

A strong policy needs to have a clear definition of the consent necessary to engage in sexual activity and an understandable yet sufficiently broad definition of prohibited sexual misconduct. The UO policy set forth in the Student Conduct Code contains a strong definition of “explicit consent” (often referred to as “effective consent” in policies at other institutions). The definition includes a requirement that consent be voluntary and clearly communicated, through verbal statements or acts “unmistakable in their meaning.” See OAR 571-021-0100(13). It couples this definition of consent with clear definitions of “mental incapacitation” and “physical helplessness,” allowing a hearing officer or panel to correctly inquire as to whether consumption of alcohol or other substances might render an alleged victim unable to give explicit consent. See OAR 571-021-1011(22). The “sexual misconduct” section of the Student Conduct Code also provides that voluntary consumption of alcohol by the alleged victim – even to the point of incapacitation – does not release the alleged perpetrator of the duty to obtain explicit consent. See OAR 571-021-0120(3)(h)(D). The policy also notes that consent given to one form of sexual activity does not negate the obligation to obtain explicit consent to other sexual activity. *Id.* Lastly, it attempts to encourage reporting by expressly providing that having violated the alcohol policy does not preclude an alleged victim from bringing a complaint of sexual misconduct arising out of that same event (nor can it be used as a defense by the alleged perpetrator). See OAR 571-021-1020(3)(C).

The policy defines “sexual misconduct” broadly, and includes sexual penetration without consent, nonconsensual personal contact, and sexual advances or other verbal or physical contact of a sexual nature that has the negative impacts described in the policy. See OAR 571-021-0100(30). “Contact of a sexual nature” is also defined in some detail. See OAR 571-021-0100(9). Other important definitions include “unwanted contact” and “penetration.” See OAR 571-021-0100(24) & (38).

“Harassment” is separately defined, and the policy includes a requirement that any non-physical conduct objected to as “sexual harassment” be objectively unreasonable.² This is

² See OAR 571-021-0100(17) which defines harassment as “(a) Intentionally subjecting a person to offensive physical contact; (b) **Unreasonable** insults, gestures, or abusive words, in the immediate presence, and directed to, another person that **may reasonably cause** emotional distress or provoke a violent response (including but not limited to electronic mail, conventional mail and telephone) except to the extent such insults, gestures or abusive words are protected expression; or (c) Other types of prohibited discrimination, discriminatory harassment, and sexual harassment as defined by law.” (Emphasis supplied.) See also OAR 571-021-0100(30)(c) which defines sexual misconduct, in pertinent part, as “Sexual advances, requests for sexual favors, and other verbal or physical

consistent with federal case law interpreting Title VII, and most student conduct codes include an “unreasonableness” component in the definition of actionable sexual harassment. However, the resolution agreement between OCR and the University of Montana-Missoula issued in May 2013 has garnered considerable attention in part because of its apparent endorsement of a significant change in this definition of harassment. Specifically, the agreement states that “[a]s used in this Agreement ... [t]he term ‘sexual harassment’ means unwelcome conduct of a sexual nature.” See Montana Resolution Agreement, p. 2. The agreement thereafter requires the University of Montana to revise its policies and procedures to “use consistently defined terms,” including an “accurate definition” of sexual harassment. Some observers have concluded that OCR now expects colleges and universities to follow the definition of sexual harassment articulated by OCR in the Montana agreement, particularly after OCR referred to that agreement as a “blueprint.”³ However, in my view, it is not at all clear whether schools must revise such definitions by removing the “unreasonableness” criterion. I recommend retaining the Student Conduct Code definitions in their present form, until such time as clearer guidance emerges from OCR or federal case law changes.⁴

Critically, the UO policy includes within its ambit modern forms of electronic harassment. For example, “[u]nacceptable use of computing resources” is defined to include “[u]se of electronic forums to violate other sections of the Student Conduct Code” (which would include the prohibition against sexual misconduct and sexual harassment) as well as “[t]hreats, abuse or Harassment, as defined in OAR 571-021-0105, conduct made or transmitted via electronic forums or electronic mail.” See OAR 571-021-0120(2)(f)(A) & (G). A broad definition of prohibited conduct that includes use of electronic means (such as cyber-stalking,

conduct of a sexual nature that interferes with work or academic performance because it has created an intimidating, hostile, or degrading environment **and would have such an effect on a reasonable person of the alleged complainant’s status when the conduct is unwelcome and sufficiently severe or pervasive** that it deprives that person of benefits of the University’s educational environment.” (Emphasis supplied.) See also OAR 571-021-0100(38) which defines unwanted contact as “repeated or persistent contact or attempts to contact another person when the contacting person knows or should know that the contact is unwanted by the other person; and (a) The contact **would cause a reasonable person fear** of physical harm; or (b) The contacting person knows or should know that the contact substantially impairs the other person’s ability to perform the activities of daily life.” (Emphasis supplied.)

³ See “Colleges Consider a New ‘Blueprint’ for Responding to Sexual Assault, The Chronicle of Higher Education, 07/24/2013 (noting that the Montana “settlement was a ‘blueprint,’ an [OCR] official said, for colleges nationwide”).

⁴ Indeed, the revised definition of sexual misconduct the University of Montana submitted to OCR for approval under their resolution agreement **retains** an “objectively unreasonable” component. The revised policy provides that hostile environment sexual harassment exists upon a showing of conduct that is “**sufficiently serious** (i.e., severe, pervasive, or persistent) **and objectively offensive** so as to deny or limit a person’s ability to participate in or benefit from the University’s programs, services, opportunities, or activities ; or when such conduct has the purpose or effect of **unreasonably interfering** with an individual’s employment.” See <http://umt.edu/policies/400-HumanResources/DiscriminationHarassmentSexualMisconductStalkingRetaliation.aspx>. (Emphasis supplied.) It also provides that “[m]ere offensiveness is not enough to create a hostile environment.” *Id.* (Emphasis supplied.)

nonconsensual recording of otherwise consensual sexual contact, and harassment via text messages or social media) is essential given modern forms of sexual exploitation.⁵

2. Limitations Period Within Which to File Complaints

An effective policy needs a limitations period for bringing complaints that is consistent with an accused student's right to due process and reflects the reality of the impact that the passage of time has on the quality of relevant evidence, yet is sufficiently broad to maximize the opportunity to hold an alleged perpetrator accountable. The UO policy provides that a claim of sexual misconduct must be brought within six (6) months of UO's "discovery of the student's ... involvement in the alleged violation," but no later than "the student's last date of enrollment or registration." See OAR 571-021-0115(5).⁶ There is always tension between having allegations heard promptly (for evidence gathering, witness memories, and fairness to an accused student) and concern that too brief a limitations period might allow some misconduct to go unpunished. There are valid reasons that an alleged victim might not raise a claim of sexual misconduct immediately, including trauma and misplaced feelings of responsibility or shame. The existing UO policy attempts to balance these competing concerns by linking the limitations period to *UO's knowledge of* alleged misconduct, rather than the alleged victim's knowledge of it.⁷

From the standpoint of personal jurisdiction, the UO policy contains critical language covering periods between academic terms, allowing for jurisdiction over allegations of sexual misconduct occurring during breaks but involving students expecting to continue in enrollment. See OAR 571-021-0115(4). This is often overlooked in many college or university policies. It also correctly limits jurisdiction to only those students who are enrolled (as UO arguably lacks

⁵ For example, the revised sexual misconduct policy adopted by the University of Virginia in 2011 defines "Sexual Exploitation," in pertinent part, as "recording, photographing or transmitting identifiable images of private sexual activity and/or the intimate parts (including genitalia, groin, breasts or buttocks) of another person; allowing third parties to observe private sexual acts; engaging in voyeurism; ..." See http://www.virginia.edu/sexualviolence/documents/sexual_misconduct_policy070811.pdf.

⁶ It appears that this six (6) month limitations period refers to the time within which the Office of Student Conduct and Community Standards must send written notice of the complaint to the accused student, rather than the time within which an alleged victim may file a complaint alleging sexual misconduct. See OAR 571-021-0200(1) (which states, in pertinent part, that "Any member of the University Community may file a complaint against a Student for violation of the Student Conduct Code. ... Any complaint should be submitted as soon as possible after the alleged violation takes place, preferably within one year. ... Once the Office of Community Standards receives a complaint, the Office has six months to send written notice to the accused Student of the complaint.")

⁷ One possible concern with the six month limitations period involves the existing procedure under which complaints are often not investigated during a break in the academic calendar, described below in section "H." I can envision a potential problem – rare, but not impossible – in a complicated case brought to UO's attention in June, but with no investigation to begin until classes resume in October. UO would be aware of the alleged misconduct in June, but might not be in a position to have completed its investigation and brought charges within the six month limitations period.

the ability to sanction an individual no longer enrolled, other than via degree revocation). See OAR 571-021-0115(5)(b).

3. Geographic Jurisdiction

The best sexual misconduct policies clearly define the jurisdictional reach of the policy, not just in terms of the time within which to bring a complaint, but also as to the physical territory within which it applies. Ideally, you want to have the broadest possible geographic reach consistent with the ability to adequately investigate the complaint, including questioning material witnesses and preserving relevant evidence. The UO policy's jurisdiction for hearing a complaint of sexual misconduct extends beyond campus and University-sponsored events. It is defined as encompassing complaints of activity occurring off-campus if the alleged activity "adversely and significantly affects the learning environment," "would have violated the Student Conduct Code if [it] had occurred on campus," and "involved violence or produced a reasonable fear of physical harm" (or "involved academic work or any records, documents, or identifications of the University"). See OAR 571-021-0115(2). Although this is likely sufficiently broad to cover most (if not all) allegations involving UO students that occur off campus, it might be helpful to consider adding a provision that provides geographic jurisdiction over any complaint "that allegedly occurred at the temporary or permanent residence of any student" as an addition to the existing (A) + (B) + (C) or (D) geographic jurisdiction formula described above.⁸

B. Website and Related Materials

One critical area of focus in any compliance review under Title IX is the extent to which the sexual misconduct policy is easily accessible to, and known by, students. The content must also be clear and easily understood on critical issues such as how and where to file a complaint, what options exist to resolve the complaint, available support services, and what the complainant (and accused) student can expect in the process. The standard against which one measures this ease of access, clarity of information, and ultimate community knowledge is the average UO student, not a trained administrator or knowledgeable student activist.

1. Ease of Locating UO Policy via a Search from the UO Home Page

A search of "sexual assault" from UO's home page brings up the University's policy as the fourth link in the search, on the first page of search results. The fifth and sixth search results (again on the first page of results) are the UOPD's links on how to make a report of sexual assault, including an anonymous report. The top three search results are links to available survivor support services through Sexual Violence Prevention & Education in Student Affairs and

⁸ A separate section of the Student Conduct Code states that a complaint of sexual misconduct "may be filed whenever Sexual Misconduct: (i) Materially interferes with another person's academic performance or participation in a University Sponsored Activity... [or] (iii) Demonstrates reasonable threat to health or safety of a Member of the University Community or the alleged student survivor." See OAR 571-021-0120(3)(h). Although this definition does not appear in the "Jurisdiction" section of the Code, it is nonetheless helpful in its breadth.

through the University's Holden Leadership Center. A search of "sexual harassment" yields similarly strong results on the first page of links.

A search of the phrase "sexual misconduct" from the UO home page brings up the University's policy (on the Dean of Students' web page) as the third link on the first page of results. The sexual harassment/violence flowchart from the Office of Affirmative Action and Equal Opportunity ("OAAEO") website, the SVPE website, and the UOPD anonymous report website are also featured on the first page of search results.

Only a search of the word "rape" from the UO home page fails to bring up the University's policy or any link to DOS, OAAEO or other reporting or support services (although a link to a counseling center's page on "How to help a friend who has been raped" does come up on the first page of results). It may be helpful to work with UO's IT/web staff to develop a way to have a link to the University's policy come up on the first page of the search results when someone searches from the UO home page using the term "rape." It is possible that some students may not use the technical terms "sexual assault" or "sexual misconduct" when searching for information.

2. Clarity of Web Content

OAAEO's home page contains a tab clearly labeled "Sexual Harassment & Assault." With a single click on that tab, a brief description of UO policy and a series of clearly labeled active links appear on a single page. Two particularly bold active links appear at left in solid green ovals, labeled "Need Help Now? Click Here" and "Anonymous Report Form." Clicking on these links takes you to an additional page of resources and links. In my opinion, ease of navigation and clarity of the information presented are both excellent.

The Office of the Dean of Students ("DOS") home page contains an active link to "Sexual Harassment Policy" in the center of the page, in bold typeface, under "Announcements and News!" That active link takes a student directly from the DOS page to the previously discussed "Sexual Harassment & Assault" content on the OAAEO web page. In addition, on the left side of the DOS home page, under the section "Student Conduct and Community Standards," are several active links to the policy, as well as a link labeled "Sexual Misconduct." Clicking on the latter link brings up an active link that, in turn, allows one to file a report online (although there is some potential for confusion with the multiple references to a "bias" report on that form). I recommend adding an active link to the OAAEO "Sexual Harassment & Assault" page from the DOS "Sexual Misconduct" section on the left side of the DOS page.

There does not appear to be an active link to the OAAEO "Sexual Harassment & Assault" page from the VPSA home page, although there is an active link to the DOS page on the left side under "Departments." However, it seems unlikely that a student would go to the VPSA page as a starting point to seek information on how to make a report of sexual assault, rather than to the DOS page or one of the pages identified in a search of "sexual assault" from the UO home page.

There is also a “UO Sexual Harassment/Violence Protocol Flowchart for Students” that is color-coded and provides guidance to students (and others) on how reports of sexual misconduct are handled at various stages of the process. It appears on the OAAEO “Sexual Harassment & Assault” web page. See <http://aaeo.uoregon.edu/sites/aaeo.uoregon.edu/files/Sexual%20Assault%20Protocols%20Flowchart%20February%202013.pdf>. The handling of sexual assault complaints is, by its nature, complicated. However, I find the flowchart to be easy to read and understand, and in my view is an excellent tool for educating students on what to expect if a report is made.⁹

Simply by way of reference, one of the best narrative summaries of the relevant elements that need to be communicated to complainants is currently in use at the University of Colorado-Boulder, entitled “Guidelines for Filing a Complaint of Sexual Assault or Sexual Harassment.” In my opinion, it hits all of the important considerations and does so in easy to read and understand language. As UO continues to refine and adjust its communications on sexual assault, the Colorado example provides a good template. See <http://hr.colorado.edu/dh/Documents/Guidelines%20for%20Filing%20a%20Complaint.pdf>.

In the wake of an OCR complaint investigation and resolution agreement, Yale University has developed several good web resources. Among them is a “Frequently Asked Questions” web page, http://provost.yale.edu/sites/default/files/files/Title%20IX_FAQs_080913.pdf, as well as a series of scenarios or hypotheticals designed to help students better understand the dynamics of consent and sexual assault, available via download at <http://smr.yale.edu>.

C. Training of Students

I did not review any training programs specifically directed to the general student body. However, in my interviews, I asked about the programs currently in place. It appears that during orientation, incoming freshmen are encouraged to view a performance play entitled “It Can’t Be Rape,” which explores the role of alcohol in sexual assaults as well as the impact of the assault on the survivor and others. There is also an online education program on alcohol provided to incoming freshmen.¹⁰ Other student-focused education programs on the issue of sexual misconduct include sessions presented by SWAT and also a program directed towards

⁹ However, in my interviews with students, there was some criticism of the flowchart as being “too legalistic” and confusing. There was also a concern that anonymous reporting was not covered in the flowchart. It was also felt that the flowchart does not make it clear what a true confidential report is (i.e., the reference to “privileged professional” will not be properly understood by students and it also shows a dotted line report from that “privileged professional” group to the “Reports to UO” box, creating the impression that such “privileged professionals” will, in fact, report the case to UOPD or others). It may be helpful to use a few student focus groups to test the flowchart again and perhaps revise it based upon that feedback.

¹⁰ It was not clear to me whether incoming transfer students also view the performance play and take the online alcohol education program.

men, entitled “Be That Guy,” although students I interviewed stated that these latter two programs only reach a very small audience each year.

D. Title IX Officer

In recent years, compliance reviews and complaint investigations by OCR have highlighted the critical importance of the school’s Title IX officer(s). UO has designated the Director of OAAEO as its Title IX officer.

The requirements of Title IX are satisfied by designation of a single individual in this role, which is not uncommon.¹¹ However, a single designation does place a considerable burden on one employee’s shoulders and arguably limits the options to students and employees. Alternatives that might be considered include multiple Title IX officers or a single Title IX officer with one or more deputy officers.¹² The creation of a new position in OAAEO, the Equal Opportunity Specialist, should help with the current work load, particularly as the position description includes “[c]onduct[ing] preliminary investigations of alleged sexual misconduct by university students [and] coordinating with Student Conduct and Community Standards on the final resolution of those matters.”

At present, the “Overview of Services and Complaint and Grievance Procedures” booklet offered in OAAEO does not contain any reference to the Title IX officer residing in OAAEO or much detail at all regarding students bringing sexual misconduct complaints. It simply refers students to the Office of Student Conduct and Community Standards to file student-on-student complaints, rather than referencing OAAEO’s role under Title IX. The OAAEO website, in contrast, provides considerable information under the “Sexual Harassment & Assault” tab, as discussed above. It may be best to discard these booklets until updated written materials are available.

¹¹ For example, the University of Southern California designates its Executive Director of the Office of Equity and Diversity as the sole Title IX officer. The University of Washington designates a single Title IX/ADA Coordinator in its Office of Risk Management, but designates multiple portals for raising complaints based upon the status of the alleged violator (e.g., complaints concerning students, student athletes, student employees, etc.). The University of Wisconsin-Madison designates a single Title IX coordinator (Assistant Vice Provost for Workforce Equity and Diversity), but requires student-versus-student complaints to be filed with the Division of Student Life rather than with the Office for Equity and Diversity where the Title IX officer is housed.

¹² For example, the University of Colorado-Boulder designates two (2) Title IX officers – the Dean of Students/Associate Vice Chancellor for Student Affairs and the Director of the Office of Discrimination and Harassment. The University of Virginia designates a Title IX Coordinator (the Director of the Office of Equal Employment Opportunity) and two Deputy Title IX Coordinators (the Associate Vice President/Dean of Students and the Senior Associate Athletics Director).

E. Reporting Sexual Misconduct / Filing a Complaint

An effective (and Title IX compliant) sexual misconduct policy is one that provides clear (and easy to find and comprehend) guidance on the methods by which a student may file a report or formal complaint and also makes that report/filing as easy as possible. The OAAEO webpage provides a prominent link to a form for making a report of sexual misconduct on an **anonymous** basis. I have also received a hard copy of that same form.¹³ The anonymous report form provides that if a complainant wants the report to be investigated, it must be filed with identifying information (i.e., as a non-anonymous report). The form also states that a complainant can file a **non-anonymous report** by calling any one of three offices: UOPD, DOS, or OAAEO. The form also clearly states that “Once you contact these offices or disclose identifiable information to a UO employee, the UO will have a duty to investigate based on available information.” In addition, the form states, in bold larger typeface: “If you fill this form out with a University employee, including a student employee, the report will no longer be anonymous.” Bold larger typeface is also used on the form to note the requirement that the University investigate allegations of sexual misconduct and follow-up with the reporter, if identified by name.

The content fields of the “Anonymous Report Form” seek information germane to the alleged offense under UO policy. These include: the date, time and location of the incident; the physical location at which the incident occurred; and the type of offense alleged to have occurred. One of the options for “type of behavior experienced” – hostile environment sexual harassment – includes only the first part of the policy definition (“other verbal or physical conduct of a sexual nature that interferes with your academic or employment experience because it has created an intimidating, hostile, or offensive environment”), while omitting the important remainder of that policy definition that includes the “objectively unreasonable” qualifier (“and would have such an effect on a reasonable person of the alleged complainant’s status when the conduct is unwelcome and sufficiently severe or pervasive that it deprives that person of benefits of the University’s educational environment”). I note this simply as a potential concern regarding the expectations of someone who may read the description of the offense in the report form, but not in the policy itself.¹⁴

In contrast to the online and paper “Anonymous Report Form” that references the ability to make a non-anonymous report of sexual misconduct by contacting either UOPD, DOS or OAAEO, the OAAEO web page describing the “Coordinated Institutional Response” states that “Incidents of alleged sexual harassment by or involving University of Oregon students are to be reported to the Office of the Dean of Students,” without reference to the other two potential reporting options (UOPD and OAAEO).¹⁵ In my interviews, it was noted that a complaint may

¹³ The content of the online form and hard copy appears to be the same. The layout is slightly different.

¹⁴ The significance of this “objectively unreasonable” qualifier is discussed in section A(1), above.

¹⁵ See <http://aaeo.uoregon.edu/sexual-harassment-violence/protocol-responding-incidents-sexual-harassment-involving-students/coordinated-institutional-response>.

also originate with Eugene Police Department (“EPD”), University of Oregon Police Department (“UOPD”), or University Housing. UO may wish to look at these various descriptions of reporting options and seek a more consistent description of preferred reporting outlets in all UO web and print media.

If a complaint is received by DOS (either by direct report from a complainant or mandatory reporter, or via referral from UOPD or Housing), the complaint is forwarded to OAAEO, often via e-mail. DOS takes the lead in reaching out to offer direct support to the complainant and to make the complainant aware of other UO and community support services that are available.

From a best practices perspective, the new Yale web page on filing a complaint of sexual misconduct is a good template. It includes a brief narrative summary, followed by active links for options to file a criminal complaint with Yale Police, a formal or informal complaint with the University, or a complaint with the Title IX Coordinator.¹⁶ Each of these options includes an active link to a page that specifically details what it means to pursue that option, so that a complainant knows what to expect in the process.

F. Mandatory Reporting by Employees

Reports to DOS or OAAEO of possible student sexual misconduct may also come in through a UO employee. All UO employees have been designated as mandatory reporters for purposes of sexual misconduct, unless an employee has a statutory or other recognized exemption from reporting (e.g., a therapist or counselor in student health).¹⁷ Training for all mandatory

¹⁶ See <http://sharecenter.yale.edu/complaint/filing-complaint>.

¹⁷ See OAR 571-003-0025 (emphasis supplied, below), which provides, in pertinent part:

(2) University Employees' Responsibilities in Dealing with Allegations of Prohibited Discrimination or Sexual Harassment: The University has the responsibility to prevent prohibited discrimination from occurring in its work-places and its academic, research, public, and student service programs:

(a) ***University employees with credible evidence that any form of prohibited discrimination is occurring have the responsibility to inform their supervisors or the Office of Affirmative Action.*** Credible evidence is evidence of the kind that prudent people would rely on in making important personal or business decisions; [cont.]

(b) Staff in the Office of Affirmative Action shall provide information about available complaint processes, services for complainants, and assistance with resolving complaints to any University employee who makes a report of alleged discriminatory behavior so that these employees may pass on this advice to those involved who may need this information;

(c) In making such reports, University employees may retain their anonymity;

reporters is taking place now.¹⁸ An excellent description of those resources available to a complainant who does not initially wish to trigger mandatory reporting is on the UO website at <http://aaeo.uoregon.edu/sexual-harassment-violence/protocol-responding-incidents-sexual-harassment-involving-students/coordinated-institutional-response>.

Nonetheless, some individuals (in particular student activists with whom I met) are concerned that designating most UO employees as mandatory reporters will place student employees, in particular RAs in residence halls, in a difficult position and may have a chilling effect on student willingness to seek help from an RA. Another concern expressed was that a complainant may not realize that the UO employee she/he has approached to talk about the assault (e.g., an RA or a professor) has a mandatory duty to report that conversation.¹⁹ Some students I interviewed believe that mandatory reporting should be limited to certain classes of employees.²⁰

However, there is a strong policy consideration behind mandatory reporting by all employees. If the objective is to increase reporting of sexual misconduct and thus increase the ability to hold perpetrators accountable (thus also enhancing campus safety), designating all employees as mandatory reporters can be a strong tool to achieve those goals. Success in designating all employees as mandatory reporters requires two key actions: (1) taking effective steps to educate students that there is limited confidentiality other than in conversations with a small class of clearly defined statutory/confidential positions; and (2) designing a training tool that is effective across broad classes of employees of differing levels of education and experience regarding what to do when they receive credible evidence of sexual misconduct (and what “credible evidence” means). As to the first challenge, it will be critical to include clear and concise information in the campus-wide sexual misconduct training to students that delineates which positions are exempt from mandatory reporting and that also explains what “reporting” actually means.²¹ A brief summary of why UO has taken this approach (to improve safety for all

¹⁸ See <http://around.uoregon.edu/story/health-safety/mandatory-workplace-harassment-prevention-training-begins> (indicating that required training that will include clarification of “employees’ understanding of their duty to report credible information regarding incidents of prohibited discrimination, including sexual assault, partner or dating violence, and gender-based stalking” will begin in October 2013 and must be completed by all employees by March 30, 2014).

¹⁹ This has also been a subject discussed recently in the UO student newspaper, *The Daily Emerald*. See <http://dailymerald.com/2013/10/21/required-reporting-many-uo-employees-may-not-be-prepared-to-be-reporters-for-sexual-assault/>; see also <http://dailymerald.com/2013/10/03/after-months-of-reluctance-uo-administration-renews-contract-with-sass/>.

²⁰ For example, the University of Colorado-Boulder requires mandatory reporting by only those employees with supervisory authority.

²¹ There is a good overview of the categories of mandatory reporters (and those who are not) at <http://aaeo.uoregon.edu/sexual-harassment-violence/student-support-and-resources/options-reporting-incidents-sexual-harassment-and-sexual-violence> and <http://aaeo.uoregon.edu/sexual-harassment-violence/student-support-and-resources/options-reporting-incidents-sexual-harassment-and-sexual-violence> on the OAAEO website. It may be helpful to more clearly delineate on these two web pages that RAs and other

students and hold perpetrators accountable) might also be helpful in achieving a greater understanding.

With respect to the second key element for success, I have reviewed a hard copy printout of the “UO Supplement to Preventing Workplace Harassment” provided to me during my visit.²² This training supplement appears to me to be well-crafted, touches key substantive points, and appears accessible to a broad range of employees. In my opinion, it will be critical to conduct an assessment sometime after the training is rolled out to measure retention and comprehension of the reporting duties and responsibilities by employees.

It is important to note that the challenge of effectively training all employees as mandatory reporters has led some experts to argue for a modified or “hybrid” approach. A good example is set forth by attorney Brett Sokolow, Executive Director of the Association of Title IX Administrators (“ATIXA”), in his commentary in *The Chronicle of Higher Education* on September 23, 2013. See <http://chronicle.com/article/Mandatory-Reporting-for-Title/141785/?cid=at>. He argues for making all employees (other than those with a statutory/confidentiality exemption) mandatory reporters, but then creating differing tiers within those mandatory reporters in terms of what details must be reported. In his view, “Supervisors must report all incidents, with full detail, to the Title IX coordinator. Nonsupervisory employees (this would include the RAs in the case at Swarthmore) are required to report but are empowered to make what we call Jane or John Doe reports, at least initially. Jane/John Doe reports include all details of an incident except for anything that would personally identify those who were involved.” *Id.* His opinion is that this option “ensure[s] that the reporting duty is fulfilled but do[es] not put the [Title IX] coordinator on notice in a way that creates institutional obligations to respond.” *Id.* AIXTA has created a document titled “Mandatory Reporters: A Policy Manual for Faculty and Professional Staff” that walks through his group’s recommendations in detail. See <http://atixa.org/wordpress/wp-content/uploads/2013/08/Mandatory-Reporters-Policy-Template.pdf>.

G. Interim Remedial Measures and Student Support

An important focus of any Title IX compliance review is the steps taken by the school to provide support to the complainant, including consideration of emergency or interim remedial measures designed to eliminate (where possible) the existing impact of the alleged misconduct

Housing/Residence Life staff, as well as faculty and academic advisors, are mandatory reporters. Some students with whom I spoke expressed concern that the existing UO web materials on this topic are confusing and incomplete. While I do not find these materials confusing, I recognize that I am an attorney and a higher education professional, and not a student. A good example of a chart classifying employees as “strictly confidential,” “mostly confidential,” and “confidential according to state law” is on the Yale University “Sexual Misconduct Response” website, <http://smr.yale.edu/>, although it could be expanded to fit the broader range of UO reporters.

²² I have not reviewed the United Educators-developed “Preventing Harassment in the Workplace” currently being used at UO in conjunction with this supplement, although I have reviewed a version of that online training at another university. I suspect that it is substantially similar in content.

on the complainant, while also respecting the legal rights of the accused student. Current understanding of Title IX compliance best practices tilts this aspect of the process in favor of the complaining student's protection and reduction of any ongoing risk of harm.

When a report or complaint of sexual misconduct is received and forwarded to the DOS, the initial outreach appears in most cases to come from that office. As the OAAEO web page states: "In response to an incident of sexual harassment/assault or other forms of gender discrimination, University Staff in the Office of the Dean of Students work with the student survivor to provide appropriate support. That can include, but is not limited to, on-campus housing changes, academic accommodations, assistance with financial aid, student employment, or other campus needs."²³ The website also notes that "Outside agencies such as SASS and Womenspace do not have authority to independently arrange on-campus remediation such as on-campus housing changes, academic accommodations, assistance with financial aid, student employment or other campus needs." This is clear and accurate information concerning support options and interim remedial steps that may be taken in a given case.

In my interviews, it was explained that DOS usually makes the initial outreach by telephone call. If unsuccessful, an email will be sent. The practice is to try to make contact within one half hour of receiving the initial report. If the alleged victim is willing, a meeting is scheduled with DOS to review support options. This information is covered by telephone if the alleged victim would prefer not to come in for a meeting. Various accommodations are discussed, including academic and housing. DOS provides any notes taken in this initial meeting or telephone call to the Title IX officer for use in the investigation to follow.

If removal of an accused student from UO housing is considered a possible option in a given case, a risk assessment meeting is convened. The meeting generally includes DOS, UOPD, Housing, SCCS and the Title IX officer. In the most serious cases, the Director of Student Conduct and Community Standards ("SCCS") has the authority under the policy to impose "emergency" interim measures that can include an "[i]mmediate withdrawal of the [s]tudent from the University" or "[r]estrictions on the [s]tudent's presence on University Premises or at University Sponsored Activities." See OAR 571-021-0230(1) & (2). The section of the policy concerning such emergency actions includes appropriate rights of the accused student to seek a preliminary hearing (within two business days), expedited review by the VPSA or her designee (within one working day after the preliminary hearing), and a panel hearing (within 14 days after the emergency action is imposed). See OAR 571-021-0230. The ability to impose an emergency interim measure such as suspension or a bar on being present in certain areas of campus or at certain UO functions is a critical tool in the most serious cases of sexual misconduct or upon an allegation against a repeat offender. For example, including in a "no contact" letter a ban on visiting the residence hall in which the complainant lives, or on

²³ See <http://aaeo.uoregon.edu/sexual-harassment-violence/student-support-and-resources/options-reporting-incidents-sexual-harassment-and-sexual-violence>.

attending a particular function at which the complainant may be present, might be appropriate in certain cases. Similarly, upon a preliminary finding via investigation of strong facts supporting such action, an immediate suspension of an accused student and corresponding ban on entering the campus may well be an appropriate action to preserve safety.

A template of the “No Contact Letter” and “Notification to Complainant that No Contact Letter sent” that are currently in use were provided to me. These letters are sent out to the complainant and accused student, respectively, by SCCS. In my interviews, it was explained that a “No Contact Letter” will be sent based upon a review of the case facts by SCCS. It is frequently sent, but is not automatic in every case. SCCS estimates that a “No Contact Letter” is issued in roughly one half of cases. These templates contain a good explanation of what constitutes inappropriate or prohibited contact between the students at issue, and also broadly define the scope of prohibited contact to include electronic means, social media, and third party agents. I advise adding a strong sentence or two reinforcing UO’s non-retaliation policy in such matters, particularly in light of the most recent OCR “Dear Colleague Letter” dated April 24, 2013 (reinforcing the non-retaliation mandate).

One area of possible tension came to light during my onsite visit. As I understand it, a member of the UO Housing Department “pro staff” (described as the duty phone professional on call, which I understand to include the Assistant Director of Residence Life, Residence Life Coordinator and Assistant Residence Life Coordinator positions) is the individual whom RAs are instructed to contact when they receive a report of possible sexual misconduct. However, the “pro staff” professional must then contact DOS and await the DOS staff member’s arrival to then provide support resources and other relevant information to the complainant.²⁴ This is seen by some as unnecessarily bureaucratic, given that a professional staff member from Housing is already on the scene. There is a belief that Housing “pro staff,” if properly trained on the support protocols, can provide the necessary support more efficiently in the residential setting and create a less stressful situation for the complainant. I note this simply as an issue that was raised during my interviews.²⁵

²⁴ This division of responsibilities between student residence life staff, residence life pro staff, and DOS on-call staff is set forth in a detailed document entitled “Sexual Violence Response Protocols,” located on the P-drive: ResidenceLifeManual/EmergencyProcedures/ResidenceLifeProfessionalStaffDutyManual/SexualViolenceResponse Protocols.

²⁵ The newly created Sexual Violence Response and Support Services Coordinator position in DOS may impact the existing protocol for initial outreach to the complaining student regarding support options and interim remedial measures. The job description states, in pertinent part, that “[t]he position provides initial crisis intervention and support to students during regular working hours and shares a rotation outside of regular working hours (24 hours/7 days a week), assessing [a] student’s immediate needs and any campus safety concerns. During an initial crisis response, the coordinator will provide information, options and refers the student to available resources in an effort to ensure that the student has the necessary support to continue her or his academic program of study.”

H. The Complaint Investigation Process

In addition to prompt outreach to the complaining student regarding support services and possible interim remedial measures, OCR's guidance on Title IX compliance requires a school to swiftly undertake an investigation, with the goal of completion within 60 days. During a compliance review, the timeliness and quality of the investigation process will be an area of close inquiry.

The UO policy provides that the Director of SCCS "shall be responsible for investigating and presenting the case to the Hearings Panel and ensuring that all relevant information is presented on both sides." See OAR 571-021-0210(16)(a). However, based upon my interviews, it appears that in practice the initial investigation of a complaint of sexual misconduct is done by the OAAEO Director in her role as Title IX officer, while DOS conducts the initial outreach to provide the complainant with access to available support services. It was explained to me that DOS usually forwards to the Title IX officer a copy of the support email sent by DOS to the complainant, which in turns triggers the Title IX officer to email the complainant and begin the investigation process. I did not see any evidence of SCCS involvement in the actual investigation process; rather, SCCS appears to handle post-investigation adjudication.

The Title IX officer shared with me the email (template) sent by OAAEO to a complainant after a report of an alleged sexual assault is received and after confirmation is received that initial outreach has been made by DOS. The OAAEO email contains several important messages: acknowledgment of receipt of the student's report; a statement that UO takes such reports seriously and is focused on student safety; confirmation of the prior outreach by DOS to offer access to support services; a specific reference to UO's obligations under Title IX; an explanation that OAAEO will now begin an investigation into the report; a reference to the objective of remediation of the harm caused; and a request to set up a meeting to talk. The template also contains very strong empowering language that makes clear the complainant may decide how much information to share and also that such a decision will be made only after the complainant understands UO policy and all possible courses of action that may be taken as a result of the report. From a compliance perspective, it also asks the complainant to acknowledge receipt of the OAAEO email even if the student declines to meet with the Title IX officer or take any further action.²⁶

In my interview with the Title IX officer, the investigation process was described in detail. If the complaining student responds affirmatively to the initial email from OAAEO, an appointment is

²⁶ It is critical that all steps taken in a case be documented in a confidential database, especially steps taken at the outset to offer support to, and obtain relevant information from, a complainant. This is also true with respect to efforts to ensure that the complainant understands UO policy and all other actions taken, such as interim remedial measures, decisions around whether to adjudicate and the method of adjudication, and any sanction imposed on the accused student and follow-up with the complainant. The Advocate system used by UO can be used for this purpose, depending upon who has access to that system.

set up for an interview.²⁷ The Title IX officer also coordinates with UOPD/EPD to determine if the complainant has decided to pursue criminal charges.²⁸ If a police report exists, the Title IX officer requests a copy and then determines if that report contains sufficient detail to avoid having the complainant go through the facts again in an interview. If the complainant comes to OAAEO for an interview, the Title IX officer begins by explaining the process and explaining why each specific step is taken. Effort is made to identify any other potential relevant witnesses and any potential physical evidence that may exist. Thereafter, the Title IX officer invites the accused student to come in for an interview. Approximately fifty percent of the time, the accused student declines to do so based upon advice of counsel. The objective is to complete the investigation within 30 days.

An issue that came to light during my interviews is the potential for delay in an investigation when the complaint is received close to a break in the academic calendar (e.g., winter break or summer break). I was told by the Title IX officer that a complaint received in June might not be investigated until October for this reason. OCR's April 2011 "Dear Colleague Letter" contains an expectation that schools will complete the investigation within 60 days from receipt of the complaint. Although this expectation is not unbending, a delay of two months over the summer before commencing an investigation could pose problems should a complainant raise a concern with OCR (or a compliance review by OCR reveal that a particular case took 100-plus days to investigate).²⁹

Upon completion of the investigation by the Title IX officer in OAAEO, a written report is prepared that summarizes the preliminary findings. The Title IX officer determines whether the

²⁷ Critically, if the complainant does not respond, the Title IX officer still reviews the facts then in hand to determine if sufficient information exists that requires UO to take additional action. In such a case, the Title IX officer may contact the complainant again, explain UO's obligation under Title IX to move forward with an investigation, explain what those steps may be, and note that UO would prefer to have the complainant's cooperation. This approach is consistent with the present Title IX guidance issued by OCR.

²⁸ The Title IX officer asks UOPD/EPD whether moving forward with the UO investigation will compromise the pending criminal investigation. On occasion, a request from the police to hold off commencing the UO investigation will result in a delay.

²⁹ I recently attended a legal conference at which an expert in the area (Gina Maisto Smith of Pepper Hamilton LLP) noted that an investigative delay over a break might well be defensible on a case-by-case basis, if the school can show that: (i) its written policies specifically provide for such a delay during a break in the academic calendar; (ii) the complainant is notified of this policy and the reasons for it are explained to her/him; and (iii) the facts of the case support the school's inability to conduct the investigation over the break (e.g., certain key witnesses are unavailable). I recommend that a specific provision be added to the current "University of Oregon response protocol when it becomes aware of an incident of possible sexual harassment, including sexual assault" to make clear that such a delay in investigation may occur if the complaint is received close to an academic break, to be evaluated case-by-case. Under such a provision, some investigations might move forward over a break (for example, if the key witnesses are available), while others might not. In any case involving a delay, clear communication with the complainant and documentation in the file as to the reason(s) is critical.

facts as known establish probable cause that a violation of the sexual misconduct policy has occurred.³⁰ If so, the investigation report is then forwarded to SCCS, and SCCS then determines whether to proceed with student conduct charges. If a decision is made to proceed, SCCS sends the accused student a “Notice of Allegation.”³¹

UOPD or the Eugene Police Department (“EPD”) play a significant role in cases that originate with them or are referred to them. UOPD is now transitioning to full police powers and will assume responsibility for policing the campus, while EPD will retain jurisdiction over off-campus areas where students reside. Although I am told that cooperation is very good, it may be helpful to have a formal “memorandum of understanding” in place between UOPD and EPD allowing for the sharing of information between the two in cases alleging sexual assault off-campus involving UO students. Ideally, EPD would agree to provide evidence gathered in its investigation to UOPD, which in turn could provide it to the Title IX officer for use in any UO investigation and subsequent adjudication coordinated by SCCS. I was informed that the UO General Counsel’s office often works directly with the EPD and the local prosecutor whenever EPD requests that UO hold off on any investigation or adjudication pending completion of the criminal investigation. However, the GC’s staff made clear that UO will not delay imposing any interim remedial measures such as housing relocation, a “No Contact Letter,” or any emergency action identified as necessary.³²

I. Adjudication Procedures

Schools striving to meet the requirements of Title IX and effectively address complaints of sexual misconduct find themselves in the difficult position of balancing the respective legal and policy rights of the complainant and the accused student when the case reaches the formal

³⁰ The document entitled “University of Oregon response protocol when it becomes aware of an incident of possible sexual harassment, including sexual assault” phrases this somewhat differently, stating that the investigation report is referred to SCCS “[i]f evidence from preliminary investigation *suggests* a violation of the Student Conduct Code.” (Emphasis supplied.) I am inferring from this that the “suggests” standard is essentially a “probable cause” determination, which is customary at the pre-adjudication threshold.

³¹ There are three versions of this document, depending upon the type of referral. I have reviewed the templates and the content appears to hit the key points and raises no obvious concerns.

³² As the April 2011 OCR “Dear Colleague Letter” makes clear, “[T]he school’s Title IX investigation is different from any law enforcement investigation, and a law enforcement investigation does not relieve the school of its independent Title IX obligation to investigate the conduct. ... Schools should not wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation and, if needed, must take immediate steps to protect the student in the educational setting. For example, a school should not delay conducting its own investigation or taking steps to protect the complainant because it wants to see whether the alleged perpetrator will be found guilty of a crime. ... Although a school may need to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence, once notified that the police department has completed its gathering of evidence (not the ultimate outcome of the investigation or the filing of any charges), the school must promptly resume and complete its fact-finding for the Title IX investigation.”

adjudication stage.³³ The language of the written policy is critical, as is the manner in which these procedures are carried out in practice.

The UO policy expressly provides two options for formal resolution of a complaint alleging sexual misconduct: an administrative conference (including a “special” administrative conference) and a panel hearing.³⁴ It appears that the accused student may request either option. See OAR 571-021-0140(5)(b).³⁵ However, the Director of SCCS may refer the case to a panel hearing, regardless of the desires of the accused student, if she/he deems such action “in the best interest of the University or the best interest of the Student.” See OAR 571-021-0200(3)(c). I was told that the vast majority of sexual misconduct cases are resolved via an administrative conference.

As a result of these specific procedures, and as reflected in the “UO Sexual Harassment/Violence Protocol Flowchart for Reporting Students,” a concern was raised in my interviews that the accused student is perceived to have a greater voice in the selection of the method of adjudication than the complaining student. For example, a complaining student may express a preference for a panel hearing, but the accused student retains the option of selecting an administrative conference rather than a panel hearing, regardless of the complainant’s preference. It may be that UO adequately empowers the complainant by having the Director of SCCS give weight to the complainant’s desire in evaluating whether to direct the case to be heard by a panel hearing under OAR 571-021-0200(3)(c). However, it is an issue of concern to some, and perhaps could be addressed more clearly in resource materials on the website.

Individuals who serve on panel hearings must be well trained in the kinds of issues critical to determining whether an accused student has violated the policy against sexual misconduct, including factual issues such as how to establish incapacitation, other facts tending to establish consent or lack of consent, witness credibility, corroboration of facts, and how to properly

³³ Recent civil suits have been filed against Denison University, Vassar College, St. Joseph’s University, and Xavier University by students accused of sexual misconduct, alleging violation of constitutional due process, federal nondiscrimination law, and/or contract rights by the host institution. See “3 Accused of Sexual Misconduct Say Colleges Acted Hastily and Assumed Guilt,” *The Chronicle of Higher Education*, 09/11/2013; “Another Ex-Student Sues Over Sexual Assault Hearing,” *Inside Higher Education*, 12/16/2013.

³⁴ The UO policy also provides for the option of voluntary mediation, as approved by the Director of SCCS. See OAR 571-021-0220(1). However, in its April 2011 “Dear Colleague” letter, OCR expressed its view that mediation is not a proper vehicle to resolve sexual misconduct complaints. Depending upon how easy it is to do such things, the UO policy can be amended to state that mediation is not an option in complaints of sexual misconduct. Alternatively, the Director of SCCS can explain to any party seeking mediation of a sexual misconduct complaint that mediation is not an option for such cases, and reflect the same on the website and other materials that explain the procedures for handling sexual misconduct complaints.

³⁵ The “Student Rights” section of the UO policy provides that an accused student has the right “[t]o request that the Director of Community Standards resolve the case in an administrative disciplinary conference or to request a panel hearing.”

apply a standard of “preponderance of the evidence” (policy violation) and “clear and convincing evidence” (sanction of expulsion). In this regard, I have reviewed the training presentation given to potential panel hearing members by SCCS staff in October 2012. The training covers the importance of confidentiality, reviews key terms and definitions in the Student Conduct Code, notes the accused student’s right to procedural due process, reviews the University’s jurisdictional basis to hear complaints, reviews the manner in which questions will be asked (and refers trainees to the hearing script), defines what a “preponderance of the evidence” standard of proof means in practice (although it only mentions, but does not further explain, “clear and convincing” evidence required for expulsion), reviews factors to consider in weighing the strength of evidence, and types of sanctions that may be appropriate as warranted after a finding of responsibility. It also covers the roles of the Panel Chair and advisors to the complainant and accused student.³⁶

Two slides (#48 and #49) specifically cover sexual misconduct cases. They note that sexual misconduct is believed to be underreported and also that false reporting of sexual misconduct is rare.³⁷ Scenario #3 (slides #52-#53) specifically concerns a hypothetical around sexual misconduct, which is helpful. A second training presentation, conducted by staff with Sexual Violence Prevention and Education, goes into greater detail concerning sexual misconduct. It attacks certain “myths” around the issue, references certain studies of perpetrators, and reviews ways in which the panel members may apply such knowledge in hearing a case. A “mock panel hearing” apparently then takes place, to allow potential panel members the opportunity to test their skills in hearing evidence and applying the policy to hypothetical facts. Overall, this appears to be comprehensive training for UO Panel Hearing members, especially if it is being done on an annual basis.

There is a script that panel hearings follow in the formal adjudication process. It provides appropriate due process to both the complainant and accused student, including an opportunity to object to a panel member based upon alleged bias or conflict of interest. It contains clearly defined procedures for adjudication of responsibility, and contrasts witnesses and other evidence that may be appropriate in a guilt phase or in a sanctioning phase. I find the script to be a very helpful tool to guide the Panel Hearing process and help insure consistency.

³⁶ One recommendation I have concerns the language in slide #12, which states (in the first bullet point) that “SCCS (or one of its designees) evaluates the report and determines which Student Conduct Code violations apply.” By using the phrase “*determines* which Student Conduct Code *violations* apply” (emphasis supplied), there is a risk that the potential panel members may feel that the SCCS staff has already reached a conclusion that a violation did, in fact, occur, and thus feel constrained in reaching an independent conclusion. Insertion of “potential” or “alleged” before “violations” in that language would resolve this concern.

³⁷ It may be helpful to vet this with the General Counsel, as it could create a concern that the panel is being trained to have a predisposition that the accused student is responsible for violating the policy simply on the basis of a complaint being filed. This would not be an issue of concern for OCR; rather, it would be an issue of concern if an accused student challenged the ultimate finding based upon a claim of bias.

The UO policy provides that an accused student has the right “[t]o call and confront relevant witnesses.” See OAR 571-021-0140(5)(e). This is further supported in the procedures for a panel hearing, which provide, in pertinent part, that “Accused Students (not their advisors) and Complainants, may ask relevant questions of witnesses.” See OAR 571-021-0210(13)(b)(A). However, this right to confront an accuser presents particular challenges in cases alleging sexual misconduct, where allowing the accused student to directly question the complainant can cause potential emotional/traumatic harm.³⁸ The UO policy does attempt to balance these competing interests by allowing the Director of SCCS to receive requests for modification of questioning in advance of the hearing and make any modifications or accommodations that may be required. See OAR 571-021-0210(17). These accommodations may include having witnesses appear or be present in separate rooms, use of testimony via electronic means (telephone; Skype; video), or receipt of written testimony. *Id.*³⁹ If a student objects to the proposed accommodation, the request is referred to the panel for resolution. *Id.* Another option is to allow the accused student and complainant to submit their questions to the panel chair, who then asks the questions rather than the parties themselves.

One area that may present a potential concern in the formal adjudication model is the difference between the evidentiary standard used for a finding a violation of the policy (preponderance of the evidence) and the standard used for imposing a sanction of expulsion (clear and convincing evidence).⁴⁰ In the April 2011 “Dear Colleague Letter,” OCR made clear that they interpret Title IX as requiring application of the lowest evidentiary standard (preponderance of the evidence) when adjudicating claims of sexual misconduct. UO’s use of the preponderance standard for determining responsibility for a policy violation is consistent with the OCR’s “Dear Colleague” guidance. What is unclear is whether application of a higher standard of proof for imposing a sanction of expulsion meets OCR’s expectations under its current interpretation of Title IX, as that issue has not been specifically addressed in any “Dear Colleague” letters or resolution agreements of which I am aware. The fact that this higher standard of proof is set forth in written UO policy, is consistently applied for all conduct violations heard by the panel hearing, and is used only to determine if the highest form of institutional sanction should be imposed (rather than to determine if sexual misconduct

³⁸ The April 2011 OCR “Dear Colleague Letter” states that “OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing. Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.”

³⁹ I do not know the extent to which such accommodations or modifications have been requested or implemented in practice at UO thus far. However, this issue appears to be of interest to OCR in compliance reviews.

⁴⁰ See OAR 571-021-0140(5)(h) which provides that an accused student has the right “[t]o be considered not responsible for the alleged conduct until proven responsible by a preponderance of the information. If expulsion is a possibility, the standard of proof must be clear and convincing information.” See also OAR 571-021-0210(16) (“Allegations of violations of the Student Conduct Code must be established by a preponderance of the evidence except a student may be expelled only based on clear and convincing evidence.”)

occurred), appears to be consistent with the current state of the law, absent a future pronouncement by OCR to the contrary.

An additional potential concern involves legal representation. Specifically, it was explained to me during an interview that the Associated Students of the University of Oregon (student government) provides an attorney to represent an accused student, but does not provide similar legal counsel to a complainant. I reviewed the UO website and located an “Office of Student Advocacy” within ASUO that “provides professional advice and assistance to students charged with student conduct code violations ... [and] inform[s] students of their rights, help obtain incident reports, assist in administrative conferences and panel hearings, and discuss settlements and sanctions.” See <http://pages.uoregon.edu/asuoosa/>. The website references “sexual misconduct” as one of the “issues we help with.” *Id.* There is no reference to similar assistance being provided to students who may need legal advice and guidance in **bringing** charges of sexual misconduct under UO policy. Indeed, the “conflict policy” on the website states that “OSA will not assist a student in a grievance or complaint against another student or ASUO program.”⁴¹

J. Procedures for Appeal

The procedures provided for appeal of a decision by a panel hearing are set forth in the UO policy. Appeals to the University Appeals Board may be raised on one of four grounds: (1) procedural error, but only to the extent that the error resulted in “significant prejudice”; (2) lack of “substantial information” to support the decision; (3) a sanction not commensurate with the conduct violation; or (4) discovery of new information sufficient to alter the decision that was not known to the appellant at the time of the original hearing. See OAR 571-021-0250(2). These grounds for appeal are consistent with best practices for administration of student conduct hearings at peer institutions. Of particular importance for purposes of Title IX compliance, the complainant may appeal on the same basis as the accused student. See OAR 571-021-0250(1). This equal right to appeal was specifically noted in the April 2011 OCR “Dear Colleague” letter.

There is also the right to appeal a decision of the University Appeals Board to the Oregon Court of Appeals. This appears to be a highly unusual option and, in my interviews, no one could recall an instance of an accused student or complainant making such an appeal.

⁴¹ It may be that the recent hiring of a new “Sexual Violence Response and Support Services Coordinator” in DOS will alleviate some of this disparity, as that official appears to be tasked with providing support to a complainant throughout the reporting, investigation and adjudication process. In addition, it appears that the Domestic Violence Clinic in the UO law school can provide legal assistance to a victim of sexual assault, at least insofar as seeking a protective order from the court. However, it does not appear from the website that the Domestic Violence Clinic is involved in providing (legal) advisory support to a student bringing a complaint of sexual misconduct under the Student Conduct Code. See <http://familylaw.uoregon.edu/dv/>.

K. Future/Periodic Assessment of Campus Climate

One issue that has been included by OCR in all resolution agreements reached with colleges and universities in recent years is a survey or study of campus climate around sexual misconduct.⁴² For example, the recent resolution agreement reached between OCR and the 29 SUNY campuses on September 30, 2013 requires the Title IX Coordinator to conduct an annual review of: (1) all “formal and informal complaints of discrimination on the basis of sex (including sexual harassment, sexual assault, and sexual violence)”; (2) the results of “periodic assessments of campus climate” on the subject of sexual harassment, sexual assault and sexual violence; and (3) recommendations received from those who believe they have been “subjected to sexual misconduct on campus.” The Title IX Coordinator must then “identify any patterns or systemic problems” and “take appropriate action to address” any such patterns identified.

I reference this simply to note that an annual review of reports and complaints of sexual misconduct should be an ongoing practice for all schools going forward. Compliance with Title IX requires that colleges look to identify patterns or systemic issues of concern that may be revealed in these reports. In addition, providing a mechanism for those who have been impacted by sexual misconduct to offer feedback on UO’s policy and procedures is also an emerging best practice under Title IX.

L. Impact of Campus SaVE Act / Clery Act Amendments

I do want to highlight a few aspects of the Campus SaVE Act (part of the VAWA reauthorization) and Clery Act amendments, which will roll out in 2014. In particular, I note that a new requirement mandates primary prevention and awareness programs for all incoming students and newly hired employees, covering: the definition of consent in reference to sexual activity and going beyond risk reduction to include primary prevention school must expressly notify alleged victims of their right to report to and pursue a criminal complaint via local law enforcement; separate definitions of and statements prohibiting domestic violence, dating violence, sexual assault, and stalking;⁴³ and options for bystander intervention. Institutions must also engage in ongoing prevention and awareness campaigns for students and faculty, including education programs to promote the awareness of rape, acquaintance rape, domestic violence, dating violence, sexual assault, and stalking.

In addition, a school’s disciplinary procedures must provide a prompt, fair and impartial investigation and resolution that provides, *inter alia*, that the complainant and accused student have the same opportunities to have a support person or advisor of their choice present at any proceeding or related meeting. The complainant and accused student also must be

⁴² Surveys of current students and an invitation to contact OCR with thoughts or concerns about a college’s approach to handling reports of sexual misconduct have also been required by OCR during the course of some compliance reviews, prior to execution of a resolution agreement.

⁴³ This will require revision of the current UO policy, which does not contain separate definitions of stalking, domestic violence and dating violence.

simultaneously informed (in writing) of: the outcome of the proceeding relative to an allegation of domestic violence, dating violence, sexual assault, or stalking; the school's procedures for an appeal; any changes to the outcome/sanction that occurs prior to the outcome being finalized; and the actual finalization of the outcome/sanction.

Lastly, complainants should receive, in writing: the procedures they should follow; interim measures; support services available on and off campus; all reporting options (e.g., UOPD, EPD, DOS, OAAEO) and the express right to report to and pursue a criminal complaint via local law enforcement; and all available protective options (e.g., no contact order, court issued protective order). Training must be conducted annually for all staff involved in disciplinary proceedings, including investigators, hearing officers, and those who may hear cases on appeal. This training should include definitions of domestic violence, dating violence, sexual assault, and stalking, as well as how to conduct an investigation and a hearing process that both protects complainants and also promotes accountability.

Thank you for inviting me to conduct this review of the UO policy, procedures and practices for handling cases of sexual misconduct. I trust that the information above will be beneficial to you and your talented staff. Please let me know if I may answer any questions raised by this summary report.

Sincerely,

A handwritten signature in cursive script, appearing to read "Allen W. Groves".

Allen W. Groves, J.D.