

# **Occidental College**

## **Report of External Audit and Assessment of Title IX Policies, Procedures and Practices**

Gina Maisto Smith  
Leslie M. Gomez

**Pepper** Hamilton LLP  
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## Executive Summary

This Executive Summary provides an overview of our Report of External Audit and Assessment of Title IX Policies and Procedures for Occidental College.

### I. Introduction

In late March 2013, Occidental College engaged Gina Maisto Smith and Leslie Gomez of Pepper Hamilton LLP to provide an objective and neutral audit and assessment of the College's response to sexual and gender-based harassment and violence under Title IX of the Education Amendments of 1972. Shortly thereafter, in response to a complaint by Occidental students and faculty, the U.S. Department of Education's Office for Civil Rights (OCR) opened a Title IX investigation of the College. The Department of Education (DOE) subsequently opened a Clery Act investigation.<sup>1</sup> More than a year later, neither OCR nor DOE have concluded their review.

We approach this review through the lens of our unique skill set and background – a background that comes from working with thousands of complainants/victims/survivors over more than four decades of our professional careers responding to sexual violence, child abuse and other forms of interpersonal violence. Our bona fide commitment to these issues as former prosecutors, educators, investigators and advisors is apparent from our professional histories, board service, pro bono work and recognition from victim services agencies. We also have extensive experience working with more than one hundred colleges and universities across the country in assessing and improving campus responses, developing policy and procedures, and providing education and training programs

Our work at Occidental included a period of community engagement and education, a review of policies, procedures and practices and an evaluation of a representative sample of past cases. We provided our initial recommendations on April 30, 2013, and they have all been implemented in part or in full. In August 2013, based on those initial recommendations, the College adopted an Interim Sexual Misconduct Policy, revised the structure of the institutional response, dedicated additional resources and personnel available to respond to sexual and gender-based harassment and violence and provided additional training and education opportunities. Throughout our engagement, we have listened to and learned from students, faculty, and staff and have spoken with or met with more than 100 individuals and groups during multiple visits to campus, including June, August, September and October 2013. This input provides the foundation for our recommendations for enhancing Occidental's Title IX response to sexual and gender-based harassment and violence.

While many students have chosen to share their accounts and experiences, some members of the community who may have relevant information or perspectives to share declined to participate in this review. We offer no criticism or rebuke to those individuals who chose not

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<sup>1</sup> Except for the places where there is natural intersection, our review did not encompass the College's responses under the Clery Act.

to participate, and we understand the dynamics that make such conversations unlikely to occur. However, this left us with an insufficient foundation to make observations and conclusions in response to specific allegations in individual cases – allegations that but for a full and fair vetting of facts, cannot be resolved based on the mere assertion of one party to the dispute. We are hopeful that OCR will bring resolution to the campus community by addressing the unresolved allegations raised by OSAC. While we remain available to those who wish to be heard, we recognize that we have gathered sufficient information to provide guidance to the College, and this report could no longer wait.

## **II. The Context**

As outlined in this report, a coordinated response to sexual and gender-based harassment and violence requires integration of the following concepts:

- The complex regulatory framework, including Title IX, the Clery Act, the recently enacted amendments to Section 304 of the Violence Against Women Reauthorization Act of 2013 and other federal, state and local authority;
- A nuanced understanding of the dynamics of sexual and gender-based harassment and violence and the impacts of trauma on individuals and communities; and,
- An appreciation of the unique culture, climate, policies and procedures, personnel, resources and underlying values of an institution.

Successful implementation must integrate these concepts to develop a coordinated and holistic response that is compassionate, legally compliant, principled and balanced in its attention to the welfare and safety of students, faculty, staff and community members.

In framing this report, it is important to provide an overview of the broader context of sexual and gender-based harassment and violence on college campuses. The issues are complex for any single institution to navigate, but in our work across the country, we have identified many shared themes, dynamics and challenges. This report provides an informed discussion of the complexities of the issue, which we view as a critical part of educating the community in order to understand our observations and recommendations and to help pave a path forward for the Occidental community.

### **A. The Evolving Regulatory Framework**

Our review at Occidental comes at a time of increasing regulatory interest in campus responses to sexual and gender-based harassment and violence. Key federal laws include Title IX of the Education Amendments of 1972 (prohibiting sex discrimination by educational institutions that receive federal funds) and implementing regulations that have the force of law; the Jeanne Clery Act (requiring reporting of crimes, education and prevention programs and policies and procedures for sexual assault); and, as of March 2013, Section 304 of the Violence Against Women Reauthorization Act of 2013 (extending Clery to dating violence,

domestic violence and stalking). In addition, California state legislation, such as Senate Bill 967, which was signed into law in September 2014, will impose additional legal requirements for California campuses, including “affirmative consent” and educational and training standards.

OCR’s April 4, 2011 Dear Colleague Letter spurred increased enforcement efforts by OCR. Those efforts, combined with unprecedented and coordinated activism by student survivors and their allies have led to a national paradigm shift regarding the scope of institutional responsibility to prevent and respond to sexual and gender-based harassment and violence. As the legal framework continues to evolve, Occidental, like all colleges and universities, must continue to adapt and incorporate the new regulatory requirements.

## **B. Dynamics of Sexual and Gender-Based Assault and Violence**

Most incidents of harassment or violence occur between individuals known to one another, often behind closed doors and typically without witnesses or physical evidence. The nature of the relationship between a complainant and respondent can impact whether and when an incident is reported. There is significant underreporting, both on college campuses and in society at large, and there is often a delay in reporting, which can result in the loss of whatever physical or forensic evidence may have been available at the time of the incident. Investigating and evaluating an incident accordingly requires an assessment of the credibility of the complainant and respondent – in other words, a word-against-word credibility assessment.

Our experience as sex crimes prosecutors evaluating thousands of word-against-word credibility cases reveals that an effective investigation demands scrupulous rigor in fact-gathering by individuals with appropriate training or experience, a toolkit designed to access relevant and material information and precise documentation to support reliable decisions. The investigation and evaluation of credibility also requires special expertise to evaluate the impact of trauma, counter-intuitive behaviors, the impact of alcohol or other drugs, predatory, pattern and grooming behaviors and the unique response by each and every complainant.

## **C. The College Context**

On campus, additional factors make investigating and adjudicating complaints more complex, and many institutions lack the resources and dedicated personnel to prevent incidents, foster reporting, provide support and advocacy for both complainant and respondent and investigate and adjudicate complaints promptly, thoroughly and reliably. Further, educational institutions are often tainted with a perception that they err on the side of protecting the institution, rather than preventing assault and harassment and protecting victims.

The very nature of a credibility determination uniformly subjects the results to question by the non-prevailing party. Dissatisfaction with the result and questions are then directed to the investigative or adjudicative process or implementers who evaluated the conduct. The outcome is often challenged through an appeal, an OCR complaint or a civil lawsuit filed by a complainant, a respondent or, in some cases, both parties.

### **III. The Context at Occidental**

Attention to these issues, at Occidental College and elsewhere, is part of a national paradigm shift in the scope of institutional responsibility to: 1) prevent sexual and gender-based harassment and violence and 2) to respond effectively when sexual and gender-based harassment and violence occur within the campus community. Recognizing the impact of the national milieu, the report provides an overview of the context at Occidental as we observed it in the spring of 2013 and during the 2013-2014 academic year.

Students and faculty have demanded reform at Occidental. We recognize and welcome their passion and commitment. We also affirm the commitment by the College, including significant steps already taken by President Veitch, the Board of Trustees, the Title IX and Clery response teams, the Sexual Misconduct Advisory Board and many dedicated students, staff and faculty.

Over the course of this engagement, two themes at Occidental have emerged above all: a genuine commitment and dedication to “getting it right” and a stark polarization of the community about how best to do that. This polarization is counterproductive, has damaged the dialogue and in some cases effectively silenced members of the College community who have expressed fear of ostracism and retaliation by either the administration or the activist community.

Concerns expressed to us by students, staff and faculty include fears of speaking freely, concerns that the campus dynamic is detrimental to the conversation, worries about lack of trust between different members of the community and fears that the campus has become so divided on this issue that the College community may not be able to work together to rebuild. A March 26, 2014 Letter of Faculty Concern echoed these concerns, describing an “unsustainable, adversarial deadlock” and a “failure to let go of hostility” that “becomes more damaging every day.”

We believe that the College is at a pivotal moment, but one that has the potential for hope and optimism. The key to achieving success at Occidental is directly tied to the community’s ability to rebuild damaged and frayed relationships and find a way to share common goals—preventing sexual and gender-based harassment and violence and improving institutional responses that prioritize individual welfare and safety—but to do so in a way that is collaborative and respectful. While we fully applaud and support achieving culture change through activism, we worry that the very tactics used to gain attention to the issues will stand in the way of candid and collaborative communication between activists and administrators. We encourage the administration, faculty, staff, students, and all members of the College community to create safe spaces for conversation that focus on inclusivity, diversity and respect for civil discourse. This will require listening openly to fellow community members, seeking to understand their perspective and searching for an inference of good will, rather than presuming a negative inference.

#### **IV. The Evolution of Policies, Procedures and Practices**

The College has made significant investments to address issues of sexual and gender-based harassment and violence over the past several years. Many of these efforts have been at the College's own initiative, while others have been driven by steadfast pressure from activists and student/faculty groups.

In the fall of 2011, the College convened a Sexual Misconduct Committee, charged with making recommendations to the Dean of Students Office. The College also reviewed recommendations from two faculty members who would later, in February 2012, assist in forming the Oxy Sexual Assault Coalition (OSAC). In November 2012, OSAC issued a list of "demands" to the administration regarding changes to the College's policies, procedures and systems related to sexual assault. The college implemented many, but not all, of these demands over the course of early 2013.

In March 2013, the College engaged us as external consultants to assess its policies and procedures regarding sexual and gender-based harassment and violence. On April 30, 2013, we issued our initial recommendations directly to the College community. These included:

1. Creation of an independent Title IX Office reporting directly to senior staff, led by a Title IX Coordinator (Completed June 2013 – Feb. 2014)
2. Review of the current structure/use of Deputy Title IX Coordinators (Completed Spring 2014)
3. Hiring of dedicated survivors' advocate (Completed April 2013)
4. Review of existing policies and development of a uniform policy uniting disparate staff/student/faculty sexual harassment and misconduct policies (Uniform policy completed August 2013; Faculty/staff procedures to be drafted)
5. Expanded training and educational programming (Completed)
6. Creation of anonymous suggestion box (Completed April 2013).

During the Summer of 2013, the College developed and implemented a comprehensive Interim Sexual Misconduct Policy. Although OSAC faculty members declined to participate in its development, the Interim Policy was based in part on extensive prior written contributions to the conversation by OSAC. This revised policy also took into account contributions by faculty and staff and was informed by a comprehensive review of applicable law, regulation and guidance.

#### **V. Review of Past Cases**

We have conducted an in-depth review of the available records for cases involving a formal complaint of non-consensual sexual intercourse or sexual contact from two academic years: 2011-12 and 2012-13, a total of seventeen formal complaints. During the course of our review, we gathered input from a broad cross-section of individuals, which we have aggregated for this report. Because our goal was to understand challenges and opportunities for structural improvement, we have made general observations and have omitted information that might identify an individual complainant or respondent.

Our review of the policies, procedures and practices and the feedback we received from community members enabled us to identify areas of concern and make observations about the investigative and hearing process. In the report, we discuss the timeframes for resolution, the processes for investigations, reaching outcomes and assigning sanctions. We also offer our observations and community feedback about interactions with administrators.

## **VI. Summary of Action Steps To Date**

In addition to our engagement, frank assessments and recommendations over the past eighteen months, the College has taken what we believe to be sincere and significant steps to enhance the level of resources and accessible information available to students, improve the immediate responsiveness to a report of misconduct, provide education and training programs and implement an infrastructure to respond effectively through remedies, investigation and resolution of a report.

These actions reflect a significant commitment to respond holistically to sexual and gender-based harassment and violence by integrating the evolving requirements of the regulatory framework and an understanding of the dynamics of sexual and gender-based harassment and violence into current policies, procedures and practices. These efforts, which are focused on prevention and education as well as effective investigative and remedial responses, reflect a commitment that goes beyond the mere “check-the-box” compliance requirements. Consistent with the institutional values as set forth in the Interim Policy, these efforts reflect the College’s commitment “to fostering a climate free from sexual harassment, sexual violence, and intimate partner violence through clear and effective policies, a coordinated education and prevention program, and prompt and equitable procedures for resolution of complaints.”<sup>2</sup>

## **VII. Recommended Next Steps**

Noting that many of our recommendations have already been implemented, reflecting the College’s commitment to improving its efforts in this area, we offer the following additional recommendations:

### **A. Continued Engagement with Community Members**

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<sup>2</sup> Occidental College Sexual Misconduct Policy.

We encourage any individual who has reported sexual or gender-based violence to the College (anonymously or otherwise), whether or not those complainants were the subject of an investigation or adjudication by a hearing panel, to consider reaching out to the College's Title IX Coordinator to address any outstanding concerns and share feedback about their participation in the process. We have learned indirectly that there are concerns that individuals may have been discouraged from reporting an incident of sexual misconduct under prior policies and administration. We especially encourage those individuals who felt they were discouraged from reporting an incident to the College or from moving forward with an investigation and resolution to contact the Title IX Coordinator to explore current options for support, accommodations, protective measures or resolution of a complaint.

In addition, we encourage Occidental to review all anonymous and informal reports received for the past two years and to ensure that each complainant known to the College receives information about resources, accommodations and current options for reporting and the resolution of a report, both on-campus and off-campus.

#### **B. Policy Evaluation**

We recommend that the College finalize the Interim Policy. In doing so, we recommend that the College consider: 1) clarifying and coordinating reporting responsibilities for campus employees (faculty and staff) to integrate the multiple reporting requirements and systems under the Clery Act (Campus Security Authority), Title IX (responsible employee), mandatory child abuse reporting and California state law (obligations of health care professionals); 2) drafting procedures for resolution of complaints against staff and faculty; 3) incorporating expanded guidance from the pending regulations implementing the 2013 Reauthorization of VAWA, including the requirement that the parties may be accompanied by an advisor of their choice; and 4) supplementing the Interim Policy with additional resource documents, including FAQs, flow charts and a "real talk" version of the policy to reinforce clarity and ongoing delivery of relevant information.

#### **C. Hearing Coordinator**

Although the College has continued to expand staff and dedicate resources to this critical arena, we recommend that the College supplement the personnel and resources available to respond to Title IX reports by hiring a permanent Hearing Coordinator to facilitate the implementation of the Interim Policy.

#### **D. Implementation and Internal Protocols**

We recommend that the College conduct a Title IX assessment in every case. In essence, each report made to the College through a responsible employee or designated reporting option should immediately be shared with the Title IX Coordinator to ensure a prompt and equitable review to guide informed and compassionate resolutions. A centralized response encourages consistent application of the policy to all individuals and allows the College to respond promptly and equitably to eliminate harassment, prevent its recurrence and eliminate its

effects. The centralized review process should involve an interdepartmental team, led by the Title IX Coordinator, which may include Deputy Title IX Coordinators, student affairs/student conduct, human resources, campus safety, health and counseling services and other necessary College personnel.

We recommend that the College continue to take steps to build consistent internal operating protocols for the coordination of information and personnel. Those steps include: identifying a Title IX response team; mapping out roles and responsibilities; outlining the institutional sequence of response; creating first responder protocols for individuals likely to receive a report; enhancing consistent communication and compliant responses through the use of template forms, communications and checklists; and implementing centralized tracking and monitoring.

#### **E. Investigations**

We recommend that the College identify a sustainable investigative model that protects the safety of complainants and promotes accountability for respondents in the context of fair and impartial processes. Regardless of the chosen model(s), we recommend that the College implement consistent investigative protocols that address forensic interview practices, interviews with the parties as well as other witnesses who may provide corroboration (or lack thereof), preservation and collection of any physical evidence (including social media) and a synthesized presentation of the facts for review by the adjudicator.

#### **F. Climate Assessment**

We recommend that the College consider conducting a climate assessment to assess the effectiveness of campus procedures and identify challenges in the current campus climate that affect the educational or employment environment or create barriers to reporting.

#### **G. Education and Prevention**

The College should designate one individual as responsible for coordinating all College training in this area and should consider multi-disciplinary training for students, faculty and staff. Programming for students and employees should incorporate requirements from Title IX, the Clery Act, VAWA and other federal and state law requirements.

### **VIII. Conclusion**

We have been impressed by the legions of passionate and dedicated individuals – students, faculty, administrators and staff alike – who are willing to speak up, speak out and take action against sexual and gender-based violence. Occidental, like colleges and universities across the country, has demonstrated an evolving and increasingly better informed response to sexual and gender-based harassment and violence and has taken steps to tend to student welfare by revamping policies and procedures, changing personnel and structure and not hesitating to be self-critical and open to change.

We live in a community of diverse ideas and beliefs. This means there may be more than one right way to respond to sexual or gender-based harassment and violence.<sup>3</sup> Our hope is that the meaningful participation of campus activists and community members, the steps taken by the College, our recommendations, and the forthcoming conclusions by the DOE provide a platform where the Occidental community can heal and rebuild trust.

At Occidental, we have sought input from all voices. We listened with an earnest intent to hear all insights. We are particularly grateful to the individuals who candidly shared their experiences, observations, recommendations and hopes with us. We encourage a continued dialogue and conversation on these issues and remain available to any Occidental community member, through the anonymous suggestion box<sup>4</sup> and/or direct communication.

In synthesizing these thoughts for the Occidental community, we brought our best efforts, informed by our collective forty-five years of experience with sexual and gender-based harassment and violence, the current state of the evolving law and insights gleaned from our work on campuses across the country. We are grateful to President Veitch, the Board of Trustees and senior leadership for entrusting us with this responsibility and for embracing the College's mission to provide a welcoming and safe environment for all students and employees.

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<sup>3</sup> *2001 Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties - Title IX*, at iii, <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

<sup>4</sup> The anonymous suggestion box is available at [https://oxy.qualtrics.com/SE/?SID=SV\\_8d1V3gEt6szEaix](https://oxy.qualtrics.com/SE/?SID=SV_8d1V3gEt6szEaix).

## I. Introduction

In late March 2013, we were engaged by Occidental College to conduct an external policy audit and assessment regarding the College's response to sexual and gender-based harassment and violence under Title IX of the Education Amendments of 1972.<sup>5</sup> At the time of our engagement, the College was working with its community to address concerns about its response to sexual and gender-based harassment and violence. Students and faculty, through the Oxy Sexual Assault Coalition (OSAC), were openly critical of the College's process. Prior to our arrival on campus, there was open campus dissension following interactions between the President, other members of senior administration and OSAC. Nationally, the efforts of coordinated activism by students began to take root, and the federal government, through the United States Department of Education's Office for Civil Rights (OCR), focused their enforcement efforts on Title IX across the nation. Indeed, campus efforts at Occidental found a national platform, and later that spring, OCR notified the College that it was opening an investigation into complaints of discrimination on the basis of sex.

In April 2013, OSAC informed the Occidental community that it had filed two federal complaints against the College. In its open letter to the community, entitled "Why is OSAC Filing Federal Complaints against Occidental College?," OSAC detailed its reasons for filing two complaints: "one with the Office for Civil Rights establishing a failure to protect women on campus and a second complaint documenting violations of the Clery Act, a law that requires that colleges disclose reports of crime."<sup>6</sup> On May 7, 2013, the College received notification that OCR accepted OSAC's complaint for investigation. Subsequently, on September 10, 2013, the College received notification that the Department of Education's Clery Compliance Division (DOE) accepted OSAC's complaint under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act).<sup>7</sup> The College did not receive the contents of either complaint from the Department of Education. The College has cooperated with both reviews, but more than one year after the onset of those two investigations, neither DOE nor OCR has concluded its review.<sup>8</sup>

We were engaged to conduct an objective and neutral external audit to bring unbiased eyes to campus to understand the dynamics, identify challenges and offer advice, guidance and counsel to assist the College in implementing compassionate, informed and effective practices. To us, that meant, first and foremost, engaging the community to hear directly from students, faculty and staff. It also meant hearing directly from victim/survivors and

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<sup>5</sup> Except for the places where there is natural intersection, our review did not encompass the College's policies, procedures or responses under the Clery Act.

<sup>6</sup> *Why is OSAC Filing Federal Complaints against Occidental College?*, <http://oxysexualassaultcoalition.files.wordpress.com/2013/04/why-is-osac-filing-complaints-against-occidental.pdf>.

<sup>7</sup> 20 U.S.C. § 1092(f).

<sup>8</sup> The College also received civil complaints by current and former students. The civil litigation was resolved in September 2013. We were not engaged to defend the College civilly and played no role in the civil litigation.

OSAC – from those who were the most vocal and passionate in their criticism of the College, so that we could understand whether, and when, the College had failed to live up to its Title IX responsibilities. As part of our assessment, we evaluated all policies, available written documents, response systems and protocols and the details of implementation. This task was not unlike one that we have performed at many campuses across the country – to be open to hearing, understanding and learning from the experiences of community members, to tend to student and employee welfare with compassion and a nuanced understanding of the dynamics of sexual and gender-based harassment and violence, to identify and remedy compliance concerns and to work with the administration and community members to improve and enhance the coordination, implementation and effectiveness of institutional responses.

Prior to our first campus visit in April 2013, we reviewed all available information about student and survivor concerns at Occidental, including information available on the OSAC website. Many of the concerns were not unique to Occidental – indeed, they were the same concerns we have heard resonate across the country: survivors felt discouraged from moving forward or reporting to law enforcement; processes were perceived as unfair to both parties; investigations and proceedings were viewed as untimely or conducted by those without appropriate training or experience; outcomes were changed on appeal; there were fears of retaliation by the College or respondent; perceptions lingered that the hearing process was ineffective; and concerns existed about Clery reporting. Our goal at Occidental was to understand the genesis of these concerns and perceptions in order to identify how the College could be more effective in its policies, procedures and practices.

While the concerns themselves were neither unique nor unexpected, other factors at Occidental were. First, we encountered intense and polarized campus dynamics and great distrust of the administration. This distrust was so significant that for some, the very fact that the College engaged us meant that we could not be viewed as objective. Second, perhaps in direct response to the polarization, some members of the community attacked our efforts and encouraged individuals to decline to participate in our review or in any other effort by the College. At the outset of our engagement, during our first meeting with OSAC, we voiced our interest in meeting with students who could share their perspectives of the process and the College’s responses. OSAC faculty advisors told us that they would not permit us to meet with student survivors. Over the course of the next eighteen months, we continued to seek the engagement of students who were willing to participate. Those efforts to engage community members are outlined in Appendix I.

We recognize and embrace wholeheartedly the concept of individual agency and autonomy – that it is an individual choice whether to participate in a review of this nature. We offer no criticism or rebuke to those individuals who chose not to participate, and we understand the dynamics that make such participation unlikely to occur. However, the decision not to participate in our review left us with an insufficient foundation to make observations and conclusions in response to specific allegations in individual cases – allegations that, but for a full and fair vetting of facts, cannot be resolved based on the mere assertion of one party to the dispute. As stated by an OSAC member who refused our request to meet, “the Department of Education is conducting an impartial investigation that will produce some useful plans for

moving forward.”<sup>9</sup> We too, are hopeful that OCR will bring resolution to the campus community by addressing the specific allegations raised by OSAC. While we remain available to those who wish to be heard, we recognize that we have gathered sufficient information to provide guidance to the College, and this report could no longer wait. We also note that the College maintains a variety of options for individuals to receive support on these matters and encourage any individual to contact the College’s Title IX Coordinator directly to discuss concerns, make a report or seek support and assistance.

In addition to the strained campus dynamics, since 2011, the federal government’s enforcement strategies have become more aggressive and have shifted in tone, focus and application during the course of our engagement. For Occidental, as for colleges and universities across the country, the seismic plates have been shifting below the institutional foundations, leaving many institutions, administrators and students struggling to find stable footing.

Given these dynamics, in many respects, our task was akin to navigating the straits between Scylla and Charybdis with little hope for successful resolution. Undaunted, we embraced our task at Occidental. We began with an intense period of community engagement, dissected policies and procedures and reviewed all cases spanning two academic years (2011-2012 and 2012-2013). As detailed in this report, we met or heard from hundreds of students, staff, faculty, parents and alumni, and reviewed thousands of pages of documents. We led community forums, had individual conversations with and provided training to students, staff and faculty. On April 30, we provided the College with specific recommendations about structure and implementation, most of which were implemented on a timely basis, including establishing a full-time independent Title IX Coordinator and a full-time confidential victim advocate.<sup>10</sup> During the summer of 2013, we worked diligently to incorporate the lessons learned from these efforts and interactions to inform our advice as to both implementation and revision of policies and procedures.

In completing our review, we struggled with how to best capture our observations, how to bring calm to unrest, how to reconcile law and guidance and, most importantly, how to help the College best serve its students and employees. This report provides an overview of the context that impacted the College, including the regulatory framework, the unique dynamics of trauma and sexual and gender-based harassment and violence, factors common across all institutions and those factors unique to Occidental. The College has taken significant strides and embraced its mission to improve its policies, procedures and practices; from our perspective, however, the College can continue to improve campus responses. In this report, we provide a candid assessment and make meaningful recommendations that enhance current policies, procedures and practices. Our hope is that this report helps the community to reconcile the challenges facing Occidental in this very public and national conversation.

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<sup>9</sup> See Appendix I. Recognizing that OCR has received firsthand information from OSAC and other interested community members about their specific and individual complaints, we look forward to OCR’s findings on these complaints so that the College may implement any required actions consistent with our recommendations.

<sup>10</sup> See Section IV. C. for additional discussion about our April 2013 recommendations.

## **A. Scope of Engagement**

As noted above, the College first engaged Pepper Hamilton LLP in March of 2013. In an April 16, 2013 letter to the community, President Veitch outlined our engagement as follows:

*I have asked Ms. Smith and Ms. Gomez to provide an honest assessment of where we are and where we need to go. Their task includes a period of community engagement and education, a review of all relevant policies and procedures, and an evaluation of our current practices for investigating and resolving reports of sexual assault. As part of this assessment, they will review a representative sample of cases from prior years, and will be available to speak to any participants in those cases who wish to do so.*

We have concluded these tasks: the period of community engagement and education; the review of all relevant policies and procedures; the evaluation of the College's practices for investigating and resolving reports of sexual assault; and, to the best of our ability given the available information, the review of cases from prior years. Our review included consideration of both written records and conversations with individuals impacted by and involved with those cases. To be clear, we were not tasked with reinvestigating prior matters or commenting on the validity of the outcomes or sanctions. Rather, we reviewed past cases to understand how policies and procedures were implemented in practice, and to incorporate lessons learned from that review into policies, procedures and implementation moving forward. Indeed, our review of past cases directly informed our approach to the development of the Interim Policy adopted in August 2013, revised procedures, the structure of systems, the necessity and role of personnel (Advocate, Interim Title IX Coordinator, and Hearing Coordinator) and the content of training to support effective implementation of Occidental's Title IX response.

In any review, our goal is to understand the unique challenges faced by students, staff and faculty so that we may assist institutions in developing or enhancing compassionate and compliant institutional responses to sexual and gender-based harassment and violence. As noted above, we interviewed, spoke with, or received feedback from more than 100 individuals. A list of the individuals/groups who provided the foundation for our recommendations is attached to this report as Appendix II.

Since April 2013, the majority of our work at Occidental has focused on supporting effective implementation of Occidental's Title IX response to sexual and gender-based harassment and violence. During the past 18 months, we have provided ongoing advice, including specific recommendations, and the College has implemented many of those recommendations in a timely and responsive manner. After our April 2013 campus visits, we returned to the Occidental campus multiple times, including June, August, September and October 2013. During those visits, we met with a broad cross-section of individuals tasked with

responding to allegations of sexual and gender-based harassment and violence, to provide education and training, enhance our understanding of how policy has been implemented at Occidental and importantly, to provide advice to develop coordinated systems that effectively implement the institutional response. We also met with community members, including faculty, staff, students, parents, trustees and alumni, in open forums and individual meetings (both in person and by telephone or email communication). Those conversations informed the draft of the Interim Policy in August 2013 and our ongoing efforts to assist the College in responding to the immediate needs of community members. In addition, we conducted multiple training sessions for those College employees charged with implementing the response to sexual misconduct, including faculty and staff interested in serving on hearing boards or serving as advisors, to ensure that the College was positioned to effectively respond to ongoing cases. We also spoke with first-year students and parents as part of the 2013 Orientation. Since October 2013, we have continued to remain engaged with the College and have provided advice about the implementation of Title IX responsibilities.

## **B. Our Background and Qualifications**

In the context of higher education, we bring a unique background and skillset that comes from advocating for thousands of complainants/victims/survivors.<sup>11</sup> Together, we have dedicated more than four decades of our professional careers to responding to sexual violence, child abuse and other forms of interpersonal violence, including domestic violence, dating violence, stalking, kidnapping and homicide. As prosecutors, we observed firsthand the need for improved systems, expanded resources, comprehensive training and education and the development of fair and impartial processes for investigation and resolution that incorporate an understanding of the impacts of trauma on a victim. As educators, consultants and advisors, our service to institutions is based on the depth and breadth of our experience. As a direct outgrowth of working with thousands of victims of interpersonal violence in the context of the law, our advice and counsel are informed by our deep understanding of the dynamics of sexual and gender-based harassment and violence and the impacts of trauma on individuals and communities. Our commitment to these issues and to supporting victims of sexual and gender-based harassment and violence within the context of fair and impartial processes is evident in our professional histories, our continued pro bono work, our board service and our multiple community awards from victim services agencies.<sup>12</sup>

Over the past several years, colleges and universities nationwide have engaged in the proactive – and at times, reactive – assessment of policies and implementation practices related to issues of sexual and gender-based harassment and violence. Educational institutions have sought to evaluate their compliance with complicated and ever-evolving law and guidance,

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<sup>11</sup> We recognize that language is both individual and value-laden. While we intentionally use the term complainant in our teaching and writing, we recognize that many individuals choose to use the terms victim or survivor.

<sup>12</sup> Our professional biographies are available online:  
Gina Maisto Smith: [http://www.pepperlaw.com/LegalStaff\\_Preview.aspx?LegalStaffKey=1024](http://www.pepperlaw.com/LegalStaff_Preview.aspx?LegalStaffKey=1024) and  
Leslie M. Gomez: [http://www.pepperlaw.com/LegalStaff\\_Preview.aspx?LegalStaffKey=1025](http://www.pepperlaw.com/LegalStaff_Preview.aspx?LegalStaffKey=1025).

and to improve the effectiveness of institutional responses. We have had the opportunity to work with over one hundred private and public institutions across the country in shaping policy, structuring systems, supporting effective implementation and delivering training and education programs. We have also had the opportunity to work directly with the DOE, OCR and the White House Task Force, and to present educational and training programs through the Clery Center and other professional organizations dedicated to improving campus responses to sexual and gender-based harassment and violence. We are committed to changing the conversation with respect to campus responses by building the framework to develop compassionate, trauma-informed and compliant practices that tend to the individual needs of students and employees. Indeed, we start our work at each institution by “flipping the lens” and viewing policies, procedures and practices from the student perspective. The lessons learned from student perspectives at campuses across the country inform our observations and recommendations.

## **II. The Context**

In framing this report, it is important to provide an overview of the broader context of sexual and gender-based harassment and violence on college campuses. The issues are complex for any single institution to navigate, but in our work across the country, we have identified many shared themes, dynamics and challenges. This section provides an informed discussion of the complexities of the issue, which we view as a critical part of educating the community in order to understand our observations and recommendations and to help pave a path forward for the Occidental community.

As outlined later in this report, a coordinated response to sexual and gender-based harassment and violence requires integration of the following concepts:

- The complex regulatory framework, including Title IX, the Clery Act, the recently enacted amendments to Section 304 of the Violence Against Women Reauthorization Act of 2013 and other federal, state and local authority;<sup>13</sup>
- A nuanced understanding of the dynamics of sexual and gender-based harassment and violence and the impacts of trauma on individuals and communities; and,
- An appreciation of the unique culture, climate, policies and procedures, personnel, resources and underlying values of an institution.

Successful implementation must integrate these concepts to develop a coordinated and holistic response that is compassionate, legally compliant, principled and balanced in its attention to the welfare and safety of students, faculty, staff and community members.

### **A. The Regulatory Framework: Title IX: Law vs. Guidance**

Title IX provides: “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>14</sup> Title IX is accompanied by implementing regulations, 34 C.F.R. § 106, which have the force and effect of law. The implementing regulations require that a school publish a non-discrimination

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<sup>13</sup> Appendix III contains an overview of the relevant regulatory framework, including Title IX, the Clery Act and VAWA.

<sup>14</sup> 20 U.S.C. § 1681(a).

statement;<sup>15</sup> appoint a Title IX Coordinator;<sup>16</sup> and adopt grievance procedures that are prompt and equitable.<sup>17</sup>

In addition to the implementing regulations, OCR has issued additional written guidance. Some of those documents have been designated as “significant guidance documents.” These documents provide policy guidance to assist schools in meeting their Title IX obligations. The most notable early guidance is the 2001 Revised Sexual Harassment Guidance (“2001 Guidance”).<sup>18</sup> In more recent years, the April 4, 2011 Dear Colleague Letter (“2011 DCL”) and the April 29, 2014 Questions and Answers on Title IX and Sexual Violence (“Title IX Q&A”) have been designated as significant guidance documents.<sup>19</sup> These guidance documents are not law; nor are they intended to add requirements to applicable law. However, they purport to provide information and examples to inform educational institutions about how OCR evaluates compliance with legal obligations under Title IX.<sup>20</sup> The Bulletin on “Agency Good Guidance Practices” (GGP) sets forth general policies and procedures for developing, issuing and using guidance documents, which include the provision that significant guidance documents do not create legally binding requirements.<sup>21</sup>

This distinction is critical to understanding the current national dialogue about compliance. Many of the concepts in the significant guidance documents address implementation and practical matters. They provide general expectations about an institution’s response in the form of “shoulds,” but they do not provide specific standards of care or, for that matter, a yardstick by which an institution may measure its efforts. The expansion of these significant guidance documents has resulted in a complex labyrinth of quasi-compliance

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<sup>15</sup> 34 C.F.R. § 106.9.

<sup>16</sup> 34 C.F.R. § 106.8(a).

<sup>17</sup> 34 C.F.R. § 106.8(b).

<sup>18</sup> The 2001 Guidance replaced the *1997 Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*. 62 Fed. Reg. 12,034 (Mar. 13, 1997). The 1997 guidance was “the product of extensive consultation with interested parties, including students, teachers, school administrators, and researchers” and the document was made available for public comment. 2001 Guidance. The 2001 Guidance was also published in the Federal Register, at 62 Fed. Reg. 66,092 (Nov. 2, 2000), and was available for public comment. The 2001 Guidance is available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

<sup>19</sup> Links to these and other guidance documents from OCR are available in Appendix IV: Links to Federal Law, Regulations and Guidance re: Sexual and Gender-Based Harassment and Violence, Dating Violence, Domestic Violence and Stalking.

<sup>20</sup> See 2011 DCL at n. 1.

<sup>21</sup> Good Guidance Practices (GGP) are maintained to ensure that guidance documents of Executive Branch departments and agencies are: developed with appropriate review and public participation, accessible and transparent to the public, of high quality and not improperly treated as legally binding requirements. Moreover, GGP clarify what does and does not constitute a guidance document to provide greater clarity to the public. All offices in an agency are expected to follow these policies and procedures. 72 Fed. Reg. 16 (Jan. 25, 2007).

requirements. While GGP notes that “guidance documents used properly can channel the discretion of agency employees, increase efficiency, and enhance fairness by providing the public clear notice of the line between permissible and impermissible conduct while ensuring equal treatment of similarly situated parties,” GGP further observes that “experience has shown, that guidance documents also may be poorly designed or improperly implemented” and “may not receive the benefit of careful consideration accorded under the procedures for regulatory development and review”.<sup>22</sup> In the context of an unrelated regulatory agency, one federal court noted:

The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.<sup>23</sup>

In the Title IX context, the significant guidance documents call for institutions to conduct an adequate, reliable, and impartial investigation of complaints;<sup>24</sup> to designate reasonably prompt timeframes for the major stages of the complaint process;<sup>25</sup> to provide bilateral and equitable access to the policies and procedures (e.g., both the complainant and the respondent should be given periodic status updates, receive notification of the outcome and be informed of the right to appeal);<sup>26</sup> and to apply a preponderance of the evidence standard.<sup>27</sup> Under the guidance documents, once an educational institution has notice of a sexual harassment or violence allegation, it must promptly take steps to protect the complainant and the campus community as necessary, including taking interim steps while the investigation is pending.<sup>28</sup> Examples of interim remedies may include no-contact orders, adjustments to academic schedules

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<sup>22</sup> 72 Fed. Reg. 16 (Jan. 25, 2007).

<sup>23</sup> *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000).

<sup>24</sup> 34 C.F.R. § 106.8(b); *see also* 2011 DCL at 9-12.

<sup>25</sup> 2011 DCL at 12-13.

<sup>26</sup> *Id.* at 12-13.

<sup>27</sup> *Id.* at 9-11.

<sup>28</sup> *Id.* at 15.

or living arrangements as appropriate, academic support, providing counseling or emotional support and allowing for other equitable solutions or responses for both parties.<sup>29</sup>

The guidance also instructs institutions to provide education and prevention programs;<sup>30</sup> to provide general training for all campus community members as to the school's policies and procedures; and to provide specific training for implementers and adjudicators relating to the school's grievance procedures and its proper response to complaints of sexual harassment and sexual violence.<sup>31</sup>

## **B. Federal Enforcement**

Under Title IX, any individual can file a complaint with OCR alleging a violation of Title IX. The OCR Case Processing Manual (CPM) outlines OCR's procedures with respect to the acceptance, evaluation and resolution of a complaint.<sup>32</sup> Upon receipt of a written complaint, OCR evaluates a complaint to determine whether OCR has sufficient information to proceed to investigation; this includes a determination whether OCR has subject matter and personal jurisdiction and whether the complaint was timely filed.<sup>33</sup> If OCR accepts a complaint for investigation, it provides notice to the educational institution of the complaint's allegations (broadly), but OCR does not provide the institution with the specific details of the complaint or, in many instances, the names of the individuals involved. The complaint itself is not shared with the educational institution.

In the 2001 Revised Sexual Harassment Guidance, OCR emphasized the importance of discretion and judgment:

One of the fundamental aims of both the 1997 guidance and the revised guidance has been to emphasize that, in addressing allegations of sexual harassment, the good judgment and common sense of teachers and school administrators are important elements of a response that meets the requirements of Title IX.

A critical issue under Title IX is whether the school recognized that sexual harassment has occurred and took prompt and effective action calculated to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects. If harassment has occurred, doing nothing is always the wrong response. However, depending on the circumstances, there may be more than one right way to respond. The important thing is for school employees or officials to pay attention to the school environment and not to hesitate to

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<sup>29</sup> *Id.* at 15-17.

<sup>30</sup> *Id.* at 14-15.

<sup>31</sup> *Id.* at 4, 7-8, 12; Title IX Q&A at 38-42.

<sup>32</sup> The CPM can be found at <http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.html>.

<sup>33</sup> *OCR Case Processing Manual*, Article I.

respond to sexual harassment in the same reasonable, commonsense manner as they would to other types of serious misconduct.<sup>34</sup>

Under this lens, enforcement efforts since 2001 have been guided by the following principle: “OCR always provides the school with actual notice and the opportunity to take appropriate corrective action before issuing a finding of violation.”<sup>35</sup> Moreover, the effectiveness of an institution’s response is based on a reasonableness standard.<sup>36</sup>

Following the April 4, 2011 Dear Colleague Letter, however, the enforcement scheme at OCR has evolved. The 2011 DCL styled itself as a call to action, calling upon institutions to review their policies and implement changes as needed. It also served as a catalyst for a significant increase in Title IX complaints. Representatives from OCR have publicly acknowledged a significant increase in sexual harassment and sexual violence complaints in the post-secondary context; indeed from 2012 to 2013, OCR noted an 88% increase in complaints of sexual violence in the post-secondary context. Equally as important, OCR has acknowledged a political priority in responding to sexual violence complaints, noting that any sexual violence complaint received, even if not timely filed, will trigger a compliance review under Article V of the CPM. And, as of April 2014, OCR shifted its long-term practice regarding confirmation of open investigations and now publicizes a weekly list of all active investigations.

The current compliance environment is interpretative at best – the lens being used by OCR goes far beyond the “musts” of the law and implementing regulations and strays into the “shoulds” of the guidance documents. This has the effect of creating heightened expectations by students and communities across the country about what is legally required for Title IX compliance. For example, many institutions comply with the requirements of the implementing regulations: they promulgate a notice of non-discrimination, designate a Title IX coordinator and have prompt and equitable grievance procedures. While the first two requirements are fairly self-evident, what constitutes prompt and equitable has become fodder for significant variations in interpretation across the country.

As an example, Occidental College had, and continues to have, a Title IX Coordinator who exercises oversight of all reports, investigations and resolutions of sexual and gender-based harassment and violence. Occidental also had, and continues to have, a notice of non-discrimination. And, as outlined in Section IV of this report, Occidental had, and continues to have, grievance procedures for the investigation and resolution of Title IX complaints. The policies and procedures, which have been updated regularly in accordance with the evolving guidance, seek to provide prompt and equitable process. Each of these concepts – prompt and equitable –has been a moving target as OCR has focused on the implementation of the grievance

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<sup>34</sup> 2001 Guidance at ii-iii.

<sup>35</sup> *Id.* at iv.

<sup>36</sup> *Id.* at vi.

procedures. Most recently, we have observed a schism between the enforcement philosophy of regional offices and the national office.<sup>37</sup>

Because of the interpretive elements of the current compliance environment, any experienced outside consultant – or OCR – could review any institution’s policies, procedures and practices and find that the institution, for one reason or another, was not in compliance with Title IX. We need look no further than recent resolution agreements that have found current non-compliance based on discrete provisions of policies and procedures. At one institution, OCR noted that “changes are necessary to ensure the safety of” students based on the following:

- policies and procedures do not make clear that interim measures (including academic adjustments and housing changes as necessary) are not only available but will be provided;
- policies and procedures state that the Title IX Coordinator will make a determination of whether the University has jurisdiction over allegations of conduct that occurred off campus, rather than state that the policy covers all allegations of off-campus sexual harassment/violence that have effects in the University’s educational setting;
- policies and procedures have inappropriate restrictions on the ability of the parties to discuss the investigation and proceedings with others (including friends) who may provide them with support and/or assistance during the process;
- policies and procedures do not state that the processing of any related matters (such as other issues arising under the student code of conduct) will not delay the prompt resolution of a complaint.<sup>38</sup>

It is difficult to understand how these elements, each of which could fairly be characterized as nuances in language, phrasing and interpretation impact overall compliance, or for that matter, student safety in the context of a school’s good faith and comprehensive efforts to embrace its Title IX goal to eliminate, prevent and address the effects of sexual and gender-based harassment and violence. When viewed through this lens, the compliance rubric seems like an overly technical application of guidance – guidance that by its very nature does not have the force of law.

We support OCR’s goals to enforce civil rights, eliminate prohibited conduct, prevent its recurrence and address its effects. We further concur with the efforts to develop trauma-informed practices and thorough, reliable and fair investigations and adjudications. We

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<sup>37</sup> OCR has 12 regional offices across the country and a national office in Washington D.C.

<sup>38</sup> See Press Release, *U.S. Department of Education Finds Tufts University in Massachusetts in Violation of Title IX for Its Handling of Sexual Assault and Harassment Complaints* (Apr. 28, 2014), <http://www.ed.gov/news/press-releases/us-department-education-finds-tufts-university-massachusetts-violation-title-ix->.

are concerned, however, that the current compliance rubric does not provide clear standards of care or benchmarks with which to measure compliance. Moreover, given the complexities of word-against-word credibility cases, we recognize the subjective interpretation and perspective that individual complainants and respondents bring to this dialogue. A school's implementation is subject to criticism not only based on the perceptions of a complainant or other individuals but also based on the subjective and individual interpretation by OCR in both the national and regional offices.

### **C. The Evolving Regulatory Framework**

Since the College engaged us, the regulatory framework has continued to evolve. Following the March 2013 enactment of Section 304 of the Violence Against Women Reauthorization Act of 2013, the DOE engaged in negotiated rulemaking through the spring of 2014. The DOE finalized the rules in October of 2014 and have set an implementation date of July 2015. In January of 2014, President Barack Obama convened the White House Task Force to Protect Students from Sexual Assault, and on April 29, 2014 the White House Task Force released *Not Alone: The First Report of the White House Task Force to Protect Students From Sexual Assault*.<sup>39</sup> While this document is advisory in nature and has no binding legal authority, it nonetheless sets forth the federal government's expectations regarding campus responses. In addition, OCR has continued to release significant guidance documents, most notably the April 29, 2014 Questions and Answers on Title IX and Sexual Violence.

In addition to these federal initiatives, the California legislature has just passed legislation that impacts the institutional response to sexual misconduct on college campuses.<sup>40</sup> California Senate Bill 967 requires that schools that receive state funds for student financial aid adopt sexual assault policies that contain certain elements, including an affirmative consent standard for determining whether consent was given by the complainant and a preponderance standard for determining whether the elements of the complaint have been proven. The bill also eliminates defenses based on the accused's or complainant's intoxication or incapacity or failure by the accused to take reasonable steps under the circumstances to determine whether the complainant affirmatively consented. Also required are policies and protocols comporting with best practices and professional standards regarding investigation, notice, witness protection, institutional supervision, training, and confidential reporting. Finally, SB-967 requires that institutions enter into partnerships with existing on-campus and community organizations and provide comprehensive prevention and outreach programs to educate students on the affirmative consent standard and institutional policies on sexual assault, domestic violence, dating violence, and stalking. The bill passed the legislature on August 28, 2014, was enrolled on September 2, 2014, and was signed by the governor on September 28, 2014.

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<sup>39</sup> *Not Alone* is available at <https://www.notalone.gov/assets/report.pdf>.

<sup>40</sup> SB-967 (2014), *An act to add Section 67386 to the Education Code, relating to student safety*, [https://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB967#](https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB967#).

As the laws and guidance continue to evolve, Occidental, like all colleges and universities, must continue to adapt and incorporate the new federal and state law, regulations and guidance.

#### **D. The Dynamics of Sexual and Gender-Based Violence**

It is important to frame this discussion with an understanding of how the dynamics of sexual and gender-based harassment and violence inform campus responses. Most incidents of harassment or violence occur between individuals known to one another, often behind closed doors and typically without witnesses or physical evidence. The nature of the relationship between a complainant and respondent can impact whether and when an incident is reported. There is significant underreporting, both on college campuses and in society at large, and there is often a delay in reporting, which can result in the loss of whatever physical or forensic evidence may have been available at the time of the incident. Investigating and evaluating an incident, therefore, requires an assessment of the credibility of the complainant and respondent – in other words, a word-against-word credibility assessment.

Our experience as sex crimes prosecutors who have evaluated thousands of word-against-word credibility cases reveals that an effective investigation demands scrupulous rigor in fact gathering by individuals with appropriate training or experience, a toolkit designed to access relevant and material information and precise documentation to support reliable decisions. The investigation and evaluation of credibility also requires special expertise to evaluate the impact of trauma, counter-intuitive behaviors, the unique response by each and every complainant, the impact of alcohol or other drugs, and the use of predatory, pattern and grooming behaviors by a respondent.

The very nature of a credibility determination uniformly subjects the results to question by the non-prevailing party. Indeed, in 100% of credibility cases, at least 50% of the constituencies involved will be dissatisfied with the result. That outcome dissatisfaction is not only directed at the individual who caused the harm but also at the investigative or adjudicative process or implementers who evaluated the conduct. The outcome is often challenged through an appeal, an OCR complaint or a civil lawsuit filed by a complainant, a respondent or, in some cases, both parties.

#### **E. The College Context**

In both the educational and law enforcement setting, there is a wide range of skill, competence, experience and training of investigators and adjudicators. The criminal justice system and the courts have long grappled with the dynamics of sexual, domestic and dating violence and there is an evolving body of law designed to address what we know about the nature of sexual assault cases. Over the past four decades, societal understanding has evolved aided by the efforts of experts in the field of sexual and gender-based violence. Consequently the law too eventually evolved to include what we have learned from those with training and experience. The resulting statutes and case law address concepts regarding: sufficiency of the evidence (the word alone of a complainant in a sexual assault case is sufficient to convict); rape

shield laws regarding the prohibitions against and the limitations on the use of a complainant's sexual history; appropriate consideration of evidence of pattern, plan or intent based on other relevant misconduct by a respondent; the importance of evidence related to a victim's initial disclosure of abuse; and more general principles of notice and an opportunity to question or challenge information. As a consequence of this framework, there are expectations created from knowledge of the subject matter as it is treated in the criminal justice process, that permeate college processes. While OCR outlines key differences between a criminal investigation and a Title IX investigation, the underlying behaviors alleged and the nature of the harm caused by a sexual assault is the same whether it be viewed through a civil rights or criminal rubric. Although the same procedural protections and legal standards necessary in the criminal justice context may not be applicable in the educational context, the same rigor of fact-gathering and analysis of the conduct using thorough, impartial, fair and reliable process must be maintained in both contexts.

Despite this foundational principle, there are significant differences between Title IX investigations and responses in the college setting and law enforcement investigations and responses under state or federal law. First and foremost, under federal law, educational institutions are required to take action in response to *all* reports of sexual or gender-based harassment or violence. In contrast, law enforcement officials can decline to investigate or charge in any matter. As OCR most recently noted,

[W]hile a criminal investigation is initiated at the discretion of law enforcement authorities, a Title IX investigation is not discretionary; a school has a duty under Title IX to resolve complaints promptly and equitably and to provide a safe and nondiscriminatory environment for all students, free from sexual harassment and sexual violence. Because the standards for pursuing and completing criminal investigations are different from those used for Title IX investigations, the termination of a criminal investigation without an arrest or conviction does not affect the school's Title IX obligations.<sup>41</sup>

We have learned from our travels across the nation that while there are some jurisdictions that will investigate a word-against-word credibility case, there are many other jurisdictions that will not investigate or prosecute these matters. This has left complainants with only one viable option to redress alleged harm – campus processes.

Second, when law enforcement officials, prosecutors and courts decline to charge or find that a sexual assault occurred, they have immunity for the exercise of judgment in the reasonable execution of these responsibilities. Educational institutions do not have the discretion to pass; nor is there the protection equivalent to immunity in the reasonable execution of Title IX responsibilities. As noted above, where there is dissatisfaction with the process or the outcome, campuses are often faced with an OCR complaint or a civil lawsuit by the parties. By contrast,

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<sup>41</sup> Title IX Q&A, F-2, at 27.

in the law enforcement context, there is no similar mechanism to test the exercise of discretion to investigate or prosecute based on the investigator or prosecutor's lack of quality, training, education or experience. Similarly, it is impossible by law to challenge judicial decisions of not guilty based upon the quality, training, education or experience of a jurist. Put simply, law enforcement officials, prosecutors and courts may pass on charging a sexual assault and they have immunity for the exercise of judgment in the reasonable execution of these responsibilities. Educational institutions do not have the discretion to pass nor is there the protection equivalent to immunity in the reasonable execution of Title IX responsibilities.

Third, as noted, campuses are investigating conduct that may, at its heart, violate criminal statutes. Because of this, we are often asked, why don't colleges call the police when there is an assault on campus? When colleges conduct campus investigations and there is no parallel law enforcement investigation, a common misconception is that colleges are intentionally choosing not to report incidents to law enforcement. Under federal law, however, it is an adult complainant's decision to notify *or decline to notify* law enforcement of the incident.<sup>42</sup> Further, OCR has noted: "Title IX does not require a school to report alleged incidents of sexual violence to law enforcement, but a school may have reporting obligations under state, local, or other federal laws."<sup>43</sup> Thus, colleges who respect an individual complainant's autonomy and decision to *not* share a report with local law enforcement are operating within the parameters of federal law and in a manner that is trauma-informed and cognizant of the dynamics of sexual and gender-based harassment and violence. This is a nuance that is generally not captured in the analysis of college processes by the media and others.

Fourth, in order to be fair and equitable, sexual and gender-based violence investigations require a thorough exploration of the facts, consideration of medical and forensic information and the ability to access relevant evidence and compel cooperation of witnesses. Most educational institutions do not have access to the same toolkit as law enforcement professionals: a toolkit that involves subpoena power, access to forensic labs and expertise, a dedicated commitment of resources and personnel, investigating grand juries, and other significant assets. Colleges often find themselves investigating sexual assaults without the requisite tools and evaluating allegations with only partial information.

Fifth, the dynamics of campus responses are complicated by the institutional structure and framework. In the criminal justice system, separate and distinct entities are tasked with each step of the process: the police department for emergency response and investigation; the prosecutor's office for additional investigation, charging authority and prosecution; a defense attorney for legal representation and advocacy for a defendant; a judge or jury for adjudication and sanctioning; a probation, parole or corrections department for enforcing and monitoring sanctions; an independent court for evaluating appeals; a victim advocate for confidential assistance for victims; community agencies for crisis response, support and advocacy, and many

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<sup>42</sup> Section 304 of the VAWA (Pub. Law 113-4).

<sup>43</sup> Title IX Q&A, F-2, at 27.

more specialists in the process. In contrast, in the educational setting, the institution is required to be all things to all people – to foster a climate that prevents incidents and fosters reporting; to provide support and advocacy for a complainant *and* a respondent; to provide an impartial, reliable and thorough investigation; to provide prompt and equitable grievance procedures; and to provide impartial adjudication and appeal. Many institutions lack the resources and dedicated personnel to effectively separate and fulfill each of these roles. Consequently, the requirements of Title IX create baked-in irreconcilable perceptions of conflict in the context of word-against-word credibility cases.

Lastly, educational institutions are often tainted with a perception of institutional bias, meaning that if and when they do err, they are presumed to have done so to protect the institution. Rather than attribute the failure to a lack of training, lack of subject matter expertise or lack of competency, the negative inference is that the institution acted out of institutional self-interest. There is little effort today to recognize the good intentions of individual administrators or to work collaboratively to educate and transform current practices. To be clear, there are certainly examples across the country of bad actors, but in our experience, not every institutional or administrative failure should be viewed through this lens. The concept of institutional betrayal, however, is one that has been broadly applied in the current national debate.

What we are observing at Occidental and across the country is that the DOE enforcement efforts are requiring colleges and universities to engage in investigating sexual violence at a level that is not currently exercised or required by law enforcement. Moreover, the DOE is requiring colleges to provide thorough impartial and equitable evaluations of facts without the necessary tool kit that would enable colleges to access important and material information in assessing word-against-word credibility cases – like text messages, Facebook posts, physical evidence, surveillance capacity and the cooperation of uncooperative witnesses. The campus process is limited by time, resources, and the power to gather important information given that their investigations are limited by the voluntary participation of the witnesses. These limitations expose college and university processes in *every* case to the accusation of unreliable findings.

While the DOE's goal is noble, and we agree wholeheartedly with the requirements of education, training and thoroughness of investigations, the national conversation and DOE enforcement efforts fail to take into account the tremendous complexity of the issues and the context, level of resources and toolkit needed, privacy considerations and other impediments to requiring educational institutions to subsume a criminal justice function. Colleges and universities are designed to educate– it is what they do well. Their most effective responses lie in prevention, education and the shifting of campus climate and culture. The more we force colleges and universities to act like prosecutors and courts, the less we enable them to carry out their underlying academic mission, particularly given the inevitable erosion of trust and faith in an institution when they assume a role outside of their core competencies and mission to

decide word against word credibility cases of sexual and gender-based harassment and violence.<sup>44</sup>

## **F. The Paradigm Shift**

Attention to these issues, at Occidental College and elsewhere, is part of a national paradigm shift in the scope of institutional responsibility: 1) to prevent sexual and gender-based harassment and violence, and 2) to respond effectively when sexual and gender-based harassment and violence occur within the campus community. The causes of this shift are many and include the April 4, 2011 Dear Colleague Letter, targeted enforcement efforts by OCR, high profile regulatory and civil actions against institutions, and the unprecedented and coordinated activism of student survivors and their allies. Having spent most of our professional careers prosecuting sexual violence, domestic violence and child abuse, we understand firsthand the personal fortitude and tremendous courage complainants have demonstrated in coming forward to publicly share their experiences through first-person accounts, and we applaud their efforts to seek change. Their contributions to this conversation are invaluable and have helped reframe the dialogue, changing the focus from mere compliance to a coordinated conversation that integrates compliance with compassion, continuity of care and prevention. Their lens highlights the significant individual and community impacts of sexual and gender-based harassment and violence and the need for informed and sensitive institutional responses.

The positive aspects of this activism are significant and have helped to dramatically increase national awareness about a critical topic. One perhaps unintended effect, however, is that the nationally coordinated activism appears, in some instances, to have elevated the movement and the cause over individual responses or solutions. The concern is that relationships and communications between activists and administrators become adversarial, rather than collaborative, and we remain mired in disputes, rather than seeking effective resolution. This tension is palpable at many institutions across the country. As an example, consider the intentional and coordinated media campaign, described by one activist in the national movement as, “Everything we did was very intentional with an eye to the press.”<sup>45</sup> The activist described a careful approach to the media campaign, noting, “We want to control the entire narrative.”<sup>46</sup> As described recently by a reporter in Harper’s blog:

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<sup>44</sup> In reconciling the inherent challenges in investigating sexual and gender-based harassment and violence, dating violence, domestic violence and stalking in the educational setting, we have long advocated for a shift in the structure of campus responses that incorporates a regional advocacy, investigation and adjudication center, similar to the multi-disciplinary approach used in child advocacy centers. These regional centers could provide access to dedicated advocacy, forensic examination services, trauma-informed interviews by external, trained and experienced investigators. A complainant could choose to share the interview with law enforcement agencies and/or educational institutions. The regional centers could also provide an independent, neutral and experienced adjudicator.

<sup>45</sup> Jay Caspian Kang, *Ending College Sexual Assault*, HARPERS (Sept. 9, 2014), available at <http://harpers.org/blog/2014/09/ending-college-sexual-assault/>.

<sup>46</sup> *Id.*

That narrative follows a simple, yet compelling structure: A student is sexually assaulted. When she gathers up the courage to report the crime to her administration, she is met with indifference or outright resistance. A shockingly callous quote from law enforcement or a campus administrator is almost always included.<sup>47</sup>

Indeed, the author credits the activists for successfully “mount[ing] a stunning media campaign – outing accused sexual assailants before any investigation had taken place, and casting universities and their administrators as callous, craven enablers of campus rape cultures – that eventually led to the creation of the White House Task Force.”<sup>48</sup>

The resulting media hailstorm, while spotlighting the issue, has further exacerbated the tensions on college campuses. In some instances, colleges have been supportive, and at times, protective, of administrators and of the institution. When speaking publicly on these issues, their responses have had the perhaps unintended consequence of alienating activists. And so the cycle begins with administrators and activists taking sides, rather than identifying the shared goals *all* of us espouse: to eliminate sexual and gender-based harassment and violence, prevent its recurrence and address its effects.

We note that the media coverage in this arena, while a critical part of raising consciousness and confronting challenging contexts, has sometimes missed the mark. While there are many talented journalists shining the spotlight on these issues, not all take the time to become fully informed about the complex dynamics, the conflicting laws and the challenges in implementation. Moreover, the media attention is not always unbiased. Many outlets have taken a strong and, at times, uninformed position, to the detriment of many - complainants, respondents and administrators. One reporter in this arena has admitted to “certain leanings in his reporting,” noting that “I approach this knowing that very few women file false rape reports and that none really have anything to gain from talking to me.”<sup>49</sup> The author of the Harper’s article presents a different perspective, observing that the reporter’s style is “to go straight for what he calls the ‘WTF moment’ in which a school’s alleged response to a survivor’s report goes far beyond the pale.”<sup>50</sup> In many instances, the school is constrained by the Family Educational Rights and Privacy Act (FERPA),<sup>51</sup> and is therefore unable to comment or correct the factual record, even where there are factual inaccuracies. The author concludes, “The veracity of these ‘WTF

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

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

<sup>50</sup> *Id.*

<sup>51</sup> 20 U.S.C. § 1232g; 34 C.F.R. Part 99.

moments' is hard to confirm, but they make for good headlines, attract hundreds of comments, and have sparked a he-said/she-said battle between universities and survivors."<sup>52</sup>

The media coverage at Occidental has been no exception. Although the Occidental community has absorbed the impact of pervasive media coverage, our hope is that this report, campus community efforts and the OCR findings will assist the College in re-engaging in a spirited yet informed and respectful process of reconciliation and resolution.

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<sup>52</sup> Jay Caspian Kang, *Ending College Sexual Assault*, HARPERS (Sept. 9, 2014), available at <http://harpers.org/blog/2014/09/ending-college-sexual-assault/>.

### **III. The Context at Occidental**

Recognizing the impact of the national debate surrounding the appropriate response to sexual and gender-based harassment and violence in higher education, this section provides an overview of the context at Occidental as we observed it in the spring of 2013 and during the 2013-2014 academic year. At Occidental, students and faculty demanded reform. Their passion and commitment to these issues is evident. Given our professional background, we welcome efforts to seek change across the nation on behalf of victim/survivors. We recognize the cultural and climate issues that impact society's response to sexual and gender-based harassment and violence, and we know that there is much work to be done, not only on college campuses, but also in law enforcement and the criminal justice context. As a nation, we are plainly not yet where we need to be. In many respects, the failures of the criminal justice system have been pushed down onto college campuses, and colleges are tasked with investigating, evaluating and adjudicating crimes that law enforcement declines to prosecute.

We also recognize, however, the strong commitment by institutions across the nation, including at Occidental, to be self-reflective and responsive, to seek community engagement and feedback and to reframe and enhance institutional responses. At Occidental, we have observed a strong commitment by the College, President Veitch, the Board of Trustees, senior leadership, the Title IX and Clery response teams, the Sexual Misconduct Advisory Board and the many dedicated students, staff and faculty who have taken earnest and significant steps to implement meaningful changes. We recognize that, as outsiders to the College, we are newcomers to the conversation and to the Occidental community. As such, we appreciate the fact that our lens is not colored by the perception of institutional betrayal or past failures.

We tried to understand that perception, however, as our goal in any review is to consider all perspectives within a campus community – those of students, faculty, staff and, in particular, those who have intersected with the College's processes. Over the course of this engagement, two themes have emerged above all: 1) the commitment and dedication by all to "getting it right"; and 2) the stark polarization of the community that has resulted based on disagreement as to how to do that. In our view, this polarization has impeded effective collaboration and damaged the trust among individuals on all sides of this issue. This polarization has in some cases effectively silenced many members of the community, and it is counterproductive to embracing and working through the tension and challenges of this timely and necessary conversation. We note that Occidental did not get to this divisive place overnight; nor does Occidental exist in a vacuum.

We heard, loudly and clearly, the voices of many students, staff and faculty who expressed a desire to participate in the conversation about sexual and gender-based harassment and violence at Occidental. While some were content to leave the conversation in the hands of those leading the conversation, whether activists or administrators, others have expressed the desire to actively participate in the conversation, but have hesitated to do so out of fear and apprehension. Some expressed fear of retaliation by the administration. Others, including faculty, staff and students, expressed fear of being ostracized or publicly attacked by the activist community. Concerns expressed to us by students, staff and faculty include:

- “Students are generally very active and not scared to share their experiences, but now students and administrators feel cornered.”
- “The campus dynamic is detrimental to the conversation.”
- “The environment causes students to feel triggered and stressed.”
- “One student described the fear that his opinion would not match that of the popular narrative, so he has stopped speaking.”
- “Both sides pointing fingers has created an environment where students who would like to be part of the debate are not able to if they have any difference in thinking.”
- “The strong advocates who are involved will continue to handle this in a way that does not allow the conversation or the process of handling this difficult issue to grow or move forward. This involves several discussions and individuals and they all need to be considered.”
- “Staff and faculty are afraid to speak freely for fear of being ostracized or pilloried.”
- “Recognition that administrators do not have ill intentions, but that attacks on them have become so personal that the dialogue can get caught up in defensiveness rather than turning to the process and framework.”
- “The administration doesn’t take this seriously; they are doing whatever they can to silence the voices of survivors.”
- “Pride in students standing up even though the College publicly shamed a survivor.”
- “Discussion about this issue is more focused on attacking rather than solving the problem and has created privacy problems for involved parties.”
- “Fear that the campus climate has become so poisonous and distrustful about this issue that we will not be able to work together to rebuild.”
- “Lack of trust between different members of the community.”
- “Worry that the communications gap between constituents on the campus is going to be much more difficult to bridge than people think – we are a very divided community with some significant wounds”
- “There are two camps, you are either in the OSAC (Oxy Sexual Assault Coalition) camp or not.”
- “Polarization of points of view, most of it driven by personality conflicts.”

- “There is a culture of fear on the campus – fear to express a view that is contrary to OSAC. This fear exists in faculty, in administrators and in students and has changed the course of education at Oxy.”

We include this representative sampling of concerns and observation to shine a light on how Occidental’s campus dynamics have eclipsed the potential for candid dialogue and meaningful change, and in some aspects, have created a challenging environment for students who are unable to navigate the conflict. We also heard concerns that some members of the Occidental student body, including African-American women and members of the LGBTQ community, have been marginalized and excluded from this conversation. We find these dynamics unfortunate in that they serve no one, least of all the students whose safety and welfare is a priority for us all.

On March 26, 2014, members of the faculty issued a “Letter of Faculty Concern” to their fellow faculty members. This letter echoes many of the same observations and concerns shared with us through the anonymous suggestion box and in direct conversations over the course of the past 18 months. In particular, the letter describes “a sense that our faculty participation in College issues is becoming increasingly unproductive.” Further, while recognizing that “several of the issues currently on our minds might only have emerged through direct and forceful confrontation,” the letter notes that “the animosity and polarization that now characterize our participation have put the College in a dangerous position.” The letter further states that “[it] seems to us that we now find ourselves in an unsustainable, adversarial deadlock, and that our failure to let go of hostility and work our way toward constructive solutions becomes more damaging every day.” While recognizing “the serious and important work on the part of faculty to improve our institution,” the letter concludes with the hope that “all of us return to constructive, cooperative forms of engagement that cultivate a deep sense of multicultural community.”

The College is at a pivotal moment of transition, a moment that has the potential for hope and optimism. The conversations happening on college campuses, in board rooms, in the media and at the highest levels of state and federal government are critical to achieving culture and climate change. Our concern at Occidental, however, is that the conversations on campus are fragmented, rather than collaborative, and there is a risk that the adversarial nature of the dialogue will impede progress in achieving this change. We are also concerned that there may be little incentive on the part of activists to seek a collaborative relationship. We fully applaud and support achieving culture change through activism, but we worry that the very tactics used to gain attention to the issues will stand in the way of candid and collaborative communication between activists and administrators.

The key to achieving success at Occidental is directly tied to the campus community’s ability to rebuild damaged and frayed relationships and to find a way for all parties to the conversation to collaborate in seeking to identify shared and common goals: preventing sexual and gender-based harassment and violence and facilitating institutional responses that prioritize student welfare and individual and campus safety. In short, the next steps for this community include a transformative approach that replaces an adversarial relationship with a

collaborative partnership, and moving toward an improved future rather than remaining mired in the past. We encourage the College and community members to create safe spaces for conversation that prioritize inclusivity, diversity of view and respect for civil discourse. This requires listening openly to our fellow community members, seeking to understand their perspective, and searching for an inference of good will, rather than presuming a negative inference.

The community dynamics at Occidental are broader than sexual and gender-based harassment and violence, and frankly, they are beyond our skill set to completely and effectively remedy. As we noted earlier, our climate observations are based on our campus visits and experiences in the spring of 2013 and the 2013-2014 academic year. We note that the climate appears to have been relatively quiet this fall, but we remain concerned about the community's ability to transcend the past difficulties. As recently as September 17, 2014, OSAC members referred to a "culture of retaliation and hostility" on campus.<sup>53</sup> We have also observed continued concerns by students, staff and faculty who decline to engage in conversation or campus efforts because of fear of OSAC's response. We hope that the significant steps taken by the College over the past 18 months and the hard work invested by those community members pressing for needed change may be seen as a sign of a shared commitment to these issues and earnest steps toward improved and effective policy and practice that tends to the welfare of students, staff and faculty. As the College's work continues, we encourage community members to seek reconciliation, to listen intently to one another and to endeavor to give each other an inference of good faith. The students you serve deserve nothing less.

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<sup>53</sup> See OSAC Facebook Page, <https://www.facebook.com/osacoalition>.

#### **IV. The Evolution of Policies, Procedures and Practices**

Over the past several years, the College has invested significant energy, resources and personnel to addressing issues of sexual and gender-based harassment and violence affecting students, staff and faculty on campus. Some of these actions have been at the College's own initiative. Others have been in response to campus community members who have steadfastly kept attention focused on the issues of sexual and gender-based harassment and violence. This section provides an overview of the evolution of policies, procedures and practices and prior recommendations to the College.

While the College has long had the required elements of the law in place – a dedicated Title IX Coordinator, a notice of non-discrimination and prompt and equitable grievance procedures to respond to allegations of sexual and gender-based harassment and violence– the College's ongoing efforts to improve its policy, procedures, practices, resources and personnel reflect the active incorporation of evolving law and guidance, community feedback and a commitment to student welfare through coordinated and compassionate practices.

##### **A. 2010-2011**

During the 2010-2011 academic year, the College maintained separate policies for sexual harassment and sexual assault. The Sexual Harassment Policy, administered by the Department of Human Resources, applied to the reporting, investigation and resolution of complaints involving sexual harassment, through the use of Designated College Officers (DCOs). The Sexual Assault Policy, administered by the Dean of Students Office, applied to the reporting, investigation and resolution of incidents of sexual assault involving students, through the use of Campus Safety and designated administrators in student affairs.

During this time frame, Dr. Maryanne Horowitz, Professor of History, served as the Title IX Officer, a position she held since 1993. As the Title IX Officer, Dr. Horowitz supervised and trained the DCOs and Advisors, who were available to assist the parties involved. Dr. Horowitz also received notification of sexual assault complaints, although Dr. Barbara Avery, Dean of Students and Vice President of Student Life, oversaw their investigation and adjudication.

In the fall of 2010, the College undertook an assessment of its existing Sexual Assault and Sexual Harassment Policies. The College retained the National Center for Higher Education Risk Management (NCHERM), a consulting firm that serves institutions of higher education, to provide an external and objective assessment and recommendations regarding its policies and procedures. The College also convened an internal Sexual Assault Working Group, which was comprised of administrators and students.<sup>54</sup>

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<sup>54</sup> The Sexual Assault Working Group included: Dominic Alletto (Assistant Director, Intercultural Community Center), Matthew Calkins (Director, Emmons Health and Counseling Center), Jacob Copithorne (student athlete), Chelsea Duncan (student and Program Assistant, Project SAFE), Dimitri Groce (student and member of Black Student Alliance), Cassidy Isch (Community Director, Residential Education and Housing

The Sexual Assault Working Group was tasked with examining issues surrounding sexual assault on campus and making recommendations to the Dean of Students Office about how to improve the College's policies and procedures. The Working Group issued a written Report and Recommendations identifying the following issues of concern:

- Faculty/staff are not fully aware of their obligations if a student reports an incident of sexual assault to them.
- Students are not fully aware of their options if they are sexually assaulted.
- Drunk sex is considered part of the college "hook up" culture and not considered rape by most.
- Students do not understand "effective consent."
- Students do not make formal complaints of sexual assault for many reasons, one of them being that they do not want to "ruin" lives, due to the automatic expulsion sanction.
- The appeals process goes to a single administrator to make the final decision, which may place undue pressure on one individual.
- The appeals panel has too much authority to change the outcome.
- Sexual assault prevention discussions tend to be heteronormative and not inclusive of LGBTQ audience members.<sup>55</sup>

As a result of the work of the Working Group and the recommendations by NCHERM, the College made significant changes to policies and procedures in the fall of 2011 (outlined below).

## **B. 2011-2012**

In July 2011, the College appointed Associate Dean of Students Dr. Erica O'Neal Howard as Title IX Coordinator. Moving the Title IX Coordinator from a faculty position to an administrative position was based on: 1) recommendations by NCHERM; and 2) concerns raised by students regarding the potential barrier to reporting caused by having a former, current or prospective professor involved in the oversight of a report.

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Services), Sarah Mofford (student and participant in Vagina Monologues), Assistant Dean of Students Tamara Rice (Chair) and Dale Widoff (Athletics).

<sup>55</sup> *Sexual Assault Working Group 2010-2011 Report and Recommendations* (undated).

In the fall of 2011, the College convened a Sexual Misconduct Committee, comprised of administrators, faculty members and students.<sup>56</sup> This Committee was charged with examining issues of sexual misconduct at Occidental and making recommendations to the Dean of Students Office. The Sexual Misconduct Committee issued a set of written recommendations that included educational programming and training recommendations, development of an advocate program, enhanced visibility and access to anonymous reporting, addition of an opportunity for participation in restorative justice/informal process and removal of “zero tolerance” terminology that could be negatively associated with automatic expulsion.<sup>57</sup>

The College also reviewed specific recommendations from Professors Caroline Heldman and Lisa Wade, faculty members who would later assist in forming the Oxy Sexual Assault Coalition (OSAC).<sup>58</sup> OSAC, officially formed on February 14, 2012, describes its mission on its webpage: “to raise awareness of the sexual assault epidemic, and to advocate for best policies and practices that provide for a safe and equitable student experience at Occidental College.”<sup>59</sup>

On November 2, 2011, the College implemented a Sexual Misconduct Policy to incorporate the recommendations made by NCHERM, the Sexual Misconduct Committee and Professors Heldman and Wade. Key changes in the policy included:

- Unification of separate sexual harassment and sexual assault policies into one uniform policy and grievance procedure for students (sexual harassment involving faculty and staff continued to be addressed separately);
- Expansion of the role of the Title IX Coordinator to monitor each stage of the grievance procedure and institute sanctions;
- Modification of the investigative model to use two investigators;

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<sup>56</sup> The Sexual Misconduct Committee included: Assistant Dean of Students Tamara Rice, Dominic Alletto (Assistant Director, Intercultural Community Center), Matthew Calkins (Director, Emmons Health and Counseling Center), Assistant Dean Ella Turenne, Roberta Dacus (Lead Nurse Practitioner, Emmons Health and Counseling Center), Caroline Heldman (Associate Professor of Politics), Thalia Gonzalez (Assistant Professor of Politics), Bianca Di Marcello (student, Program Assistant, Project SAFE), Audrey Logan (Program Assistant, Project SAFE), Maurice Judge (student, KOXY radio host) and Alana Murphy (student).

<sup>57</sup> *Sexual Misconduct Committee Recommendations – 2011-2012* (undated).

<sup>58</sup> Caroline Heldman & Lisa Wade, *Sexual Assault on Campus: Overview and Best Practices*, prepared for President Jonathan Veitch, Occidental College (Oct. 3, 2011). At the time, Professors Heldman and Wade wrote: “Adjudicators may be less likely to find guilty perpetrators ‘guilty’ under a zero-tolerance policy for rape if it means expulsion. A graduated penalty system (e.g. suspension with required counseling) may allow for a more nuanced response, and may prevent future rapes (at our institution and others) by focusing on perpetrator rehabilitation.”

<sup>59</sup> *OSAC’s Efforts – Timeline*, <http://oxysexualassaultcoalition.wordpress.com/timeline/>.

- Removal of penal code definitions for rape and sexual battery and move to tiered system of prohibited conduct: non-consensual sexual contact and non-consensual sexual intercourse;
- Removal of automatic expulsion sanction and imposition of discretionary, graduated sanction system (and subsequent removal of “zero tolerance” language based on recommendation of Sexual Misconduct Committee);
- Reframing of the 2010 definition of consent to recognize non-verbal forms of communication in the 2011 definition:
  - 2010 Sexual Assault Policy definition, in relevant part: Both parties who have the capacity to act freely must receive verbal agreement *or* physical cooperation for sexual contact to be considered consensual under this Policy. Both parties who have the capacity to act freely must receive verbal agreement *and* positive physical cooperation for sexual intercourse to be considered consensual under this Policy.
  - 2011 Sexual Misconduct Policy definition, in relevant part: Consent can be given by words or actions, as long as those words or actions create mutually understandable clear permission regarding willingness to engage in (and the conditions of) sexual activity.
- Narrowing of the definition of incapacitation to require a more discerning evaluation of a person’s ability to give consent, based on the person’s ability to make reasonable decisions rather than simply equating intoxication with incapacitation.

In May 2012, OSAC completed an evaluation of the College’s sexual assault policies, practices and programming using “promising practices from academic scholarship, the Department of Justice, and feedback from Oxy students who have experienced the process.”<sup>60</sup> Those recommendations provided a foundation for many changes enacted by the College in 2012 and 2013.

### **C. 2012-2013**

In the fall of 2012, at the request of Dean Avery, Assistant Dean of Students Tamara Rice and Assistant Director Dominic Alletto developed a Sexual Assault Education Strategic Plan. This plan reviewed the recommendations of the Sexual Assault Working Group, the Sexual Misconduct Committee and OSAC in order to assess implementation of those recommendations. Dean Howard also requested that Jennifer Heetderks, Counselor, Emmons Health and Counseling Center, and Lead Nurse Practitioner Roberta Dacus submit a proposal for an Advocacy Program and a Coordinated Community Response Team. Finally, Mr. Alletto and

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<sup>60</sup> *Occidental College Sexual Assault Policy Evaluation* (May 15, 2012).

Dr. LaMesha Carter, Visiting Fellow, Division of Student Affairs, commissioned a presentation by the California Coalition Against Sexual Assault and a subsequent report on the development of a Coordinated Community Response Team.

On November 6, 2012, OSAC issued a list of “12 Demands” to the Occidental administration: 1) remove the automatic appeals language from the policy; 2) reinstate consent as verbal consent in the policy; 3) establish a permanent Sexual Assault Advisory Committee; 4) return the Title IX Coordinator position to the faculty; 5) inform the campus of all changes to the sexual misconduct policy; 6) double the size of Project SAFE and give program assistants more decision-making authority; 7) use the College’s crime alert system to inform the campus of reported sexual assaults; 8) distribute a detailed annual sexual misconduct report; 9) establish a 24-hour sexual assault hotline; 10) provide annual Peace Over Violence training to all staff involved in the sexual assault process; 11) provide annual Peace Over Violence training to all student leaders; and, 12) bring Peace Over Violence to orientation for the next five years.<sup>61</sup>

As reflected elsewhere in this letter, the College implemented many, although not all, of these demands, albeit not as quickly as some had hoped. With respect to the policy demand to remove the automatic appeal, on January 4, 2013, the College amended the grounds for appeal and removed a challenge to the sanction as a permissible ground. This effectively removed the “automatic appeals language” from the policy. Further, in the spring and fall of 2013, the College: established a Sexual Assault Advisory Committee, titled the Sexual Misconduct Advisory Board; elevated the Title IX Coordinator position to a full-time and independent position outside of the Student Affairs Division; doubled the size of Project SAFE; established a 24/7 hotline; provided Peace Over Violence training to many; and informed the College community of all changes to policy in a direct and transparent manner.

In February 2013, the College commissioned the Sexual Assault Task Force, comprised of administrators, faculty and students. The Task Force was created, in part, to provide a space for open dialogue to seek agreement on issues that had served to divide and polarize the community in the wake of campus discussions about the College’s response to sexual misconduct. On March 21, 2013, the Task Force held a town hall meeting. The Task Force met regularly through the spring but was disbanded in May 2013. Despite the good intentions of the Task Force, the prevailing view is that the Task Force did not function as effectively as possible given the incendiary campus climate in the spring of 2013.

In March 2013, the College engaged our services as external consultants to assess the College’s policies and procedures regarding sexual harassment and assault. As noted earlier, in mid-April 2013, OSAC announced that it was filing two federal complaints. On April 30, 2013, in response to the community’s request for direct access to our conclusions, we issued our initial recommendations directly to the community.<sup>62</sup>

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<sup>61</sup> <http://oxysexualassaultcoalition.wordpress.com/2012/11/06/osac-dozen/>.

<sup>62</sup> A copy of our April 30, 2013 report and recommendations is attached as Appendix V.

Our initial recommendations included:

1. *Creation of an independent Title IX Office, with a direct report to a member of Senior Staff and/or the President, an interim full-time Title IX Coordinator (to be followed by a national search for a permanent position) and appropriate administrative support;*

**(Position created June 2013; Interim Title IX Coordinator appointed in June and August 2013; Permanent Title IX Coordinator appointed February 2014)**

2. *Review of the current structure and use of Deputy Title IX Coordinators;*

**(Completed Spring 2014)**

3. *Hiring of a dedicated advocate for survivors of sexual assault and other forms of sexual misconduct;*

**(Completed April 2013)**

4. *Review of existing policies and development of uniform policy that unites the disparate policies on sexual harassment for faculty, sexual harassment for staff, sexual harassment for students, and sexual misconduct policy for students;*

**(Uniform policy completed August 2013; Faculty and staff procedures in process of being drafted)**

5. *Expanded training and educational programming for the 2013-14 school year;*

**(Completed)**

6. *Creation of an anonymous suggestion box on the Sexual Assault Resources & Support website to allow all individuals equal access to voice their concerns and ideas*

**(Completed April 2013).**

In response to our recommendations, on June 4, 2013, the College appointed Dr. Irene Girton, Associate Dean of the College and Department Chair, Music, as the Interim Title IX Coordinator. Dr. Girton had previously served as a Deputy Title IX Coordinator for two years. During the summer of 2013, Dr. Girton oversaw the continued resolution of active cases reported to the College late in the spring semester. Dr. Girton also assisted in the drafting and implementation of the current Interim Sexual Misconduct Policy. Unfortunately, due to health considerations, Dr. Girton stepped down from this position prematurely in late summer, and former sex crimes prosecutor and consultant Lauren Carella was appointed as Interim Title IX Coordinator in late August 2013.

## **D. 2013-2014**

### **1. Interim Sexual Misconduct Policy**

During the summer of 2013, the College, with our assistance, worked diligently to draft a comprehensive Interim Sexual Misconduct Policy. Conversations with students, faculty members and staff members and interviews of implementers informed this effort. On August 23, 2013, the College implemented an Interim Sexual Misconduct Policy, which integrated the Sexual Misconduct and Sexual Harassment Policies into one uniform policy that applies to the entire community, including faculty, students and staff. This Interim Policy was informed by our initial review of past cases and the contributions of many Occidental community members, as outlined in the President's August 23, 2013 letter to the community.<sup>63</sup> Importantly, although OSAC faculty members declined to participate directly in the policy review process, in framing the policy, we considered the prior extensive written contributions of OSAC to this conversation, including lessons learned from the *Survivor Stories*,<sup>64</sup> *Why is OSAC Filing Title IX and Clery Federal Complaints Against Occidental College*,<sup>65</sup> *Promising Practices*,<sup>66</sup> the Occidental College Sexual Assault Policy Evaluation<sup>67</sup> and written policy revisions proposed by OSAC.<sup>68</sup> We also considered information provided by faculty and staff as to internal operating procedures, implementation in practice and the handling of past cases. Finally, the Interim Policy was informed by a comprehensive review of applicable law, guidance and relevant enforcement actions, including voluntary resolution agreements and letters of findings from recent regulatory actions. While not legally binding, these agreements provided a road map to issues deemed critical to compliance by OCR.

Recognizing the importance of community acceptance to effective implementation, the College intentionally implemented an Interim Policy. In drafting the Interim Policy, we sought to capture the most effective and promising practices we have seen in our extensive policy work with educational institutions. The College intended that the Interim Policy serve as a platform for the Sexual Misconduct Advisory Board and the new Title IX Coordinator

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<sup>63</sup> Jonathan Veitch, *A Letter to the Campus Community* (Aug. 23, 2013), <http://www.oxy.edu/presidents-office/letter-campus-community>.

<sup>64</sup> <http://oxysexualassaultcoalition.wordpress.com/survivor-stories-2/>.

<sup>65</sup> *Why is OSAC Filing Federal Complaints Against Occidental College?*, <http://oxysexualassaultcoalition.files.wordpress.com/2013/04/why-is-osac-filing-complaints-against-occidental.pdf>.

<sup>66</sup> Caroline Heldman & Lisa Wade, *Sexual Assault on Campus: Overview and Best Practices*, prepared for President Jonathan Veitch, Occidental College (Oct. 3, 2011).

<sup>67</sup> *Occidental College Sexual Assault Policy Evaluation* (May 15, 2012).

<sup>68</sup> *Reworked Policy and Procedure September 25, 2012*, as presented to President Veitch on November 6, 2012, and shared with us by Professors Danielle Dirks, Caroline Heldman and Lisa Wade on April 23, 2013.

to engage the community in conversation. This process contemplated the evaluation of discretionary policy concepts about which there were diverse perspectives at Occidental.

As outlined in President Veitch's August 23, 2013 letter to the community, the policy:

- recognizes the importance of respect for the autonomy and agency of complainants;
- seeks to remove barriers to reporting by delineating confidential resources and promoting ease of access to reporting options;
- provides a balanced approach to protect individual and community safety;
- recommends a sanction of suspension or expulsion for sexual assault; and,
- reinforces the College's commitment to fairness and equity for all parties involved.

The foundation of the policy is a centralized process that begins with an initial assessment by the Title IX Coordinator and trained administrators. The policy provides community members an opportunity to pursue a formal disciplinary or an "informal" remedies-based resolution process, expanding the College's ability to respond to prohibited conduct in a manner consistent with its Title IX responsibilities. The policy also provides an expanded discussion of resources, including: interim measures and accommodations available to all community members; increased protection for community members through expanded definitions of sexual harassment, sexual assault and more specific forms of prohibited conduct, including: harm to others and stalking; refined and expanded definitions of consent, coercion and incapacitation; a commitment to encouraging bystander engagement and intervention; amnesty provisions for personal use of alcohol and drugs to encourage reporting; and time frames for all major stages of investigation and resolution.<sup>69</sup>

The Interim Policy represents the best efforts of the College to integrate the federal compliance requirements in a manner that is trauma-informed, fair and impartial.<sup>70</sup> The

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<sup>69</sup> Many of the policy revisions were included to incorporate the anticipated requirements of Section 304 of the Violence Against Women Reauthorization Act of 2013, enacted in March 2013 with an effective date of March 2014. Our recommendations in this regard have been informed by our professional expertise in this area. Over the past several months, we have had the opportunity to serve the U.S. Department of Education's Negotiated Rulemaking Committee on the amendments to the Violence Against Women Act. Gina Smith was asked to serve as expert to advise the Subcommittee on Prevention/Training/ Education and Leslie Gomez was asked to serve as an expert on the Subcommittee on Stalking.

<sup>70</sup> For more information about trauma-informed responses, see *The Importance of Understanding Trauma-Informed Care and Self-Care for Victim Service Providers*, <http://www.justice.gov/ovw/blog/importance-understanding-trauma-informed-care-and-self-care-victim-service-providers>.

Interim Policy was informed by individual perspectives, community feedback and the dynamics of trauma and sexual and gender-based harassment and violence. It will continue to be an iterative document and will continue to evolve on an annual basis. We are confident that OCR's review of this Interim Policy will acknowledge the care and attention to the law, the guidance and the input of all community members, including the OSAC recommendations. Indeed, we note that the White House Task Force released a policy checklist in April 2014 that recommended language for inclusion in campus sexual misconduct policies. Occidental's Interim Policy, implemented six months before the White House Task Force report, already incorporated the component parts of the White House Task Force's policy checklist.<sup>71</sup>

## **2. Staffing**

Since April 2013, the College has significantly expanded the professional resources available to assure a coordinated and integrated approach to sexual and gender-based harassment and violence. The College implemented dedicated resources at each level of the institutional response: a Survivor Advocate to provide confidential advocacy for student survivors; a dedicated Title IX Coordinator to oversee and provide education, prevention and training programs, oversee the investigation and resolution of reports, assure compliance with all aspects of Title IX and VAWA, and provide for consistent application of the Interim Policy; a Hearing Coordinator to facilitate the hearing process; and a Clery Coordinator to oversee the College's compliance with Clery reporting responsibilities. In addition, the College has hired a new Chief of Campus Safety and a new General Counsel; both are integral to the implementation and oversight of the Interim Policy.

In April 2013, the College created a full-time Survivor Advocate position to provide 24/7 confidential support to students. The Survivor Advocate, Naddia Palacios, provides confidential crisis support and resource options to students who experience sexual violence of any kind. Ms. Palacios provides survivors with on-campus and off-campus resources and supports survivors in navigating the path the survivor chooses for recovery. The Survivor Advocate's services include assisting survivors with all steps of the Oxy adjudication process, case management and accompanying survivors to rape treatment centers and medical services 24 hours a day. The Survivor Advocate is certified as a Sexual Assault Counselor/Advocate under California law and provides legally protected confidentiality.

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<sup>71</sup>*Checklist for Campus Sexual Misconduct Policies* (Apr. 2014), <https://www.notalone.gov/assets/checklist-for-campus-sexual-misconduct-policies.pdf>. The Not Alone website not contains additional policy guidance regarding the role of the Title IX Coordinator, <https://www.notalone.gov/assets/role-of-title-ix-coordinator.pdf>, interim and supportive measures for victims, <https://www.notalone.gov/assets/interim-and-supportive-measures.pdf>, and definitions of prohibited conduct, <https://www.notalone.gov/assets/definitions-of-prohibited-conduct.pdf>.

In early September 2013, just prior to the beginning of the fall semester, the College appointed Lauren Carella as the new Interim Title IX Coordinator. Ms. Carella, a former sexual assault prosecutor from Pennsylvania, actively worked to resolve cases that were reported late in the spring of 2013, in a timely manner. Several factors contributed to delays in these cases including: the difficulty in scheduling given the impact of summer break on the availability of witnesses, investigators and panel members; the volume of cases reported late in the semester; the transition of the Title IX Office to an independent and at that time not yet fully resourced office; and Dr. Girton's sudden and unexpected unavailability.

In October 2013, the College hired Cherie Scricca to serve as the Hearing Coordinator under the Interim Policy. Previously, Dr. Scricca served as an independent consultant to colleges, universities and higher education professional associations, advising them on compliance-based concerns, organizational strategy, product development and service diversification. Before coming to Occidental, Dr. Scricca held leadership positions at: the University of Southern California; University of Maryland; University of California, Berkeley; Golden Gate University; University of California, Hastings College of the Law; and Minnesota State University, Mankato.

In February 2014, after a national search, the College hired Ruth Jones as the permanent Title IX Coordinator. Ms. Jones previously served as a Professor of Law and Associate Dean for Scholarship at the University of the Pacific, McGeorge Law School. She has also served as a staff attorney for the National Organization for Women (NOW) Legal Defense and Education Fund, where she pursued litigation, legislative advocacy, writing and public speaking on women's rights, and as an Assistant District Attorney in the New York County District Attorney's Office, where she prosecuted domestic violence and child sexual abuse cases. Ms. Jones is an accomplished author and lecturer on issues related to sexual and gender-based harassment and violence. A copy of Ms. Jones' curriculum vitae is attached as Appendix VI.

In June 2014, with funds from a grant from the U.S. Department of Justice's Office on Violence Against Women (OVW), the College hired Karla Aguilar as the full-time Project S.A.F.E. Program Coordinator and Prevention Program Specialist. In this role, Ms. Aguilar plans, coordinates and administers activities related to the goals of the OVW grant, namely, developing and coordinating data collection, participating in OVW training workshops and preparing and distributing program materials. She is also responsible for coordinating and implementing prevention programming and bystander intervention training and assisting with the Coordinated Community Response Team (CCRT). Before coming to Occidental, Ms. Aguilar worked with the Los Angeles Conservation Corps and the American Civil Liberties Union's Reproductive Justice Project. She also currently volunteers as a certified sexual assault coordinator/advocate at Peace Over Violence and is certified in domestic violence training. Ms. Aguilar has a master's in social work from the University of Southern California.

In August 2014, the College hired full-time General Counsel Leora Freedman. Ms. Freedman previously served as University Counsel in the Chancellor's Office in the California State University system, where she was responsible for both the San Bernardino and Stanislaus campuses. At CSU, she served as a member of the Academic/Student Affairs team

and as an expert resource in the areas of student conduct and international programs. Ms. Freedman is a graduate of Wesleyan University and UCLA School of Law, after which she clerked for the Honorable Harry L. Hupp of the United States District Court for the Central District of California. Before joining CSU, Ms. Freedman practiced law in the private sector, and then served on the staff of Public Counsel, where she was the directing attorney for the Homelessness Prevention Law Project and the Consumer Law Project.

In August 2014, the College created a full-time position to coordinate the College's reporting responsibilities under the Clery Act. Veronika Barsegyan, the College's new Clery Coordinator, has prior legal experience as a legal manager, paralegal and legal assistant. Ms. Barsegyan has also worked as a financial analyst and premium auditor, spending considerable time on auditing and verifying records and data. Ms. Barsegyan has a B.A. from UCLA and a J.D. from the University of West Los Angeles.

In September 2014, the College hired Victor Clay to serve as the Chief of Campus Safety. Mr. Clay is a 28-year veteran of the Los Angeles County Sheriff's Department, where he spent three years of service focused on the nine campuses of the Los Angeles Community College District. His service also included stints as a patrol deputy, training officer, sergeant, watch commander and SWAT team member. Most recently, Mr. Clay held a managerial position at Cooke Protective Services, where he was responsible for executive and estate protection details for highly sensitive assignments.

**V. Review of Past Cases**

Our review of cases encompassed two academic years: 2011-2012 and 2012-2013. We conducted an in-depth review of all formal complaints of non-consensual sexual intercourse or non-consensual sexual contact that proceeded to resolution through an investigation and/or hearing panel. In 2011-2012, there were ten formal complaints: eight involved a complaint of non-consensual sexual intercourse and two involved a complaint of non-consensual sexual contact. In 2012-2013, there were seven formal complaints that met these criteria: six involved a complaint of non-consensual sexual intercourse and one involved a complaint of non-consensual sexual contact.

The terms non-consensual sexual intercourse and non-consensual sexual contact encompass a broad range of behavior. Under the Sexual Misconduct Policy in effect between 2011-2012 and 2012-2013, non-consensual sexual intercourse was defined as: “any sexual intercourse, however slight, with any object, by a man or woman upon a man or a woman, that is without consent and/or by force.” Sexual intercourse included: “vaginal penetration by a penis, object, tongue or finger; anal penetration by a penis, object, tongue, or finger, and oral copulation (mouth to genital contact or genital to mouth contact), no matter how slight the penetration or contact.” Non-consensual sexual contact was defined as: “any intentional sexual touching, however slight, with any object, by a man or a woman upon a man or woman, that is without consent and/or by force.” Sexual contact included: “intentional contact with the breasts, buttock, groin, or genitals, or touching another with any of these body parts, or making another touch you or themselves with or on any of these body parts; any intentional bodily contact in a sexual manner, though not involving contact with/of/by breasts, buttocks, groin, genitals, mouth or other orifice.”

The following tables outline the outcomes, sanctions, appellate outcomes and time frames for the seventeen matters.

**Overview of Formal Complaints of Non-Consensual Sexual Intercourse or Non-Consensual Sexual Contact between 2011-2102 and 2012-2013**

**Table 1: Findings of Responsibility**

<b>Prohibited Conduct</b>	<b>Outcome</b>	<b>Sanction</b>	<b>Timing to Outcome</b>	<b>Appeal</b>	<b>Timing to Resolution of Appeal</b>
<b>Non-consensual Sexual Intercourse</b>	Responsible	Expulsion	47 days	Appeal denied	10 days
<b>Non-consensual Sexual Intercourse</b>	Responsible	Expulsion	42 days	Appeal granted; Sanction modified to 2 yr suspension (Later expelled for another complaint)	32 days

<b>Prohibited Conduct</b>	<b>Outcome</b>	<b>Sanction</b>	<b>Timing to Outcome</b>	<b>Appeal</b>	<b>Timing to Resolution of Appeal</b>
<b>Non-consensual Sexual Intercourse</b>	Responsible	Expulsion	133 days*	None	N/A
<b>Non-consensual Sexual Intercourse</b>	Responsible	Expulsion	59 days	Appeal denied	35 days
<b>Non-consensual Sexual Intercourse</b>	Responsible	Expulsion	176 days*	Appeal denied	27 days
<b>Non-consensual Sexual Intercourse</b>	Responsible	Expulsion	136 days*	Appeal denied	139 days**
<b>Non-consensual Sexual Intercourse</b>	Responsible	One semester suspension	62 days	Appeal denied	3 days
<b>Non-consensual Sexual Intercourse</b>	Responsible	One semester suspension	59 days	Appeal granted; Sanction modified by rescinding suspension New sanction: 50 hours community service and educational project	14 days
<b>Non-consensual Sexual Intercourse</b>	Responsible	Sanction imposed at end of senior year; Restricted from any participation in campus and alumni activities for one-year post graduation; Educational sanctions	86 days	None	N/A

**Table 2: Admissions of Responsibility by Respondent**

<b>Prohibited Conduct</b>	<b>Outcome</b>	<b>Sanction</b>	<b>Timing to Outcome</b>	<b>Appeal</b>	<b>Timing to Resolution of Appeal</b>
<b>Non-consensual Sexual Contact</b>	Admission by the Respondent	One semester probation	27 days	None (Later expelled on another matter)	N/A
<b>Non-consensual Sexual Contact</b>	Admission by the Respondent	One semester probation	8 days	None	N/A
<b>Non-consensual Sexual Contact</b>	Admission by the Respondent	Three months disciplinary probation	55 days	None (Later expelled for another complaint)	N/A

**Table 3: Findings of Not Responsible**

<b>Prohibited Conduct</b>	<b>Outcome</b>	<b>Sanction</b>	<b>Timing to Outcome</b>	<b>Appeal</b>	<b>Timing to Resolution of Appeal</b>
<b>Non-consensual Sexual Intercourse</b>	Not Responsible	None	52 days	Appeal denied	13 days
<b>Non-consensual Sexual Intercourse</b>	Not Responsible	None	43 days	None (Immediately expelled on a concurrent matter)	N/A
<b>Non-consensual Sexual Intercourse</b>	Not Responsible	None	48 days	Appeal denied	20 days
<b>Non-consensual Sexual Intercourse</b>	Not Responsible	None	135 days*	Appeal denied	121 days**
<b>Non-consensual Sexual Intercourse</b>	Not Responsible	None	109 days*	Appeal filed and later withdrawn	29 days

\* Four of these reports were made in April or May, near or at the end of the academic year. The extended period of resolution includes the intervening summer break. One of these reports involved a more extensive investigation.

\*\* The delays in resolving these appeals included challenges in identifying the appellate authority and panel members. One of these matters was ultimately resolved by an external adjudicator.

In addition to these seventeen complaints, during this time frame, the College received complaints of non-consensual sexual intercourse or contact that did not move forward to an investigation or hearing. In each of these cases, the Title IX Coordinator or an administrator in the Dean of Students Office provided the complainant with information about on-campus and off-campus resources and support, as well as on-campus and off-campus reporting options, and a detailed explanation of the options under the College's policy. These cases did not move forward for a variety of reasons. In some cases, the complainant declined to share the name of the respondent; in others, the complainant either did not respond to the College's outreach or requested that no investigation occur. In other cases, the respondent was not a current Occidental student or employee. In each case that did not move forward to an investigation or hearing, however, there was documentation reflecting that the College sought to support the complainant, and in many of these reports, that the College provided interim measures and accommodations to support the complainant.

During the course of our review, we gathered input from a broad cross-section of individuals, which we have aggregated for this report. We also offer our own observations and, at times, conclusions, regarding key aspects of the College's Title IX investigation and resolution process. Because our goal was to understand challenges in implementation and opportunities for improvement at a structural and systems level, our observations are noted generally, deliberately omitting identifying information or context that might reveal an individual complainant or respondent.<sup>72</sup> In the context of the Title IX complaint filed with OCR, we understand that OCR may have access to more detailed or individualized concerns than we have identified in our review. We look forward to OCR's factual findings regarding those complaints. In the interim, we share our observations, general findings and overview of how the College has responded to those observations to date.

#### **A. General Observations**

At the outset, we note that the nature of the incidents reported at Occidental is consistent with the known dynamics of sexual and gender-based harassment and violence in the campus setting. All seventeen cases we reviewed involved non-stranger sexual assault, meaning that the complainant and respondent were known to one another. While this in no way diminishes the impact or effect of sexual violence on a complainant, it highlights the need for continued education about the ways in which non-stranger sexual assault may impact the identification of misconduct, reporting of misconduct, continued participation in campus processes and education regarding risk reduction and prevention. As outlined below, we recognize that the College provides education and prevention programs that incorporate these elements.

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<sup>72</sup> In addition, the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 C.F.R. Part 99, prohibits the release of identifying information or discussion of the specific factual allegations of any report. Instead, as promised in April 2013, information is shared in this report in an aggregate format in order to provide meaningful recommendations and conclusions.

All of the complainants involved in these seventeen reports are female and all of the respondents are male. We recognize that these cases do not provide an accurate view of the spectrum of individuals who may be affected by sexual misconduct at Occidental. Given concerns expressed about underreporting in the LGBTQ and multicultural communities at Occidental and across the nation, we encourage the College to dedicate attention to enhancing existing initiatives, programming and available resources, such as the Center for Gender Equity and Project SAFE, in order to more effectively remove potential barriers to reporting and serve all segments of the community.

Consistent with what is statistically known about sexual assault cases, the majority of the cases reviewed did not involve physical evidence or third-party eyewitness accounts of the incidents in question. Incidents of sexual violence often happen behind closed doors. Given the nature of the acts themselves (typically without physical injury), human physiology (the ability to heal quickly) and a delay in reporting, investigators and adjudicators are often left to evaluate conduct based on an assessment of word-against-word credibility. This credibility assessment is one that must be carried out with great care and attention to the specific attendant details, circumstances and context of each allegation. The precision of this informed approach can form the basis for sound and supportable decisions, but by its very nature, in the absence of dispositive physical evidence or a third-party eyewitness, such an assessment often subjects final outcomes to criticism based on one's individual perspective and interpretation of the facts.

## **1. Reporting**

Many of the seventeen reports reflected a significant delay from the time of the incident to the time of the report. The delay ranged from a few days to, in some instances, more than two years. These delays in reporting are consistent with the well-documented dynamics of sexual misconduct. These reporting delays highlight the need for ongoing conversation about sexual and gender-based harassment and violence to identify potential barriers to reporting and foster an environment to increase reporting. Highlighting the delay in reporting is not a criticism of any individual choice as to when, where and how to report. On the contrary, we affirm an individual's right to choose when, how and to whom to disclose sexual violence, as those choices are uniquely personal and impacted by a multitude of factors. In this regard, any reporting choice, regardless of the timing, is the right choice for that individual. An informed understanding of barriers to reporting and the factors that may inhibit a complainant from coming forward, however, is critical to assuring that an institution's policies, procedures and practices do not create additional barriers. Rather, policies and procedures should provide clear and effective information to individuals that can foster increased reporting. The goal is to meet all those affected with sensitive and informed responsiveness to ensure the consistent provision of all available resources and options following an incident of sexual violence.

Occidental has risen to this challenge. First, the Interim Policy provides clearly delineated reporting options and confidential resources. The language of the Interim Policy also encourages reporting regardless of where or when the incident occurred and regardless of whether a complainant knows how to identify the incident. The Interim Policy also provides

extensive and clearly delineated options for reporting, which seek to remove barriers and foster increased reporting. Reports may be made to: the Title IX Coordinator, Deputy Title IX Coordinators, the Dean of Students Office (including the Dean on Duty), Campus Safety and an anonymous reporting option on the College's website. In addition, the College has long provided confidential resources such as the Emmons Health Center and the Office for Religious and Spiritual Life, and as of the fall of 2013, the College has provided dedicated confidential resources through the Survivor Advocate, the Oxy 24/7 Confidential Hotline, and the Occidental Assault Advocacy and Response Team (OAART). Information about these reporting options and confidential resources is distributed widely through the College's website, in orientation materials, in mandatory online educational programs, on residential hall bulletin boards, in pamphlets and handouts, and in student trainings through: Hallspreads, the First Year Residential Education Program, Project SAFE and student leadership training (for Resident Advisors, O-Team, Greek Life, student club leaders and senior leaders). In addition, this information is provided through email communications from the Office of the President, the Dean of Students Office, Residential Life, Occidental newsroom publications and town hall and general assembly meetings.

Most of the seventeen cases we reviewed were reported directly to the Title IX Coordinator, the Director for Student Advocacy and Accountability or a Resident Advisor. Other cases were shared with a faculty member or another trusted individual before being reported to the designated College administrator. Among those seventeen cases, once an initial report was made, the reporting protocols in place assured that reports were shared in a timely manner with the Title IX Coordinator through the use of the Student Early Alert Notification System (SEAN).<sup>73</sup>

## **2. Intersection with Alcohol or Other Drugs**

The majority (but not all) of the cases we reviewed involved alcohol or other drug use by the complainant, respondent or both. Our review of the facts of the cases highlights important educational objectives for the community: reinforcement of the concept that the use of alcohol or other drugs does not diminish one's responsibility to obtain consent or potential liability for violation of the Sexual Misconduct Policy and the need for ongoing education about the effects of alcohol or other drugs and their impact on an individual's ability to give consent.

Occidental has long provided educational programming regarding the use of alcohol or other drugs. Since January 2012, the College has required all students to read and sign an acknowledgement of the College's policy about alcohol and other drugs. The College

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<sup>73</sup> The Student Early Alert Notification (SEAN) system is a secure, online system designed by the College to capture reports about students of concern. It covers conduct and students for whom there exist academic or personal concerns. Upon receipt, the reports are reviewed by designated College employees from the behavioral intervention team (Student Success Team) so that appropriate steps can be offered to students who are facing personal challenges.

has also required that all incoming students complete an online training program, “Alcohol-Wise,” as a mandatory pre-registration requirement. As explained in the College’s orientation materials, Alcohol-Wise is “designed to assist students in making healthy decisions regarding alcohol use in college.” The course discusses “how expectations influence behavior; alcohol’s effect on learning and memory; and how to recognize and respond to an alcohol-related emergency.” In August 2013, the College added an online program, “Think About It,” which provides comprehensive alcohol, drug, and sexual assault education for Oxy students, including an abbreviated version of the College’s Interim Policy. All Occidental students, new or returning, were required to complete the “Think About It” online training to enroll at Oxy for the 2013-2014 academic year. In addition to these online programs, orientation programming has included a ninety-minute presentation about alcohol or other drugs, followed by a mandatory sixty-minute Orientation Team meeting: “The Right Mix,” (2011-2012); and “Alcohol and Other Drugs Education Session,” (2012-2013 and 2013-2014).<sup>74</sup>

In the fall of 2013, the College implemented a First Year Residential Education (FYRE) program, a mandatory education conducted by Residential Education and Housing Services in the residence halls. The six-week program, which involves weekly meetings to address prominent issues in transitioning to college, including “Making Healthy Decisions,” the College’s alcohol policy and amnesty for potential alcohol violations, is now an annual initiative in its second year of implementation. Resident Advisors (RAs) are also provided with a comprehensive staff manual that provides guidance on how to respond to alcohol and drug use and with dedicated training, titled “Behind Closed Doors,” which involves senior RAs acting out potential scenarios for new RAs and testing how new RAs would respond based on their training.

## **B. Observations About Process**

### **1. Timeframe for Resolution**

One of the concerns that has been repeatedly raised, both at Occidental and across the country, is that reports have not been investigated and resolved in a timely manner. Participation in a lengthy investigation or resolution process can be difficult for all parties and prompt resolution can ameliorate some of those impacts. Notwithstanding the goal of prompt resolution, there is often good cause for extending the time frame of an investigation. When those delays in the process are not accompanied by effective communication to address the reason for the delay, however, the lack of communication can lead to distrust in the process and in the institution.

The federal government attempted to provide guidance with respect to the meaning of prompt time frames. In the April 4, 2011 DCL, OCR provided as follows:

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<sup>74</sup> Orientation Team Leaders, better known as O-Team, are a group of selected students who assist in the planning and implementation of orientation activities. The O-Team serves as a resource to new students and families to assist in the transition to Occidental's academic, social and cultural environment.

OCR will evaluate whether a school's grievance procedures specify the time frames for all major stages of the procedures, as well as the process for extending timelines. Grievance procedures should specify the time frame within which: (1) the school will conduct a full investigation of the complaint; (2) both parties receive a response regarding the outcome of the complaint; and (3) the parties may file an appeal, if applicable. Both parties should be given periodic status updates. Based on OCR experience, a typical investigation takes approximately 60 calendar days following receipt of the complaint.<sup>75</sup>

This 60-day time frame has been perceived by many as a "mandate" rather than an expectation. This misconception, however, demonstrates the significant disconnect between guidance and implementation. As OCR has expressly stated, there is flexibility in this time frame:

Whether OCR considers complaint resolutions to be timely, however, will vary depending on the complexity of the investigation and the severity and extent of the harassment. For example, the resolution of a complaint involving multiple incidents with multiple complainants likely would take longer than one involving a single incident that occurred in a classroom during school hours with a single complainant.<sup>76</sup>

OCR's language anticipated the potential that the time frame may be extended, with appropriate notice to the parties, when the interests of a thorough, impartial and fair process warrant additional time. The imprecision with which time frames were addressed, however, raised more questions than answers for many institutions: what stages of the process were included in the investigation? What types of delays were reasonable? How long was too long? Did OCR mean 60 business or calendar days?

In the April 2014 Title IX Q&A, OCR provided some additional helpful guidance. OCR clarified that the 60 days referenced are calendar days, and inclusive of the:

entire investigation process, which includes conducting the fact-finding investigation, holding a hearing or engaging in another decision-making process to determine whether the alleged sexual violence occurred and created a hostile environment, and determining what actions the school will take to eliminate the hostile environment and prevent its recurrence, including imposing

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<sup>75</sup> April 4, 2011 DCL at 12, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

<sup>76</sup> *Id.*

sanctions against the perpetrator and providing remedies for the complainant and school community, as appropriate.<sup>77</sup>

OCR clarified that this timeframe does not include appeals, but noted that “an unduly long appeals process may impact whether the school’s response was prompt and equitable as required by Title IX.”<sup>78</sup>

Most importantly, however, OCR specifically stated that the 60-day timeframe is not a mandate, noting that it “does not require a school to complete investigations within 60 days; rather OCR evaluates on a case-by-case basis whether the resolution of sexual violence complaints is prompt and equitable.”<sup>79</sup> OCR provided specific factors for evaluating timeliness:

Whether OCR considers an investigation to be prompt as required by Title IX will vary depending on the complexity of the investigation and the severity and extent of the alleged conduct. OCR recognizes that the investigation process may take longer if there is a parallel criminal investigation or if it occurs partially during school breaks. A school may need to stop an investigation during school breaks or between school years, although a school should make every effort to try to conduct an investigation during these breaks unless so doing would sacrifice witness availability or otherwise compromise the process.<sup>80</sup>

This same concept was adopted by the Negotiated Rulemaking Committee on the VAWA amendments. The rules, as published on October 20, 2014, recognize that the designated timeframes for institutional disciplinary proceedings can be extended for good cause. The language states that institutional disciplinary proceedings should be “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.”<sup>81</sup>

At Occidental, the average time frame for the resolution of the seventeen reports, not including the appeal, was 75 days, and two-thirds of the investigations were concluded within or close to the 60-day time frame. In ten of the seventeen matters we reviewed, the investigation was concluded within 60 days; one was concluded in 62 days; one in 86, and the

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<sup>77</sup> Title IX Q&A, Question F-8, at 31-32.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Violence Against Women Act, 79 Fed. Reg. 62751, 62789 (Oct. 20, 2014) (to be codified at 34 C.F.R. 668), <https://www.federalregister.gov/articles/2014/10/20/2014-24284/violence-against-women-act>.

remaining five took over 100 days to resolve. Each of those five matters, however, was either reported late in the semester (April or May) or involved multiple allegations. Other factors impacting delays at Occidental included the complexity of the investigation, the timing of the report during the semester, the availability of the witnesses and administrators during school breaks and the transition to a new Title IX Coordinator in the midst of active matters. In some instances, delays were occasioned based upon the request of the parties. The more significant delays, however, involved matters that were initiated in the spring of 2013 and involved timing challenges based on the summer break and the transition within a short time span between two separate interim Title IX Coordinators. While these delays may be deemed reasonable, they nonetheless had a disruptive effect on the lives of the students.

We find that the College made good faith efforts to comply with the time frames as designated in College policy and outlined in OCR's most recent guidance. As noted above, where there were delays, there were reasonable explanations, although not always fully communicated to the parties. We recognize the impact that delays of this nature can have on individual complainants, respondents and community members and how such delays can undermine faith in the process. We encourage the College to remain committed to prompt and equitable resolution of reports and to provide transparent communication where timeframes may need to be extended for good cause.

## **2. Investigation**

At Occidental, the criticisms of the investigative process shared with us include:

- “Investigations were inadequate.”
- “Complainants were not updated enough.”
- “Complainants were contacted too much (had to tell their story too many times).”
- “Not all witnesses were contacted.”
- “Investigations took too long.”
- “Complainants did not meet with investigators as frequently as respondents met with them.”
- “Typos in the investigation documents.”
- “Investigators appeared ‘uncomfortable’ with the subject matter.”
- “No availability of investigators who did not have a potential bias.”
- “Multiple concurrent investigations and not enough investigators to handle the volume.”

These perceptions are critical to understand and address. For an educational institution, the investigation of sexual and gender-based harassment and violence is one of the most sensitive and difficult tasks involved in campus responses to sexual and gender-based harassment and violence. The quality and integrity of an investigation is vital in providing a sufficient factual foundation to support determinations of responsibility and establishing faith in outcomes and sanctions. In the context of word-against-word credibility assessments, it is imperative that this aspect of the College's response be conducted by individuals with appropriate training and experience.

According to the 2011 Dear Colleague Letter, Title IX requires adequate, reliable and impartial investigations that are conducted by investigators with sufficient experience or training.<sup>82</sup> OCR expanded on this guidance in the 2014 Title IX Q&A, noting that "provisions for adequate, reliable, impartial and prompt investigation of complaints require: the opportunity for both parties to present witnesses and evidence; interim measures to be implemented before the final outcome of the investigation; periodic updates on the status of the investigation to be presented to the parties; and the application of the preponderance of the evidence standard."<sup>83</sup> OCR has also noted that "a balanced and fair process that provides the same opportunities to both parties will lead to sound and supportable decisions."<sup>84</sup> Notably, OCR has not provided specific standards of care for investigations beyond broadly capturing concepts such as adequate, reliable, impartial and thorough.<sup>85</sup>

Applying the above standard to Occidental, the investigations we reviewed included the minimum elements identified by OCR: the opportunity for both parties to present witnesses and evidence; interim measures to be implemented before the final outcome of the investigation; periodic updates on the status of the investigation to be presented to the parties;

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<sup>82</sup> 2011 DCL at 9-12.

<sup>83</sup> Title IX Q&A, A-5, at 3; C-5, at 12-14. This significant guidance document was released in April 2014, after the date of these investigations. Many of these concepts, however, were present in the 2001 Guidance.

<sup>84</sup> *Id.*, F-1, at 24-26.

<sup>85</sup> In April 2014, OCR set forth specific training requirements for investigators, noting that: "All persons involved in implementing a school's grievance procedures (e.g., Title IX coordinators, others who receive complaints, investigators, and adjudicators) must have training or experience in handling sexual violence complaints, and in the operation of the school's grievance procedures. The 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 (preponderance of the evidence); 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, complainant, and school community; 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; and cultural awareness training regarding how sexual violence may impact students differently depending on their cultural backgrounds." Questions and Answers on Title IX and Sexual Violence, J-3 at 40.

and the application of the preponderance of the evidence standard. In our interactions with Occidental's investigators, they articulated a common goal of fair and impartial assessment of the facts and circumstances. The records we reviewed demonstrated that the investigators interviewed complainants, respondents and fact witnesses to gather sufficient information to present to a panel to evaluate whether the elements of a conduct violation had been met. In most of the cases, the investigators interviewed more than five witnesses, and in some cases, they interviewed more than ten.

In the fall of 2011, Occidental trained a large pool of administrators interested in serving as investigators. In keeping with the most effective investigative practices, the College implemented an investigative model that employed a team of two investigators for each report. We applaud the team approach and the dedication of the diverse staff members who were willing to undertake the requisite training and sensitive and time-consuming investigations in addition to their existing job responsibilities. We note, however, that the model implemented by the College in 2011 did not prove to be effective as had been hoped. In our view, the College created a pool of investigators that was too large. In the cases we reviewed, the College relied upon more than twenty investigators. While some were tasked with responding to more than one report, others were not utilized as frequently. Despite an effort to pair a more experienced investigator with a first-time investigator, the result was a model that ensured that some of the investigators, while exposed to the issues through training, had little opportunity to gain experience and build on strengths over time.

A related impact of such a large pool was a lack of consistency in investigative protocols, the development of investigative plans and the exploration of consistent avenues of inquiry in each matter (i.e., pre-incident behavior, post-incident behavior, circumstances of disclosure). In some cases, investigators declined to speak with witnesses who had been identified by the parties as potentially having relevant information. The scope of information gathered in each investigation was based on the individual investigator's comfort level, skill set and communication abilities, which varied across the pool. We observed a similar lack of uniformity in documentation, with interview memos and investigative reports varying in format and content. Indeed, the scope of the investigation and factors considered in reaching conclusions varied from investigation to investigation. Some addressed credibility; some did not. Some made findings on the facts; others only gathered facts neutrally without making a specific finding. The policy in effect at the time provided that the investigator make a finding based on a preponderance of the evidence whether a policy violation had occurred, but not every report approached this determination consistently.

The records also demonstrated investigative challenges, including an uninformed approach to the use of pattern evidence of prior (or subsequent) misconduct by a respondent despite the existence of policy provisions that allowed its consideration under limited circumstances. A similar investigative challenge involved the use of medical information, including how to interpret and consider medical records or findings. For both pattern evidence and medical records, the lack of clear protocols for how to address such factual information may have led to inconsistent application of these concepts and rendered some investigations less effective as a result.

Given our decades of experience in conducting sexual misconduct investigations and in training investigators and multi-disciplinary teams nationally, both in the context of criminal investigations and in the educational setting, we have high and exacting standards regarding the quality and nature of investigations. In part because there are no standards of care for campus Title IX investigations, we observe great disparity across the country in the manner in which investigations are conducted and documented. At Occidental, we believe that the College has the opportunity to make meaningful improvements in its investigative practices and protocols. We shared these observations with the College during the summer of 2013. In the August 2013 Interim Sexual Misconduct Policy, the College incorporated the option to engage an outside investigator as needed, and began to do so in the fall of 2013. As noted in our recommendations section below, we encourage the College to continue to explore alternative investigative models to address the above concerns.

### **3. Outcomes and Sanctions**

There has been great discussion across the country and on the Occidental campus in particular about appropriate outcomes and sanctions and about the concept of “zero tolerance.” Zero tolerance presupposes that particular acts will result in expulsion, although there is no consensus on what behaviors should warrant expulsion. There has also been extensive discussion nationwide regarding the risk of serial offenders. While an assessment of prior misconduct or pattern evidence is always a necessary and relevant inquiry, not every respondent is a serial perpetrator. In addition, as noted above, many cases investigated and adjudicated on a college campus involve conduct that does not get prosecuted criminally. These concepts, together with the significance and the gravity of the harm caused by sexual violence, frame the discussion and the discord about sanctions.

The law and the guidance reflect the wide latitude OCR gives schools to fashion “appropriate” sanctions designed to eliminate a hostile environment, prevent its recurrence and address its effects. OCR is neither prescriptive nor proscriptive with respect to sanctions, relevant factors to consider, and it does not opine on the relative merits of discretionary, presumptive or mandatory sanctions.<sup>86</sup> Similarly, while VAWA requires that a school’s policy include the “possible sanctions or protective measures that such institution may impose following a final determination of an institutional disciplinary proceeding regarding rape, acquaintance rape, domestic violence, dating violence, sexual assault, or stalking,” VAWA still leaves these decisions to the discretion of the institution.

We reviewed the outcomes and sanctions for each of the seventeen cases. As noted above, those cases involved both non-consensual sexual contact and non-consensual sexual intercourse. In addition, although there were seventeen distinct reports, the conduct alleged involved only twelve respondents. Eight of those respondents were found responsible; four were

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<sup>86</sup> As noted earlier in this report, there is not a uniform consensus on the value of zero tolerance and mandatory expulsion provisions, and even OSAC members have changed their position over time with respect to these concepts.

found not responsible. The final outcomes for the eight individuals found responsible were as follows:

- Five respondents were ultimately expelled (63%);
- One respondent received a one-semester suspension (13%);
- One respondent received probation as the most significant sanction (13%); and,
- One respondent received 50 hours of community service and an educational sanction (13%).

With respect to these twelve respondents, four respondents were the subject of two or more allegations. In only one of those cases, however, was the College aware of any reported incident prior to the date of the second or subsequent incident.

- For one respondent, the conduct allegedly occurred in September 2010 and January 2011, but neither incident was reported to the College until September and October 2011. The respondent was ultimately expelled.
- For another respondent, the conduct occurred in August 2011 and early fall of 2011 (date unknown), but the incidents were not reported to the College until November 2011 and April 2012, respectively. The respondent received probation for the first incident, and his transcript was held for a year. Because he had already completed his course requirements before the second report resolved, the sanction imposed post-graduation included a prohibition from returning to campus for student or alumni activities.
- One respondent was the subject of three reports. All three incidents occurred before any of the conduct was reported to the College for follow-up and investigation. The incidents occurred in September 2009, August 2010 and September 2011. The first report to the College was made in 2011, prior to date of the last incident, but the complainant did not share the name of the respondent with the College at the time of the initial report. It was not until October 2011, after the last incident had occurred, that the College first learned the identity of the respondent. The second and third reports were made in November 2011 and March 2012. The respondent was subsequently expelled.
- In the last matter, the first reported incident of non-consensual sexual contact occurred in August 2011 and was reported in August 2012. The respondent admitted to the conduct and was placed on a three-month probation. In May 2013, four months after the completion of his

probationary period, an incident of non-consensual sexual intercourse involving the respondent, occurring in March 2013, was reported to the College. The respondent has since been found responsible and expelled from the College.

We note that the outcome in each of these complaints is based on the unique facts and circumstances of each incident. Given our retrospective evaluation, we are not positioned to reinvestigate or reevaluate sanctions imposed. However, we recognize the importance of a careful and consistent approach to the imposition of sanctions to ensure that the sanctions are properly tailored to the conduct and reflect consideration of the seriousness and impact of the conduct violation. We also note the value of transparency in outcomes. One way to achieve transparency is to report outcomes in the aggregate to the community with a semester or year delay to protect the identity of those involved in the process.

The Interim Policy tends to both of these goals. It provides a clear description of the range of available sanctions and carefully delineates a list of factors that should be considered by the adjudicator in every case. The range of available sanctions, as set forth in the Interim Policy, includes: warning; censure; disciplinary probation; restitution; removal from campus housing; suspension; expulsion; revocation of admission and/or degree; and withholding degree. Other sanctions may be imposed instead of, or in addition to, these sanctions, including service, education or research projects.<sup>87</sup> The Interim Policy further provides:

- Any student who is determined to have committed sexual assault may receive a sanction ranging from suspension to expulsion.
- Any student who is determined to have committed non-consensual sexual contact or any other prohibited form of conduct may receive a sanction ranging from conduct warning to expulsion.<sup>88</sup>

The Interim Policy notes that “the hearing panel may deviate from the range of recommended sanctions, based upon a full consideration of the following factors: (1) the Respondent’s prior discipline history; (2) how the College has sanctioned similar incidents in the past; (3) the nature and violence of the conduct at issue; (4) the impact of the conduct on the Complainant; (5) the impact of the conduct on the community, its members, or its property; (6) whether the Respondent has accepted responsibility for his actions; (7) whether the Respondent is reasonably likely to engage in the conduct in the future; (8) the need to deter similar conduct by others; and (9) any other mitigating or aggravating circumstances, including the College’s values.”<sup>89</sup>

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<sup>87</sup> Occidental College Sexual Misconduct Policy.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

The law and guidance give great deference to an institution to fashion an appropriate sanction. We note that, since we did not reinvestigate or reevaluate the incidents in question, we could not substitute our judgment as to sanction. Recognizing that reasonable minds may differ regarding the appropriate sanction in any given case, in the Interim Policy, the College has sought to address concerns about its sanctioning processes. The goal of the Interim Policy is to create consistency, transparency and realistic expectations by setting forth clear guidance, presumptive sanctioning and consistent sanctioning considerations. This approach is certainly within the parameters of the law and the guidance, which are largely silent as to sanctions.

#### **4. Appeals**

As with sanctions, the law and the guidance provide educational institutions wide latitude to provide for an appeal of the findings or remedies, so long as the process provides equal access by both parties, prompt and equitable resolution of the appeal by an impartial decision-maker and written notice of the outcome of the appeal.

The appeals process under the Sexual Misconduct Policy in effect during the 2011-2012 and 2012-2013 academic years involved two steps: 1) an initial determination of whether the grounds articulated satisfied the policy-based standing requirements; and 2) a subsequent review by an Appeals Committee.

We heard concerns about the role of the appellate authority, including: the perception that results were affected by the threat of a lawsuit; the perceived preferential treatment of respondent appeals; and the belief that sanctions were routinely downgraded or waived on appeal. In its April 2013 letter, titled *Why is OSAC Filing Federal Complaints against Occidental College?*, OSAC asserted that “After a thorough adjudication process in which a respondent is found responsible, administrators have granted ‘automatic appeals’ to respondents” but asserted that “Complainants’ requests for appeals are routinely denied.”

The cases we reviewed do not support these assertions. An appeal was filed in eleven of the seventeen reports we reviewed. Only two of those eleven appeals were granted. In the remaining cases, eight appeals (filed by both complainants and respondents) were denied and one was withdrawn. Thus, in fifteen of the seventeen cases formally adjudicated over a two-year period, the outcome of the hearing was final.

For the two appeals that were granted, both on behalf of respondents, the finding of responsibility was affirmed, but the sanction was reduced. In one instance, the sanction was reduced from expulsion to a two-year suspension. The respondent, however, never returned to campus given his concurrent expulsion on a separate report. In the other instance, based on the consideration of new evidence, the sanction was reduced from a one-semester suspension and ten hours of community service to fifty hours community service and an educational sanction.

The concerns raised about the appellate process recognize the need for finality in outcomes, timely resolution of appeals, concise and limited grounds for appeal, and transparency

in the identity of the appellate authority. They also highlight the continued need for transparency in sharing the rationale for resolving the appeal. The Interim Policy incorporates elements that address each of these concerns.

### **C. Interactions between College Administrators and Students**

The perspectives shared by campus constituents varied greatly with respect to their evaluation of College administrators, including the Dean of Students, the President, the Title IX Coordinator and College counsel during the 2012-2013 academic year. We received significant feedback, both positive and negative, about these and other College administrators. Opinions ranged from the public votes of no confidence on the faculty floor with respect to College Counsel and the Dean of Students to staunch support of the President, Student Affairs Division and Title IX Coordinator. For example, some viewed the President as disconnected and slow to respond to the call to action, while others viewed his efforts as sincere and significant steps to understand and address the issue of sexual violence on campus. What is abundantly clear to us is that there is no consensus – nor does there seem to be a neutral or vocal middle ground. While some community members were able to give the benefit of the doubt to the stated good intentions of professionals on either side of the debate, others could find no basis to do so.

Specific observations by community members included the following:

- “Administrators made insensitive comments;”
- “Dissatisfaction with administrators because of tone, misspellings in documents and lack of attention to detail;”
- “Administrators did not have sufficient resources and support;”
- “Need for a coordinated response team that is comprised of more than two people;”
- “Need to improve communication with the parties at all stages of the process, but in particular, in cases where resolution lasts longer than 60 days without effective updates;”
- “Communication by the College with the parties is sporadic and student-driven, largely because Title IX Coordinator is under-resourced and overburdened with other job responsibilities;” and
- “Administrators are well-intentioned, but overwhelmed.”

Our review of the available documents reflects the same range of responses. We reviewed correspondence that demonstrated, in some cases, inconsistent communications and responses by administrators. Some of the correspondence included acknowledgments by the administrator of delayed communication because of overwhelming responsibilities affiliated with

the scope of the administrator's job duties. In contrast, we also reviewed correspondence that reflected ongoing and regular communication between administrators and complainants, including communications by complainants praising the administrators for their care, concern and responsiveness.

As these comments indicate, we received accounts of insufficient training, inartful communication, lack of coordination, insufficient resources, poor judgment and missed opportunities for proactive responses. We did not, however, observe, nor did we receive specific accounts of, ill will or malice on the part of administrators. While we are aware of the retaliation concerns expressed by OSAC to the media and in their publications, individuals did not come forward to share those concerns with us directly. Notwithstanding the existence of those complaints, which we expect OCR will address, we observed a consistent and dogged commitment by the College to improve its response. Every administrator we spoke to cooperated fully with our review and was open to enhancing the College's institutional responses. The same was true of student affairs staff, faculty members and students alike. The administrators and faculty we interviewed articulated a genuine commitment to student welfare. Indeed, in the spring, summer and fall of 2013, given the close connection of student affairs personnel to these issues, we observed significant morale concerns within the division. We spoke with many student affairs professionals who expressed sadness and disappointment that some of the very students they served felt that the student affairs personnel failed to do so effectively. Many expressed a reluctance to come to work, and described impacts that transcended their professional lives. Despite the sometimes personal attacks, however, these professionals approached our process openly, recognizing that the perception of failure was enough to warrant a closer look at policies, procedures and practices.

As outside consultants, we are keenly aware of having begun our assessment at a time when significant damage had already been done to lines of communication and trust between the administration and other members of the community, including students and faculty. We remain optimistic, however, in our conclusion that the College administrators share the same goals as many on campus: elimination of sexual and gender-based harassment and violence, holistic support for those affected by sexual violence, fair and equitable investigative and adjudicative processes and compliant yet caring institutional responses.

Regardless of whether perceived administrative failures are substantiated, the nature of the concerns highlight the need for dedicated employees, appropriate resources, training and education and a renewed commitment to regular and ongoing communication. We cannot overstate the importance of consistent, timely and appropriate communication with the parties by the administrators charged with overseeing the Title IX response. For a complainant and a respondent, seeking formal disciplinary action and participating in an investigation and hearing can be overwhelming. Providing regular periodic communication that sets reasonable expectations as to time frames and next steps is critical to an individual's well-being and will better serve complainants and respondents throughout the process.

In our teaching on these issues across the country, we identify these early interactions between students and administrators as a prime opportunity for improving

implementation. College administrators and front-line staff properly trained in the impacts of trauma and in understanding the many trajectories of healing in the aftermath of a traumatic incident can learn how to better support complainants in these initial conversations, and importantly, how to buttress the effectiveness of these communications.

In the absence of clear and effective communication, particularly in the current context, the result is often a negative inference. As an example, in *Why is OSAC Filing Federal Complaints against Occidental College?*, OSAC identified a concern that students had been discouraged from reporting. In one example, OSAC noted that a student was told that “They should not go to the police (e.g., by saying that the “LAPD wasn’t going to be as nice” as Oxy).” As an outside observer, without knowing the identity of the parties or the circumstances of the conversation, we nevertheless understand some of the underlying dynamics of such a conversation. Acknowledging that there are examples of miscommunication at campuses across the country, we often observe a disconnect between the words of a well-intentioned administrator and the message heard by a complainant. The administrator will share that it was their intention to provide candid observations about the college or law enforcement process to provide a complainant with realistic expectations of the process and the benefit of the administrator’s experience. In contrast, complainants will share that what they heard is not a frank acknowledgement of the difficulties of the path ahead to empower informed choices, but instead, when filtered through the lens of trauma, the message heard is that the complainant is not strong enough, that their account is not valid, or even discouragement from contacting the police or pursuing a complaint.

Two effective practices, both of which are now mandated by law, include: 1) allowing a complainant (and a respondent) to be accompanied by an advisor of their choice to any disciplinary proceeding or related meeting;<sup>90</sup> and, 2) providing written information to a complainant regarding rights and options.<sup>91</sup> Each of these practices enhance the effectiveness of communication, help to avoid miscommunication and provide a complainant with meaningful information in a format that can be shared with those who are providing support and care. The College has embraced these goals and has already incorporated the evolving laws and guidance of 2013 and 2014.

As discussed above, we provided staffing recommendations to assure the College has the personnel and resources to enhance the College’s ability to support community members who experience sexual assault. The College likewise has embraced that recommendation and significantly expanded the resources and personnel available to respond to sexual and gender-based harassment and violence.

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<sup>90</sup> Section 304 of the VAWA (Pub. Law 113-4).

<sup>91</sup> *Id.*

## **VI. Summary of Action Steps to Date**

In addition to our engagement, frank assessments and recommendations over the past eighteen months, the College has taken what we believe to be significant steps to enhance the level of resources and accessible information available to students, improve the immediate responsiveness to a report of misconduct, provide education and training programs, and implement an effective infrastructure to respond effectively through remedies, investigation and resolution of a report. Steps taken by the College since April 2013 include:

- Creation of Survivor Advocate position and hiring of Naddia Palacios to provide 24/7 confidential support to students who are survivors of sexual violence (April 2013)
- Redesigned and expanded website, Sexual Assault Resources and Support, to serve as central resource (April 2013)
- Creation of online anonymous suggestion box (May 2013)
- Creation of an independent Title IX Office that directly reports to the President (June 2013)
- Appointment of Dr. Irene Girton as Interim Title IX Coordinator (June 2013)
- Peace Over Violence training for senior leadership (June and July 2013)
- Implementation of 24/7 telephone crisis hotline (August 2013)
- Creation of Occidental Assault Advocacy and Response Team (OAART) to provide comprehensive support system for survivors of sexual assault that includes advocacy, counseling and medical services, as well as information about additional support including forensic exams, legal support and housing and academic accommodations (Summer 2013)
- Appointment of former sexual assault prosecutor Lauren Carella as Interim Title IX Coordinator (August 2013)
- Implementation of a uniform Interim Sexual Misconduct Policy (August 2013)
- Sexual Assault Survivor Advocate and Emmons staff attended the 2013 National Sexual Assault Conference (August 2013)
- Training sessions for faculty and staff to create an expanded pool of individuals interested in serving as advisors or hearing panel members (August and September 2013)
- More than fifty training sessions for resident advisors, Residential Education and Housing Services, graduate assistants, professional staff, Campus Safety, Orientation

team leaders, student leaders, athletes, athletics staff, and Greek organizations, students and the campus community (Ongoing as part of annual initiatives)

- Expanded staffing for Project SAFE (addition of two paid positions, bringing the total to four) (August 2013)
- Introduction of Think About It online education module (which incorporates an introduction to the Interim Sexual Misconduct Policy) for all incoming and returning students (August 2013)
- Expanded orientation programming to include 4.5 hours of programming specifically devoted to issues of sexual violence, including a presentation by Jackson Katz as recommended by OSAC (August 2013)
- Implementation of First Year Residential Education Program, including a mandatory sexual misconduct component for all incoming students (September 2013)
- Independent Clery review by Margolis Healy and Associates (September 2013)
- Appointment of Sexual Misconduct Advisory Board to provide ongoing review of policies, practices, procedures, and programming relevant to sexual misconduct (September 2013)
- Creation of search committee for selection of a permanent Title IX Coordinator (September 2013)
- Use of external investigators and adjudicators in sexual assault cases (2013-2014)
- Revised format for Annual Security Report (October 2013)
- Self-reported revisions of Clery numbers to ensure accuracy (October 2013 and ongoing)
- Creation of Hearing Coordinator position and hiring of Cherie Scricca as Interim Hearing Coordinator (November 2013)
- Engagement of external adjudicator to resolve September 2013 report (November 2013)
- Independent review of Student Affairs Division by Dr. Gwen Dungy and Dr. Elizabeth Griego (2013- 2014)
- Appointment of a permanent Title IX Coordinator, Ruth Jones (February 2014)
- Applied for and received a \$300,000, three-year grant from the U.S. Department of Justice to improve on-campus training and better coordinate with off-campus partners, including the Los Angeles Police Department (2013-2014)

- Appointment of Deputy Title IX Coordinators (March 2014)
  - Jacalyn Feigelman, Associate Director of Human Resources
  - Alison Haehnel, Title IX athletic issues
- With funds from a U.S. Justice Department grant, hired Karla Aguilar as the full-time Project S.A.F.E. Program Coordinator and Prevention Education Specialist (June 2014)
- Adopted a new case management software system, designed specifically for higher education recordkeeping, to improve recordkeeping, document management, and analyze trends and patterns through an analytics component (July 2014)
- Hired Veronika Barsegyan as the College's first full-time Clery Administrator (August 2014)
- Title IX Office created and distributed new brochures on how to report, available resources, rights and responsibilities of complainants and respondents and responsible employees (August 2014)
- Revised slideshows describing each stage of the formal resolution process to be shown to complainants and respondents (August 2014)
- Project Safe created a print empowerment guide for survivors (August 2014)
- Developed and implemented more formal Title IX office protocols for complaint assignment to investigators and communications with participants in the process (August 2014)
- Hired Leora Freedman, former University Counsel for California State University, as full-time legal counsel (August 2014)
- Solicited recommendations for faculty to serve as Deputy Title IX Coordinator (September 2014)
- Hired Victor Clay, a 28-year veteran of the Los Angeles County Sheriff's Department, as the Chief of Campus Safety (September 2014)
- Campus formally notified that faculty, staff and administrators are responsible employees under Title IX (September 2014)
- Completed twenty-two Title IX training sessions for faculty, staff and students, with an additional twelve sessions scheduled. A few of the training sessions will be in Spanish. (August 2012 to present; ongoing)

- Hired student employees to translate training materials into Spanish (September 2014)
- Title IX office update e-mail sent to community (September 2014)
- Training for advisors (September 2014)
- Office of Institutional Research to draft a campus climate survey to be administered during the current 2014-15 academic year

These actions reflect a significant commitment to holistically responding to sexual and gender-based harassment and violence by integrating the evolving requirements of the regulatory framework and an understanding of the dynamics of sexual and gender-based harassment and violence into current policies, procedures and practices. These efforts, which are focused on prevention and education as well as effective investigative and remedial responses, reflect a commitment that goes beyond the mere “check-the-box” compliance requirements. Consistent with the institutional values as set forth in the Interim Policy, these efforts reflect the College’s commitment “to fostering a climate free from sexual harassment, sexual violence, and intimate partner violence through clear and effective policies, a coordinated education and prevention program, and prompt and equitable procedures for resolution of complaints.”<sup>92</sup>

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<sup>92</sup> Occidental College Sexual Misconduct Policy.

## **VII. Recommended Next Steps**

Effective institutional responses must transcend a compliance-based mindset and incorporate an integrated and coordinated approach to Title IX, Clery and VAWA that prioritizes student and employee welfare and safety, assures compassionate and trauma-informed responses and takes into account an educational institution's unique context and circumstances.

Similar to our approach in drafting the Interim Policy, the scope of our audit and assessment goes beyond technical compliance with Title IX and related laws. Our recommendations seek to integrate the human element into policies and procedures by incorporating compassionate, trauma-informed, fair and impartial practices. A central goal of our engagement has been to understand how the College's policies, procedures and the role of implementers have served – or failed to serve – Occidental's students in the past, and to identify areas where the College could improve policies, procedures and implementation practices. This process is necessarily an ongoing one, and the College should continue to assess the effectiveness of policies, procedures and practices, both individually and systemically, on an annual basis. Our observations and conclusions about past practices have served as the foundation for our advice to the College to date. Many of our recommendations have already been implemented, reflecting the College's commitment to improving its responsiveness to allegations of sexual and gender-based violence and harassment.

We recognize that the federal Title IX and Clery investigations are still ongoing, and we expect that the resolution of those complaints may provide additional recommendations and required actions by the College. In the interim, as we await federal determinations of compliance with respect to past and current policies, procedures and practices, we offer the following recommendations for the College to consider:

### **A. Continued Engagement with Community Members**

As noted above, in synthesizing the information learned to date from our interactions with community members, we felt that we were still missing some voices in the conversation. Before completing our final report, we sought additional opportunities to allow all Occidental community members to participate in our review. Although this report concludes our active audit and assessment, the anonymous suggestion box remains open and we remain available to speak directly with any student, staff or faculty member regarding their experiences, practices or reactions to this report. We encourage anyone interested to contact us directly or via the online anonymous suggestion box. We know that the College is committed to this continued open and transparent conversation.

In particular, we encourage any individual who has reported sexual or gender-based violence to the College (anonymously or otherwise), whether or not those complainants were the subject of an investigation or adjudication by a hearing panel, to consider reaching out to the College's Title IX Coordinator to address any outstanding concerns and share feedback about their participation in the process. We have learned indirectly that there are concerns that individuals were discouraged from reporting an incident of sexual misconduct under prior

policies and administration. We especially encourage those individuals to contact the Title IX Coordinator to explore current options for support, accommodations, protective measures or resolution of a complaint.

In addition, we encourage Occidental to review all anonymous and informal reports received for the past two years, and to ensure that each complainant known to the College receives information about resources, accommodations and current options for reporting and the resolution of a report, both on-campus and off-campus. We note that the College has established a practice of providing such information in response to all reports where the complainant's identity is known, and we encourage the College to take steps to ensure consistent adherence to that practice.

## **B. Policy**

We recommend that the College finalize the Interim Policy. We recommend that the College consider the following steps in finalizing the policy:

- 1) Clarify the reporting responsibilities of all employees, including faculty and staff, to integrate the multiple reporting requirements and systems under the Clery Act (Campus Security Authority), Title IX (responsible employee), mandatory child abuse reporting and California state law (obligations of health care professionals);
- 2) Draft procedures for resolution of complaints against staff and faculty (in progress);
- 3) Incorporate expanded guidance from the pending regulations implementing the 2013 Reauthorization of VAWA, including the requirement that the parties may be accompanied by an advisor of their choice (in progress); and
- 4) Supplement the policy with additional resource documents as necessary to increase its accessibility, reinforce clarity and facilitate ongoing delivery of relevant information.

## **C. Hearing Coordinator**

Although the College has continued to expand staff and dedicate resources to this critical area, we recommend that the College supplement the personnel and resources available to respond to Title IX reports by creating a permanent Hearing Coordinator position to facilitate the implementation of the Interim Policy. Although the College filled this position on an interim basis in November 2013, no final determinations have been made as to the permanent status of this position. Should the College consider moving to an investigative model (where an investigator or investigative team determines policy violations in lieu of a hearing board), this position may no longer be required.

## **D. Implementation and Internal Protocols**

We recommend that the College continue to take steps to build consistent internal operating protocols for the coordination of information and personnel. We note that both Ms. Carella and Ms. Jones have taken steps to develop these protocols, but with the addition of new personnel, we encourage the College to ensure that appropriate protocols are in place to enhance the coordination of information and personnel, and as outlined below, facilitate the identification and coordination of roles and responsibilities. Those steps include:

### **1. Title IX Assessment**

We recommend that the College implement a coordinated and integrated institutional response by conducting a Title IX assessment in every case where the College knows or should know of sexual or gender-based harassment or violence. In essence, each report made to the College through a responsible employee or designated reporting option should immediately be shared with the Title IX Coordinator to ensure a prompt and equitable review, investigation and resolution. A centralized response encourages consistent application of the policy to all individuals and allows the College to respond promptly and equitably to eliminate the harassment, prevent its recurrence and eliminate its effects. The centralized review process should involve an interdepartmental team, led by the Title IX Coordinator, which may include Deputy Title IX Coordinators, student affairs/student conduct, human resources, campus safety, health and counseling services and other necessary College personnel. This multi-disciplinary team approach facilitates more nuanced and consistent institutional processes based on: the coordination of personnel and sharing of information; compassionate and trauma-informed responses; prioritization of care, support, and resources; the recognition of complainant agency and autonomy; a thorough, sound and supportable investigation, and fair and impartial processes that protect the safety of victims and the community and promote accountability for violations.

### **2. Identify a Title IX response team and map out roles and responsibilities**

The members of the Title IX teams should be clearly identified. The Title IX team is a core group of administrators tasked with carrying out an initial assessment, implementing interim protective measures and accommodations and ensuring fair and impartial investigation and adjudication.

As a first step, the Title IX Coordinator, working with the Title IX team, should clearly identify and articulate the roles and responsibilities of each University employee involved in responding to an incident of sexual harassment, sexual assault, dating violence, domestic violence or stalking. This step also includes discussion about the primary responsibility of each department, the coordination and sharing of information between and among relevant departments and the protocols that should be followed where there are overlapping responsibilities or conflicts in roles. It also includes discussion about the distinction between privacy and confidentiality, the separation of support and advocacy from investigative functions and clarity of roles in the process from the student perspective.

**3. Outline institutional sequence of response**

As a second step, we recommend drafting internal operating procedures that funnel all information to a centralized Title IX assessment, outline workflow steps, build mechanisms for timely coordination of information and outline the institutional sequence following a report.

**4. Create first responder protocols for individuals likely to receive a report**

The College should identify all potential first responders and create first responder protocols that relay consistent information to the Title IX Coordinator/team in a timely manner. As noted below, the College should also assure that these first responders are appropriately trained in how to receive and respond to a report. The College should also communicate with the community its goal to eradicate sexual and gender-based violence, foster increased reporting and break the culture of silence by connecting complainants to professional resources that prioritize agency and autonomy for a complainant and provide reasonably available interim measures and supports regardless of a complainant's chosen course of action.

**5. Enhance consistent communication and compliant responses through the use of template forms, communications and checklists**

The College should strive for consistent and compliant responses through the use of template forms and communications, checklists and careful documentation and record keeping. These resources will reinforce informed, consistent, fair and caring communications and responses. The College should also consider building in decision trees regarding timely warning, how to proceed if a complainant requests confidentiality, the use of interim remedies and other responses (including suspension), how to respond to retaliation and other key determinations, to ensure a consistent institutional response rather than an ad hoc response to each incident. For example, in considering the implementation of interim remedies, we recommend that the College identify the factors that will be considered in determining whether a reasonably available remedy is appropriate, determine who has the ultimate authority in implementing the remedy, and assure that the decision, and reasons in support of that determination, are carefully documented.

**6. Implement centralized tracking and monitoring**

We recommend that the College implement a centralized tracking system for all reports, informal or formal, to enable the College (through the Title IX Coordinator) to track patterns and evaluate campus occurrences in the context of the duty to eliminate and prevent the existence of a hostile environment and provide remedies for the safety and protection of the campus community. The College has taken significant steps to use existing software platforms to achieve this goal.

## **E. Investigation**

We recommend that the College identify a sustainable investigative model that protects the safety of complainants and promotes accountability for respondents in the context of fair and impartial processes. Given the climate and context as it relates to student affairs, this may involve hiring a dedicated Title IX investigator or, as the College is currently doing, deciding to engage external investigators on a contract or as-needed basis. Depending on the structure of the investigative model, the College may choose to eliminate the use of a hearing panel and streamline administrative responses. There are many discretionary aspects in drafting a new investigative model. As options, the College should consider:

- 1) The use of current trained and experienced employees, the hiring of a dedicated Title IX investigator, and/or the continued retention of external investigators;
- 2) Exploring options in the scope of the investigator's role, including allowing the investigator to gather the facts, make a threshold determination, or make the final determination, by a preponderance of the evidence, whether there is sufficient information to find that the policy has been violated.
- 3) Depending on the role of the investigator, designating an individual administrator, panel, or external adjudicator as the decision-maker and/or disciplinary authority.

Regardless of the chosen model(s), we recommend that the College implement consistent investigative protocols that address: forensic interview practices; interviews with the parties as well as other witnesses who may provide corroboration (or lack thereof); preservation and collection of any physical evidence (including social media); and a synthesized presentation of the facts for review by the adjudicator. A competent Title IX investigation should be conducted by skilled investigators trained in the dynamics of sexual assault, trauma, counter-intuitive victim behaviors, dating and domestic violence, stalking, the impact of drugs and alcohol, and evaluating consent. Investigators should be trained in how to evaluate a word-against-word credibility case, including an understanding of the importance of demeanor, interest, detail, corroboration and known patterns of human behavior. Investigators should remain neutral and impartial. Where possible, we recommend that the investigation be conducted by an experienced, impartial team of two individuals. In addition, investigative and support functions should be kept separate.

We note that since the fall of 2013, the College has hired licensed and experienced investigators on an as-needed basis. This practice addresses many of the recommended considerations here, but we recognize that this model may not be sustainable on a continuing basis.

## **F. Climate Assessment**

We recommend that the College consider conducting a climate assessment that seeks to identify challenges in the current campus climate that affect the educational or

employment environment or create barriers to reporting. This may include: an assessment of the campus climate; an evaluation of the role of alcohol or other drugs on campus and the efficacy of existing alcohol and other drug policies; and an assessment of any areas of risk for students. A canvassing of all campus community members through a variety of methods – online and in-person, both anonymous and in open forums – serves a critical role in identifying key issues, assessing campus climate as reflected in recent OCR guidance, identifying educational and training needs for all constituencies and, ultimately, eliminating a hostile environment based on a greater understanding of the context. It also demonstrates the College’s commitment to addressing issues of sexual violence directly and openly.

There is no legal requirement, at this time, that the College conduct a climate assessment. In the 2011 Dear Colleague Letter, OCR recommended that schools “conduct[], in conjunction with student leaders, a school or campus ‘climate check’ to assess the effectiveness of efforts to ensure that the school is free from sexual harassment and violence, and us[e] the resulting information to inform future proactive steps that will be taken by the school.”<sup>93</sup> In the Title IX Q&A, OCR also suggested that a school consider conducting climate surveys, but framed the goal as “to learn more about the prevalence of sexual violence at the school,” rather than evaluating effectiveness.<sup>94</sup> In addition, the White House Task Force “urge[d] schools to show they’re serious about the problem by conducting [a climate] survey” within the next year.<sup>95</sup> Like the Title IX Q&A, the White House Task Force recommends a climate assessment to test prevalence, noting that, “When done right, these surveys can gauge the prevalence of sexual assault on campus, test students’ attitudes and awareness about the issue, and provide schools with an invaluable tool for crafting solutions.”<sup>96</sup> While the recommendations in the significant guidance documents and references to climate surveys in the White House Task Force report are not binding, we acknowledge that a typical voluntary resolution agreement will require a climate assessment. We also note that the White House Task Force is exploring legislative or administrative options to require schools to conduct such a survey in 2016.

In moving forward with a climate assessment, we recommend that the College proceed carefully in the design and application of the assessment. A close look at the sample climate survey toolkit provided as a link in the White House Task Force Report reflects that the sample climate survey questions admittedly “have not been validated.” Further, the authors of the toolkit acknowledge that “untrustworthy data can do more harm than good in efforts to change campus climate.”

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<sup>93</sup> 2011 DCL at 18.

<sup>94</sup> Title IX Q&A at 24.

<sup>95</sup> *Not Alone, The First Report of the White House Task Force to Protect Students From Sexual Assault* (Apr. 2014), at 2, <https://www.notalone.gov/assets/report.pdf>.

<sup>96</sup> *Id* at 8.

We recognize that there are many methods of conducting climate assessments, many of which do not involve a formal written survey. Over the past two years, the College has sought community feedback and engagement through the work of the Sexual Misconduct Advisory Board, town hall meetings, Think About It surveys and the online anonymous suggestion box. Each is a tool that can be used to assess and understand climate and effectiveness of policies and procedures, and we encourage the College to remain committed to identifying avenues for community input.

**G. Education, Prevention and Training**

As noted in the Summary of Action Steps to Date, the College already provides extensive ongoing education, prevention and training programs. We recommend that the College augment those programs with additional content set forth in VAWA and the Q & A on Title IX and Sexual Violence. We also recommend that the College consider a coordinated and systemic approach to education and prevention, as follows:

- 1) Designate one individual with oversight responsibility for coordination of all College training and educational programming.
- 2) Assure that all Title IX training across the many different facets of the College is comprised of consistent messages and content.
- 3) Consider multi-disciplinary programming to address issues of sexual violence, gender equity, tolerance and diversity, alcohol and substance abuse, intimacy, consent, the “hook up” culture, social media, bullying, hazing, classism, racism and other issues that can impact campus culture and the development and education of students. We note that much of this training may be occurring through Project SAFE, FYRE and other initiatives, but we encourage the College to consider the intersectionality of the many existing efforts on campus and continue to find creative ways of presenting content in integrated ways.
- 4) Review existing training and education programs to assure that the key VAWA elements addressing domestic violence, dating violence, sexual assault and stalking are incorporated for students and employees. Education programs should include:
  - a. Primary prevention and awareness programs for all incoming students and new employees, including safe and positive options for bystander intervention;
  - b. Information on risk reduction to recognize warning signs of abusive behavior; and,
  - c. Ongoing prevention and awareness programs for students and faculty.

- 5) Continue to provide regular and ongoing integrated training to all employees that addresses reporting responsibilities for campus employees regarding:
  - a. Clery: Campus Security Authority
  - b. Title IX: Responsible Employee
  - c. Mandatory child abuse reporting
  - d. California state law (obligations of health professionals).
  
- 6) Review existing training programs to assure that they encompass the expanded scope of content under the Title IX Q & A. A training guide is provided as Appendix VII.

## VIII. Conclusion

We have been honored to work with Occidental since April 2013. Occidental is distinguished by the legions of passionate and dedicated individuals – students, faculty, administrators and staff alike – who are willing to speak up, speak out and take action against sexual and gender-based violence. We have heard, from many corners of campus, voices of optimism and hope. To that end, we would like to share some of those thoughts of optimism shared by members of the community:

- “The student leadership has been amazing;”
- “Our students in OSAC have been incredibly brave;”
- “Glad we have faculty and staff that are passionately seeking solutions to this process;”
- “The students involved in this have been exemplary – articulate, brave, respectful, and admirable;”
- “I’m proud of the students, faculty and staff who have set a precedent for supporting survivors;”
- “I see so many members of our community dedicated to healing wounds and moving forward. It’s heartening to see people who believe in their cause;”
- “I believe everyone wants to make the campus safe and non-hostile, even if we don’t know how to get there;”
- “There is an interest by all partners in the development of better policies to deal with sexual misconduct on campus;”
- “I think there is the will here to get things right – people care about each other;” and
- “My goal is for everyone to understand that we have a shared goal – the well-being of our students.”

Experiencing an act of sexual or gender-based harassment or violence can be life altering. No two individuals respond alike, and individuals may experience a range of emotions and changes in life circumstances. Any act of sexual or gender-based harassment or violence is one act too many, and we commend the College and its community members for its continued commitment to these issues.

The simple truth is that no institutional response will ever be “good enough” to undo the harm caused by another individual, reverse an act of sexual or gender-based harassment or violence, or erase the impacts. But that does not mean that colleges should not continue to approach these issues with fervor and relentlessly seek to assess and enhance sensitive and

informed responses. Occidental has demonstrated meaningful and ongoing efforts to serve its students well – to overhaul policies and procedures, change personnel and structure and continually hold a mirror to its own actions.

We live in a community of diverse ideas and beliefs. This means there may be more than one “right” way to respond to sexual or gender-based harassment and violence.<sup>97</sup> Our hope is that the meaningful participation of campus activists and community members, the steps taken by the College, the transparency in information shared in this letter and prior communications by the College and the forthcoming recommendations by the DOE provide a platform where the Occidental community can heal and rebuild trust.

At Occidental, we have sought input from all voices. We listened with an earnest intent to hear all insights. We are particularly grateful to the individuals who candidly shared their experiences, observations, recommendations and hopes with us. We encourage a continued dialogue and conversation on these issues and remain available to any Occidental community member, through the anonymous suggestion box<sup>98</sup> and/or direct communication.

In synthesizing these thoughts for the Occidental community, we brought our best efforts, informed by our collective forty-five years of experience with sexual and gender-based harassment and violence, the current state of the evolving law, and insights gleaned from our work on campuses across the country. We are grateful to President Veitch, the Board of Trustees and senior leadership for entrusting us with this responsibility and for embracing the College’s mission to provide a welcoming and safe environment for all students and employees.

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<sup>97</sup> *2001 Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* - Title IX, pg. iii.

<sup>98</sup> The anonymous suggestion box is available at [https://oxy.qualtrics.com/SE/?SID=SV\\_8d1V3gEt6szEaix](https://oxy.qualtrics.com/SE/?SID=SV_8d1V3gEt6szEaix).

# **APPENDIX I**

**Appendix I:**

**Our Efforts to Engage Individual Community Members**

In early April, 2013, during our first visit to Occidental, we met with faculty and student members of the Oxy Sexual Assault Coalition (OSAC). During that meeting, we expressly requested to meet with complainants in order to directly understand their concerns. OSAC faculty members present that day specifically told us that they would not permit us to meet with complainants. We continued, however, to express interest in doing so, both in that initial meeting and by providing other opportunities, including community forums, the online suggestion box and an open invitation to the campus for any individual who wished to speak with us to have individual meetings. Many community members, including complainants, took advantage of those invitations and spoke with us.

And yet, we still felt that there were more voices to be heard at Occidental. In particular, we felt it important to understand the perspective of those individuals who had negative experiences with the College's policies and procedures. We learned that a Title IX complaint had been filed with the Office for Civil Rights outlining specific concerns by students and faculty, but that complaint has not been made available to either the College or to us. On our second campus visit in late April 2013, at our request, we again met with OSAC. We also met with Oxy Men Against Rape (OMAR). And in July, in preparation for our August campus visit, the College directly contacted faculty members affiliated with OSAC on our behalf to request a meeting with complainants:

*On Tue, Jul 30, 2013 at 5:49 PM, Rebecca Stolz <rstolz@oxy.edu> wrote:*

*Dear Caroline [Heldman], Danielle [Dirks], James [Ford] and Richard [Mora],*

*Gina Smith and Leslie Gomez, who are conducting an independent review of Oxy's sexual misconduct policies and procedures, will be on campus August 23-26 to meet with various groups. I am assisting them with scheduling for this visit.*

*Would you please let me know how best to extend an invitation to OSAC and OMAR members to meet with Gina and Leslie while they are on campus? Would the two groups prefer a joint meeting, or separate meetings?*

*Please let me know how best to proceed, or if I should contact someone else.*

*Thank you!*

*Rebecca*

The College received the following response:

*From: Caroline Heldman <heldman@oxy.edu>*

*Date: Wed, Jul 31, 2013 at 3:29 PM*

*Subject: Re: OSAC and OMAR meetings with Gina & Leslie?*

*To: Rebecca Stolz <rstolz@oxy.edu>*

*Cc: Danielle Dirks <dirks@oxy.edu>, Richard Mora <rmora@oxy.edu>, James Ford <jford@oxy.edu>*

*Dear Rebecca,*

*Thank you for this invitation. OSAC will not be participating with Smith and Gomez's investigation since our previous meetings with these attorneys have been so unfruitful, and since the DOE is conducting an impartial investigation that will produce some useful plans for moving forward.*

*Best,*

*Caroline + Danielle*

President Veitch replied on August 7, 2013, reinforcing our interest in meeting with OSAC: “The College, as well as Gina and Leslie, continue to value OSAC's feedback as we work towards a coordinated and integrated response to sexual violence and harassment, including achieving the longer-term goal of creating a model final policy.” OSAC declined this outreach as well.

On February 7, 2014, we responded to the Occidental Weekly's request for an update on the timing of our recommendations, as follows:

*In synthesizing the information learned to date, however, we felt that we were still missing some voices in the conversation. Before completing our final report, we are taking an additional opportunity to invite Occidental community members to participate in our review. The suggestion box remains open, but we are also available to speak directly with any student, staff or faculty member who would like to be heard on the issues before we conclude our review.*

In an April 29, 2014 article in the Occidental Weekly, it was reported that OSAC would become a student only organization.<sup>1</sup> On May 20, 2014, we contacted the student representative who was quoted on behalf of OSAC with the following communication:

*We are writing to you as a representative of OSAC. Over the past year, we have sought the input of survivors in our review of past cases. While we have heard from many, we believe that there are others with concerns and experiences that may be valuable to our*

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<sup>1</sup> Juliet Suess, *Allies, Trustees Clash over College Policy*, OCCIDENTAL WEEKLY (Apr. 29, 2014), <http://occidentalweekly.com/news/2014/04/29/allies-trustees-clash-over-college-policy/>.

*review. Is there a forum or shared list serve for OSAC members where you would be willing to post the message below?*

*Thank you,*

*Leslie and Gina*

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*To student members of OSAC,*

*In April 2013, we were tasked with conducting an external review of the College's response to cases over the past two years. To us, a central part of that review is understanding the perspectives and experiences of those who have reported, felt discouraged from reporting, participated in an investigation or hearing, or otherwise intersected with the College's Sexual Misconduct Policy or administrators responsible for its implementation. During our first visit to campus, we met with faculty and student members of OSAC. During that meeting, we expressly requested to meet with survivors who were willing to meet with us in order to directly understand their concerns. We were specifically told that OSAC would not permit us to meet with survivors. We continued, however, to express interest in doing so, both in that initial meeting and by providing other opportunities, including community forums, the online suggestion box, and an open invitation to the campus for any individual who wished to speak with us to have individual meetings. Many community members, including survivors, took advantage of those invitations and spoke with us. On our second visit to campus in late April, we met with members of OSAC and OMAR, again at our request. And in July, the College on our behalf, directly contacted OSAC and OMAR faculty advisors to request a meeting with each group. The College was told, in writing, that OSAC would not be participating in our review.*

*We seek to include all opportunities for survivors to impact the nature of the College's future responses to sexual and gender-based harassment and violence. We have opened many avenues for the receipt of this information, including anonymous, in person, or any other forum that may best meet the needs of a survivor. We understand that there may be distrust of the College, and as an extension, of outside consultants, but as we shared with OSAC and many other Oxy community members, our independence and our ability to call it as we see it is critical to our effectiveness. Since beginning our careers in the Philadelphia District Attorney's Office 2 to 3 decades ago, we have devoted our lives to*

*championing the rights of victims, working tirelessly for justice and seeking improvement in societal responses to sexual violence. The underpinnings of our work at Oxy are no different.*

*While we have read the Survivor Stories on the OSAC webpage and incorporated that information in our review, it is no substitute for understanding the individual student experience. In short, we believe that there are still more voices to be heard at Occidental before we can complete our report. As we shared with the Occidental Weekly on February 7, 2014:*

*In synthesizing the information learned to date, however, we felt that we were still missing some voices in the conversation. Before completing our final report, we are taking an additional opportunity to invite Occidental community members to participate in our review. The suggestion box remains open, but we are also available to speak directly with any student, staff or faculty member who would like to be heard on the issues before we conclude our review.*

*Please know that we respect the autonomy of any survivor to choose to speak or decline to speak with us. We understand that the choice to do so is a deeply personal one. Please also know that any information shared by a survivor will be used in an aggregate form, meaning that the survivor's name and other identifying information will not be shared with the College by us. Our goal is to have a sensitive, informed conversation – in person, by telephone or by Skype – with any survivor interested in speaking with us. We are hopeful that many of you consider taking the time to speak with us, or if you prefer, to communicate by email or through the anonymous Suggestion Box.*

*We can be reached at:*

*Leslie Gomez                      215-981-4522      [gomezl@pepperlaw.com](mailto:gomezl@pepperlaw.com)*

*Gina Smith                        215-981-4490      [smithgm@pepperlaw.com](mailto:smithgm@pepperlaw.com)*

*Thank you for your consideration of this important request.*

*Gina Smith and Leslie Gomez*

We also contacted OSAC directly on July 11, 2014, via the email address available on OSAC's webpage, with the following communication (nearly identical to the May 20 email):

*To student members of OSAC,*

*Over the past year, we have sought the input of survivors in our review of past cases. While we have heard from many, we believe that there are others with concerns and experiences that may be valuable to our review. Is there a forum or shared list serve for OSAC members where you would be willing to post the message below?*

*Thank you,*

*Leslie and Gina*

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*To student members of OSAC,*

*In April 2013, we were tasked with conducting an external review of the College's response to cases over the past two years. To us, a central part of that review is understanding the perspectives and experiences of those who have reported, felt discouraged from reporting, participated in an investigation or hearing, or otherwise intersected with the College's Sexual Misconduct Policy or administrators responsible for its implementation. During our first visit to campus, we met with faculty and student members of OSAC. During that meeting, we expressly requested to meet with survivors who were willing to meet with us in order to directly understand their concerns. We were specifically told that OSAC would not permit us to meet with survivors. We continued, however, to express interest in doing so, both in that initial meeting and by providing other opportunities, including community forums, the online suggestion box, and an open invitation to the campus for any individual who wished to speak with us to have individual meetings. Many community members, including survivors, took advantage of those invitations and spoke with us. On our second visit to campus in late April, we met with members of OSAC and OMAR, again at our request. And in July, the College on our behalf, directly contacted OSAC and OMAR faculty advisors to request a meeting with each group. The College was told, in writing, that OSAC would not be participating in our review.*

*We seek to include all opportunities for survivors to impact the nature of the College's future responses to sexual and gender-based harassment and violence. We have opened many avenues for the receipt of this information, including anonymous, in person, or any other forum that may best meet the needs of a survivor. We understand that there may be distrust of the College, and as an extension, of outside consultants, but as we shared with OSAC and*

*many other Oxy community members, our independence and our ability to call it as we see it is critical to our effectiveness. Since beginning our careers in the Philadelphia District Attorney's Office 2 to 3 decades ago, we have devoted our lives to championing the rights of victims, working tirelessly for justice and seeking improvement in societal responses to sexual violence. The underpinnings of our work at Oxy are no different.*

*While we have read the Survivor Stories on the OSAC webpage and incorporated that information in our review, it is no substitute for understanding the individual student experience. In short, we believe that there are still more voices to be heard at Occidental before we can complete our report. As we shared with the Occidental Weekly on February 7, 2014:*

*In synthesizing the information learned to date, however, we felt that we were still missing some voices in the conversation. Before completing our final report, we are taking an additional opportunity to invite Occidental community members to participate in our review. The suggestion box remains open, but we are also available to speak directly with any student, staff or faculty member who would like to be heard on the issues before we conclude our review.*

*Please know that we respect the autonomy of any survivor to choose to speak or decline to speak with us. We understand that the choice to do so is a deeply personal one. Please also know that any information shared by a survivor will be used in an aggregate form, meaning that the survivor's name and other identifying information will not be shared with the College by us. Our goal is to have a sensitive, informed conversation – in person, by telephone or by Skype – with any survivor interested in speaking with us. We are hopeful that many of you consider taking the time to speak with us, or if you prefer, to communicate by email or through the anonymous Suggestion Box.*

*We can be reached at:*

*Leslie Gomez            215-981-4522    [gomezl@pepperlaw.com](mailto:gomezl@pepperlaw.com)*

*Gina Smith              215-981-4490    [smithgm@pepperlaw.com](mailto:smithgm@pepperlaw.com)*

*Thank you for your consideration of this important request.*

*Gina Smith and Leslie Gomez*

We received no response from either outreach.

## **APPENDIX II**

**Appendix II:**

**List of Individuals/Groups Who Provided Foundation for Recommendations**

- Participants in the process:
  - Individual complainants and parents
  - Investigators
  - Advisors
  - Hearing panel members
  - Appeals committee members
- Individual faculty, staff and students who spoke with us confidentially
- Senior Leadership, including President Jonathan Veitch, Dean of College and Vice President for Academic Affairs Jorge Gonzalez, Vice President for Finance and Planning Amos Himmelstein, Dean of Students and Vice President for Student Life Barbara Avery, Vice President for Institutional Advancement Shelby Radcliffe, Associate Vice President for Strategic Initiatives Brett Schraeder, Associate Vice President and Director of Athletics Jaime Hoffman and Vice President for Admission and Financial Aid Vince Cuseo
- Current and former Title IX and Deputy Title IX Coordinators, including Lauren Carella, Irene Girton, Erica O’Neal Howard, Maryanne Horowitz, Richard Ledwin and Jaime Hoffman
- Faculty Council as of April 2013, including professors Amy Lyford, Aram Nersissian, Julie Prebel and Susan Gratch
- Campus Safety members, including Holly Nieto, Tim Chang and Sean Kennedy
- OSAC, including professors Caroline Heldman, Danielle Dirks, Lisa Wade, Richard Mora and student members
- Oxy Men Against Rape (OMAR), including Professor Richard Mora and several students
- February 2013 Sexual Assault Task Force, including Vice President for Institutional Advancement Shelby Radcliffe (Co-Chair), Assistant Professor Danielle Dirks (Co-Chair), Aja-Fullo Sanneh '13, Sr. Associate Dean of Students and Title IX Coordinator Erica O’Neal Howard, Professor John Swift, Lead Nurse Practitioner Roberta Dacus, and Hailey Jures '14

- Mary Christianakis, Associate Professor of Language, Literacy, and Culture, Department of Critical Theory and Social Justice and Chair of the Sexual Misconduct Advisory Board
- Associate Director of Athletics Brian Newhall and representative male athletes
- Marketing and Communications team members, including Brett Schraeder, Jim Tranquada and Tricia Long
- Title IX Search Committee, including Donna Maeda, Ella Turenne, James Uhrich, Mary Beth Heffernan, Nalsey Tinberg, Roberta Dacus, Sal Fernandez, Jorge Gonzalez and Lauren Carella
- Emmons Health and Counseling Center staff, including Robin Davidson, Matt Calkins, Roberta Dacus and Jenny Heetdirks
- Sexual Assault Survivor Advocate Naddia Palacios
- Faculty Council Hearing Board, April 2013
- Administrator/Staff Council open session for staff, August 27, 2013
- Associated Students of Occidental College (ASOC) Senate, April 2013
- ASOC open session for students, August 27, 2013
- Board of Trustees Student Life Committee and Audit Committee
- Board of Trustees Executive Committee
- Student Affairs Division staff, including Barbara Avery, Robin Davidson, Tim Chang, Emily Harris, Ella Turenne, Tamara Rice, Paula Crisostomo, Justin Gerboc, Chad Myers, Meredith Mickaliger, Juls White, Devon MacIver and Jesus Maldonado
- In-house College counsel
- Open campus sessions, April 22 and 23, 2013
- “Sexual Respect at Oxy” family orientation information session, August 24, 2013
- “Sexual Respect at Oxy” first year Orientation session, August 24, 2013
- Peace Over Violence staff, including Executive Director Patti Giggins, Associate Director Cathy Friedman, Director of Intervention Services Yvette Lozano, Director of Prevention Services Lili Herrera and Youth Services Coordinator Melodie Kruspodin

- Faculty Meetings, April 23, 2013 and August 26, 2013
- Alumni Board of Governors
- Town Hall, Homecoming/Family Weekend, October 2013
- Steve Healy, Margolis Healy and Associates
- Online suggestion box, which provided direct, candid and typically anonymous feedback from more than 100 Occidental community members, including, but not limited to, staff members, parents or other relatives, faculty members, current students, alumni and complainants
- Dear Oxy Tumblr, <http://dearoxy.tumblr.com/>
- OSAC website, <http://oxysexualassaultcoalition.wordpress.com/>, including
  - *Why is OSAC filing Title IX and Clery Federal Complaints Against Occidental College*  
<http://www.slideshare.net/osacoalition/why-is-osac-filing-title-ix-and-clery-federal-complaints-against-occidental-college>
  - *Survivor Stories*  
<http://oxysexualassaultcoalition.wordpress.com/survivor-stories-2/>
- Minimum Safety Requirement Evaluation List compiled and shared by Occidental alumni

# **APPENDIX III**

## **Appendix III:**

### **Overview of Regulatory Framework**

#### **I. Title IX**

This section discusses three categories of legal authority relevant to Title IX: (1) the Title IX statute, 20 U.S.C. § 1681 *et seq.*, which sets forth the law; (2) Title IX’s implementing regulations, 34 C.F.R. Part 106, which have the force and effect of law; and (3) guidance documents from the Department of Education’s Office for Civil Rights (OCR). Specifically, OCR has issued several “significant guidance documents” that constitute policy guidance to assist schools with meeting their Title IX obligations. The most notable of these guidance documents are the April 4, 2011 Dear Colleague Letter (“2011 DCL”) and the April 29, 2014 Questions and Answers on Title IX and Sexual Violence (“Title IX Q&A”). Links to these and other guidance documents from OCR are available in Appendix IV, Links to Federal Law, Regulations and Guidance re: Sexual and Gender-Based Harassment and Violence, Dating Violence, Domestic Violence and Stalking.

Although guidance documents from OCR do not add requirements to applicable law, they provide information and examples to inform recipients about how OCR evaluates whether schools are complying with their legal obligations.<sup>2</sup> Furthermore, the Bulletin on ‘Agency Good Guidance Practices’ sets forth general policies and procedures for developing, issuing and using guidance documents. The purpose of Good Guidance Practices (GGP) is to ensure that guidance documents of Executive Branch departments and agencies are: “developed with appropriate review and public participation, accessible and transparent to the public, of high quality, and not improperly treated as legally binding requirements.”<sup>3</sup>

Title IX of the Education Amendments of 1972 is a federal law that prohibits discrimination on the basis of sex in education programs and activities and in employment.<sup>4</sup> Title IX applies to all colleges and universities that receive federal financial assistance either directly or indirectly.<sup>5</sup>

Title IX states that “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>6</sup> Although Title IX is

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<sup>2</sup> 2011 DCL at n. 1.

<sup>3</sup> 72 Fed. Reg. 16.

<sup>4</sup> *See generally* 20 U.S.C. § 1681 *et seq.*; 34 C.F.R. Part 106. See Appendix IV for Links to Federal Law, Regulations and Guidance re: Sexual and Gender-Based Harassment and Violence, Dating Violence, Domestic Violence and Stalking.

<sup>5</sup> 20 U.S.C. § 1681(a); 34 C.F.R. § 106.11.

<sup>6</sup> 20 U.S.C. § 1681(a).

perhaps best known for its mission to achieve gender equity in athletic programming, Title IX's protections are much broader in scope. It applies to all forms of sexual discrimination, including sexual harassment, sexual misconduct and sexual violence.<sup>7</sup> Title IX applies equally to students, staff and faculty.<sup>8</sup> It protects students and employees from sexual harassment by any school employee, student, or non-employee third party.<sup>9</sup>

Title IX requires that a school: publish a non-discrimination statement;<sup>10</sup> appoint a Title IX Coordinator;<sup>11</sup> adopt grievance procedures that are prompt and equitable and allow for adequate, reliable and impartial investigation of complaints;<sup>12</sup> provide education and prevention programs;<sup>13</sup> and provide general training for all campus community members as to the school's policies and procedures and specific training for implementers and adjudicators relating to the school's grievance procedures and its proper response to complaints of sexual harassment and sexual violence.<sup>14</sup>

Title IX requires that a school's grievance procedures be prompt and equitable.<sup>15</sup> Policies must designate reasonably prompt timeframes for the major stages of the complaint process.<sup>16</sup> Both the complainant and the respondent should be given periodic status updates, receive notification of the outcome, and be informed of his/her right to appeal.<sup>17</sup> Grievance procedures must: ensure an investigation that is adequate, reliable and fair; apply a preponderance of the evidence standard; and balance the rights of the complainant and respondent.<sup>18</sup>

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<sup>7</sup> 2011 DCL at 1.

<sup>8</sup> See 34 C.F.R. § 106.8(b) (requiring schools to adopt and publish grievance procedures for students and employees); 34 C.F.R. § 106.51 (prohibiting discrimination on the basis of sex in employment in education programs or activities); see also 2011 DCL at n. 11 ("Title IX also protects employees of a recipient from sexual harassment.").

<sup>9</sup> See 2011 DCL at n. 11 ("Title IX also protects third parties from sexual harassment or violence in a school's education programs and activities.").

<sup>10</sup> 34 C.F.R. § 106.9.

<sup>11</sup> 34 C.F.R. § 106.8(a).

<sup>12</sup> 34 C.F.R. § 106.8(b); see also 2011 DCL at 9-12.

<sup>13</sup> 2011 DCL at 14-15.

<sup>14</sup> *Id.* at 4, 7-8, 12; Title IX Q&A at 38-42.

<sup>15</sup> 34 C.F.R. § 106.8(b).

<sup>16</sup> 2011 DCL at 12-13.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 9-11.

Once a school has notice of a sexual harassment or violence allegation, it must promptly take steps to protect the complainant and the campus community as necessary, including taking interim steps while the investigation is pending.<sup>19</sup> Examples of interim remedies may include no-contact orders, adjustments to academic schedules or living arrangements as appropriate, academic support, providing counseling or emotional support and allowing for other equitable solutions or responses for both parties.<sup>20</sup>

Under Title IX, if a school knows or reasonably should know about sexual harassment that creates a hostile environment, the school must eliminate the harassment, prevent its recurrence and address its effects.<sup>21</sup> Once a school is on notice of off-campus sexual violence, it must assess whether there are any continuing effects on campus or in an off-campus education program or activity that are creating or contributing to a hostile environment. Therefore, a school violates Title IX if it has “notice” of a sexually hostile environment and fails to take immediate and corrective action. A school is deemed to have notice if a responsible employee knew or, in the exercise of reasonable care, should have known, about the harassment. A responsible employee includes any employee who: (1) has the authority to take action to redress the harassment; (2) has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees; or (3) a student could reasonably believe has the authority or responsibility to take action.<sup>22</sup>

## **II. Overview of the Clery Act**

The Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act, 20 U.S.C. § 1092(f), is a federal statute enacted in 1990 that requires all schools that receive federal financial assistance, either directly or indirectly, to keep and publish information about crime on or near their campus.<sup>23</sup> The purpose of the Clery Act is to provide students, their families and employees with accurate, complete and timely information about campus safety to better inform future decisions.<sup>24</sup>

This section discusses three sources of authority relevant to the Clery Act: (1) the Clery Act statute, 20 U.S.C. § 1092(f), which sets forth the law; (2) the Clery Act’s implementing regulations, 34 C.F.R. § 668.46, which are issued by the U.S. Department of

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<sup>19</sup> *Id.* at 15.

<sup>20</sup> *Id.* at 15-17.

<sup>21</sup> *Id.* at 4.

<sup>22</sup> Title IX Q&A at 15-16.

<sup>23</sup> See generally 20 U.S.C. § 1092 (f); 34 C.F.R. § 668.46. See Appendix III for Links to Federal Law, Regulations and Guidance re: Sexual and Gender-Based Harassment and Violence, Dating Violence, Domestic Violence and Stalking.

<sup>24</sup> U.S. Department of Education, *The Handbook for Campus Safety and Reporting* (Feb. 2011) at xi, <http://www2.ed.gov/admins/lead/safety/handbook.pdf>.

Education and have the force and effect of law; and (3) the U.S. Department of Education's February 2011 Handbook for Campus Safety and Security Reporting, which is not legally binding but is intended to provide guidance on interpreting the regulations. The Clery Act statute and its implementing regulations therefore take precedence over the Handbook.<sup>25</sup>

Clery requires that schools report offenses and disclose statistics for crimes that were reported to the local police and Campus Security Authorities.<sup>26</sup> Reportable crimes include those that occurred on-campus, in or on non-campus buildings or property, or on public property within or immediately adjacent to and accessible from the school's campus.<sup>27</sup> Furthermore, it is not necessary for the crime to have been investigated by the police or a Campus Security Authority, nor must a finding of guilt or responsibility be made to constitute a reportable crime—as long as there is a reasonable basis for believing the information is not rumor or hearsay, the crime should be reported.<sup>28</sup>

Campus Security Authorities at institutions include four groups of individuals and organizations:

- 1) Individuals who work within a campus police or security department;
- 2) Individuals who have responsibility for campus security but are not a part of a campus police or security department;
- 3) Individuals who are named in an institution's policy as persons to whom students and employees should report; and

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<sup>25</sup> The U.S. Court of Appeals for the District of Columbia Circuit has described the complicated relationship between statutes, regulations and guidance as follows:

The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.

*Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000).

<sup>26</sup> 20 U.S.C. § 1092(f)(1)(F); 34 C.F.R. § 668.46(c).

<sup>27</sup> 20 U.S.C. § 1092(f)(1)(F), 20 U.S.C. § 1092(f)(12); 34 C.F.R. § 668.46(c), 34 C.F.R. § 668.46(c)(4).

<sup>28</sup> *The Handbook for Campus Safety and Reporting*, *supra*, at 73, 77.

- 4) Individuals who have significant responsibility for student and campus activities.<sup>29</sup>

Campus Security Authorities are required to report, to the individual or office designated by the institution to collect crime report information, any Clery Act crime allegations that the Campus Security Authorities believe were made in good faith.<sup>30</sup> Under Clery, the report must contain information about: (1) where the crime occurred, (2) the type of crime, (3) to whom the crime was reported and (4) when the crime was reported.<sup>31</sup> When reporting sex crimes, the offenses should be divided into two categories: forcible and non-forcible.<sup>32</sup> Forcible sex offenses include any sexual act that is directed against another person either (1) forcibly and/or against that person's will or (2) non-forcibly or against the person's will and the victim is incapable of giving consent.<sup>33</sup> Examples of forcible sex offenses are forcible rape, forcible sodomy, sexual assault with an object and forcible fondling.<sup>34</sup> Non-forcible sex offenses are those incidents of unlawful, non-forcible sexual intercourse.<sup>35</sup> Examples of non-forcible sex offenses are incest and statutory rape.<sup>36</sup>

Moreover, the Clery Act requires that the school's Campus Security Authorities maintain a public Daily Crime Log of all crimes reported to them.<sup>37</sup> A crime entry must be made within two business days of when the school learned the information, and each entry must include information about: (1) the nature of the crime, (2) the date of the crime, (3) the time of the crime, (4) the general location of the crime and (5) the disposition of the complaint, if known.<sup>38</sup> The log must be accessible to the public during normal business hours and remain open for 60 days, after which it must be made available upon request within two business days.<sup>39</sup>

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<sup>29</sup> 34 C.F.R. § 668.46(a) (defining "Campus security authority"); *The Handbook for Campus Safety and Reporting, supra*, at 74-75.

<sup>30</sup> 34 C.F.R. § 668.46(b)(2)(iii); *The Handbook for Campus Safety and Reporting, supra*, at 73.

<sup>31</sup> *See generally* 34 C.F.R. § 668.46(c); *The Handbook for Campus Safety and Reporting, supra*, at 11.

<sup>32</sup> 20 U.S.C. § 1092(f)(1)(F)(ii); 34 C.F.R. § 668.46(c)(ii).

<sup>33</sup> *The Handbook for Campus Safety and Reporting, supra*, at 37.

<sup>34</sup> *Id.* at 37-38.

<sup>35</sup> *Id.* at 39.

<sup>36</sup> *Id.* at 39-40.

<sup>37</sup> 20 U.S.C. § 1092 (f)(4)(A); 34 C.F.R. § 668.46(f).

<sup>38</sup> 20 U.S.C. § 1092 (f)(4)(A); 34 C.F.R. § 668.46(f)(2).

<sup>39</sup> 20 U.S.C. § 1092 (f)(4)(B); 34 C.F.R. § 668.46(f)(5); *The Handbook for Campus Safety and Reporting, supra*, at 95.

The Daily Crime Log must include *all* crimes reported to campus police or security for the required geographic location.<sup>40</sup> The geographic location includes all reported crimes that occur “on campus, in or on noncampus buildings or property or on public property within the campus or immediately adjacent to and accessible from the campus,” as well as all crimes that occur within the patrol jurisdiction of the campus police.<sup>41</sup> The patrol jurisdiction comprises any property that does not meet any of the Clery geographic area definitions but is regularly provided with police or security patrol services by campus security.<sup>42</sup>

The Clery Act requires timely warning notification to the campus community of all Clery Act crimes that are reported to Campus Security Authorities or local police and are considered by the school to represent a threat to students and employees.<sup>43</sup> Warnings are to be made as soon as the pertinent information is available, so as to effectively alert the community of a continuing threat to safety and aid in the prevention of similar crimes.<sup>44</sup> Schools must issue a timely warning when a Clery crime is considered by the school to represent a “serious or continuing” threat to students and employees.<sup>45</sup> The decision to warn is to be made by the school on a case-by-case basis taking into consideration the nature of the crime, the threat of continuing danger and the coordination with law enforcement.<sup>46</sup> If the school concludes that a warning is appropriate, the warning should be made in a format that is reasonably likely to reach the entire campus community, e.g., via e-mail, intranet, text message, etc.<sup>47</sup>

Finally, the Clery Act mandates that schools develop policies, procedures, and programs regarding sex offenses.<sup>48</sup> The reporting procedures should outline the procedures that a student should follow if a sexual offense occurs, including who should be contacted, the importance of preserving evidence, and to whom the alleged offense should be reported.<sup>49</sup> The school should also have procedures for disciplinary action, including an equal right to have

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<sup>40</sup>*The Handbook for Campus Safety and Reporting, supra*, at 91; 20 U.S.C. § 1092 (f)(4)(A); 34 C.F.R. § 668.46(f).

<sup>41</sup>*The Handbook for Campus Safety and Reporting, supra*, at 91; *see also* 34 C.F.R. § 668.46(f).

<sup>42</sup>*The Handbook for Campus Safety and Reporting, supra*, at 92.

<sup>43</sup> 20 U.S.C. § 1092 (f)(3); 34 C.F.R. § 668.46(e).

<sup>44</sup> *The Handbook for Campus Safety and Reporting, supra*, at 111.

<sup>45</sup> *Id.* at 118; *see also* 20 U.S.C. § 1092 (f)(3) (requiring that campus security “make timely reports to the campus community on crimes considered to be a threat to other students and employees”); 34 CFR 668.46(e)(iii) (requiring warnings when crimes are “[c]onsidered by the institution to represent a threat to students and employees”).

<sup>46</sup> *The Handbook for Campus Safety and Reporting, supra*, at 112-13.

<sup>47</sup> *Id.* at 114.

<sup>48</sup> 20 U.S.C. § 1092 (f)(8); 34 C.F.R. § 668.46(b)(11).

<sup>49</sup> 20 U.S.C. § 1092 (f)(8)(B)(iii); 34 C.F.R. § 668.46(b)(11)(ii).

persons present during the proceeding, to be informed of the outcome and the sanctions imposed, and to speak about the offense.<sup>50</sup> Additionally, the policy should list the potential sanctions for offenses.<sup>51</sup> The victim should be informed of his/her right to call police(both local and on-campus), the availability of on- and off-campus counseling and mental health services, and the options for reasonable accommodations in changing academic and living situations after an alleged sexual assault incident.<sup>52</sup>

### **III. Overview of Section 304 of the 2013 Reauthorization of the Violence Against Women Act (VAWA)**

On March 7, 2013, President Barack Obama signed a bill reauthorizing the Violence against Women Act (VAWA).<sup>53</sup> Section 304 of VAWA revised schools' requirements with respect to education and prevention, reporting, and policy and procedures with respect to sexual assault. It also expanded those same categories of required steps to domestic violence, dating violence and stalking.

Under the new data collection requirements, VAWA requires that schools: disclose incidents of domestic violence, dating violence, sexual assault and stalking, in annual campus crime statistic reports; expand the definition of reportable hate crimes to include bias crimes that are based on an individual's national origin or gender identity; and withhold the names of complainants as confidential in timely warnings notifications. Schools must also provide information about how they will protect the confidentiality of individuals, including protecting such information in publicly-available records.

In addition, schools must develop and distribute policies regarding: education programs designed to promote the awareness of rape, acquaintance rape, domestic violence, dating violence, sexual assault and stalking and prevent domestic violence, dating violence, sexual assault and stalking; procedures they will follow once an incident of domestic violence, dating violence, sexual assault or stalking is reported; and the standard of evidence used during disciplinary actions.

VAWA requires schools to provide education programs that promote awareness of rape, acquaintance rape, domestic violence, dating violence, sexual assault and stalking. The education programs must be provided to all incoming students and new employees and should include: a statement that the school prohibits the offenses of domestic violence, dating violence, sexual assault and stalking; the definition 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;

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<sup>50</sup> 20 U.S.C. § 1092 (f)(8)(B)(iv); 34 C.F.R. § 668.46(b)(11)(vi).

<sup>51</sup> 20 U.S.C. § 1092 (f)(8)(B)(ii); 34 C.F.R. § 668.46(b)(11)(vii).

<sup>52</sup> 20 U.S.C. § 1092 (f)(8)(B)(v)-(vii); 34 C.F.R. § 668.46(b)(11)(iii)-(iv).

<sup>53</sup> See generally Pub. L. 113-4, Violence Against Women Reauthorization Act of 2013 (Mar. 7, 2013).

information regarding risk reduction; and the school's ongoing prevention and awareness campaigns for students and faculty.

Furthermore, VAWA requires that a school's written policy contains all of the information taught in the school's education program. The policy must also contain: possible sanctions or protective measures that the school may impose following a final determination of rape, acquaintance rape, domestic violence, dating violence, sexual assault or stalking; procedures individuals should follow if a sex offense, domestic violence, dating violence, sexual assault or stalking occurs; information regarding the importance of preserving evidence; identification of the administrator to whom alleged offenses should be reported; options regarding notifying law enforcement and campus authorities about alleged offenses, including the option to be assisted by campus authorities in notifying law enforcement authorities or to decline to notify authorities; and individuals' rights and the school's responsibilities regarding orders of protection, no contact orders, restraining orders or similar lawful orders issued by a criminal, civil or tribal court. Schools must also publish procedures for institutional disciplinary action in cases of alleged domestic violence, dating violence, sexual assault or stalking. These procedures must include a clear statement that the proceedings will entail a prompt, fair and impartial investigation and resolution.

Under VAWA, during disciplinary actions, both parties must have the same opportunities to have others present during a disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice. Furthermore, both parties must be simultaneously informed in writing of: the outcome of any institutional disciplinary proceeding that arises from an allegation of domestic violence, dating violence, sexual assault or stalking; the institution's procedures for both parties to appeal the results of the disciplinary proceeding; any change to the results of the proceeding that occurs prior to the time that such results become final; and when results of the proceeding become final.

Schools also must notify individuals of: on and off campus counseling, health, mental health, victim advocacy and legal assistance programs; interim remedies that are available regardless of whether an individual chooses to report an alleged crime to campus police or law enforcement; and a written explanation of an individual's rights and options when a student or employee reports that they have been a victim of on or off campus domestic violence, dating violence, sexual assault or stalking.

VAWA also requires schools to prohibit retaliation, intimidation, threats, coercion or any other type of discrimination against any individual for reporting domestic violence, dating violence, sexual assault or stalking.

Further, VAWA requires that implementers must 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." This requirement builds on OCR's 2001 Guidance, which directed schools to "ensure that employees are trained so that those with authority to address harassment know how to respond appropriately," and the April 2011 DCL, which requires that schools: "ensure that all persons involved in implementing grievance procedures (e.g. Title IX Coordinators,

investigators, and adjudicators) have training in the recipient’s grievance procedure”; “ensure that all persons involved in implementing grievance procedures (e.g. Title IX Coordinators, investigators, and adjudicators) have training in confidentiality requirements”; and “in sexual violence cases, the fact-finder and decision-maker should have adequate training or knowledge regarding sexual violence.”<sup>54</sup>

#### **IV. The Coordinated and Integrated Approach**

In implementing Clery Act, Title IX and VAWA requirements, educational institutions are tasked with integrating complex and at times inconsistent provisions of each of these three statutes to provide integrated, coordinated and compliant institutional responses. In order to appropriately respond to incidents of sexual and gender-based harassment and violence, intimate partner violence and stalking, institutions must necessarily consider how these laws intersect, overlap, and in some instances, conflict. Colleges and universities can achieve seamless and effective service to students and employees by investing the time to develop a comprehensive and coordinated understanding of the applicable laws and guidance.

Colleges and universities are tasked with providing a safe and nondiscriminatory educational environment.<sup>55</sup> In the arena of sexual harassment, sexual assault, dating violence, domestic violence and stalking, schools are responsible for the prevention, investigation, evaluation and adjudication of allegations of sexual violence – an arena traditionally reserved for law enforcement officers and prosecutors and seemingly beyond the traditional role of an institution of higher education. The reality is that current law requires that schools take appropriate action under campus policies, regardless of whether the matter is reported to law enforcement.<sup>56</sup>

At the same time, schools must coordinate with law enforcement. A criminal investigation and a Title IX investigation are two distinct processes; the same procedural protections and legal standards are not required in each.<sup>57</sup> The purpose of a criminal investigation is to determine whether an individual violated a law.<sup>58</sup> If an individual is found guilty, the individual may be imprisoned or subject to other criminal penalties.<sup>59</sup> Therefore, the Constitution provides criminal defendants who face the risk of incarceration numerous protections including, but not limited to, the right to counsel, the right to a speedy trial, the right

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<sup>54</sup> See generally January 19, 2001 Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties - Title IX; 2011 DCL.

<sup>55</sup> Title IX Q&A, at C-3, <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

<sup>56</sup> *Id.* at F-2, F-3.

<sup>57</sup> *Id.* at F-2.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

to a jury trial, the right against self-incrimination and the right to confrontation.<sup>60</sup> In addition, police and prosecutors usually have discretion to decide which complaints to investigate.<sup>61</sup>

In contrast, Title IX investigations, which will never result in an incarceration, have different procedural protections and legal standards.<sup>62</sup> Under Title IX, schools do not have the discretion to resolve some complaints and not others, as they do in the criminal context.<sup>63</sup> Schools have a duty to resolve all complaints promptly and equitably and to provide a safe and nondiscriminatory environment for all students.<sup>64</sup>

Schools should coordinate with any other ongoing school or criminal investigations and establish appropriate fact-finding roles for each investigator.<sup>65</sup> Schools should also consider whether information can be shared among the investigators so that complainants are not unnecessarily required to give multiple statements about a traumatic event.<sup>66</sup> However, a school should not wait for the conclusion of a criminal investigation or criminal proceeding to begin its own Title IX investigation.<sup>67</sup> Although a school may need to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence, the school must still take interim measures to protect the complainant and the community.<sup>68</sup>

OCR recommends that a school work with its campus police, local law enforcement and local prosecutor's office to learn when the evidence gathering stage of the criminal investigation is complete. Schools may also want to enter into a memorandum of understanding (MOU) or other agreement with these agencies regarding the protocols and procedures for referring allegations of sexual violence, sharing information and conducting contemporaneous investigations.<sup>69</sup> Any MOU or other agreement must allow the school to meet its Title IX obligation to resolve complaints promptly and equitably and must comply with the Family Educational Rights and Privacy Act ("FERPA") and other applicable privacy laws.<sup>70</sup>

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at F-1.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at F-3.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

In assessing the effectiveness of policies and procedures, schools should begin the assessment with an understanding of the context, which we conceptualize in three broad categories: *first*, the legal mandates (Title IX, the Clery Act, and VAWA, to name a few); *second*, the dynamics of sexual harassment, sexual assault, dating and domestic violence, stalking and the impacts of trauma; and *finally*, each institution’s unique culture, climate, policies and procedures, personnel, resources and underlying institutional values. By understanding the intersection of these three distinct categories, a school can develop a coordinated and integrated institutional response that is principled and intentional to achieve compliance and tend to the welfare of students, faculty and staff.

To successfully implement a coordinated response, we recommend that institutions: designate an institutional team of implementers; implement policies and procedures to coordinate information and personnel; provide a clear articulation of roles and responsibilities of implementers; sequence the institutional steps provided in response to every report; and maintain systems for documenting reports and actions taken in response. This process requires a coordinated discussion about the primary responsibility of each department, the coordination and sharing of information between and among relevant departments, and the protocols that should be followed where there are overlapping responsibilities or conflicts in roles. It also requires a clear articulation of who is accountable for each task, who has oversight responsibility and who will be vested with ultimate decision-making authority on critical issues.

The DOE has emphasized that “[compliance] is not a one-person job...[A] key ingredient in ensuring compliance is coordination—knowing who does what and when. This means that most of you will find it necessary to coordinate compliance activities with many people and offices in the campus community.”<sup>71</sup>

This mapping of roles and responsibilities can serve as the initial framework for the drafting of internal operating protocols. Those internal operating procedures should funnel all information to a centralized institutional response, outline workflow steps, utilize template forms and communications and create checkpoint lists to ensure a consistent response. Schools should consider building in decision trees regarding timely warnings, how to proceed if a complainant requests that their name not be shared with the respondent or no investigation be pursued, the use of interim remedies, when to use interim suspension, how to respond to retaliation and other key determinations to seek consistent institutional responses. This approach will minimize the risks attendant to relying upon ad hoc responses to each incident. There should also be clear expectations about coordinated communication and protocols for regular documentation and record-keeping.

Key elements of an effective institutional response include:

- Adherence to coordinated and accessible policies and procedures;

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<sup>71</sup> *The Handbook for Campus Safety and Reporting, supra*, at xi.

- An independent Title IX Coordinator with sufficient authority and resources to effectively navigate oversight responsibilities;
- A similarly situated independent Clery Administrator;
- A coordinated multi-disciplinary response team to provide support, resources and accommodations and to facilitate informed decision-making;
- A centralized reporting and review process to ensure consistent application of policies and procedures;
- An initial assessment in each report designed to address: the protection of the complainant and the campus community; whether there have been other sexual violence complaints about the same respondent; whether the respondent has past arrests or records indicating a history of violence; the protection of the complainant's privacy to the greatest extent possible; the consistent provision of interim remedies and measures; and the identification of the appropriate institutional response (remedies-based vs. sanctions-based);
- Separation of support and advocacy functions from impartial investigative and adjudicative processes;
- Reliable and thorough investigations by experienced and trained investigators;
- Procedures for resolution that recognize the balance between complainant autonomy/agency and fair and impartial process that incorporates notice and an opportunity to be heard;
- Regular communication with the parties and transparency about processes to maintain the trust of individual stakeholders and the community;
- Consistent training, education and prevention programs; and
- Centralized record-keeping and documentation for tracking and monitoring reported incidents, monitoring patterns and assessing campus climate.

# **APPENDIX IV**

**Appendix IV:**

**Links to Federal Law, Regulations and Guidance re: Sexual and Gender-Based Harassment and Violence, Dating Violence, Domestic Violence and Stalking.**

Title IX (the law)

- Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq.,
- Regulation implementing Title IX, 34 C.F.R. Part 106

Title IX (guidance documents)

- 1997 Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties
- 2001 Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties - Title IX
- April 2011 Dear Colleague Letter (significant guidance document<sup>72</sup>)
- Questions and Answers on Title IX and Sexual Violence (April 29, 2014 Q&A answering FAQs from the 2011 DCL - significant guidance document<sup>73</sup>)

Dear Colleague Letters:

- October 2010 Dear Colleague Letter
- April 2013 Dear Colleague Letter

Voluntary Resolution Agreements (not significant guidance – informative but not binding on other schools):

- 2010 Eastern Michigan University Resolution Agreement
- 2010 Notre Dame College Voluntary Resolution Agreement
- 2011 University of Notre Dame Resolution Agreement
- 2012 Xavier University Resolution Agreement
- 2012 Yale University Voluntary Resolution Agreement

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<sup>72</sup> The Department has determined that this document is a “significant guidance document” under the Office of Management and Budget’s Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), [http://www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507\\_good\\_guidance.pdf](http://www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf). The Office for Civil Rights (OCR) issues this and other policy guidance to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that OCR enforces. OCR’s legal authority is based on those laws and regulations. This guidance does not add requirements to applicable law, but it provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations.

<sup>73</sup> *Id.*

- [2013 University of Montana Letter](#)
- [2013 University of Montana Resolution Agreement](#)
- [2013 Memorandum of Agreement Between the United States Department of Justice and the University of Montana Regarding the University of Montana Office of Public Safety's Response to Sexual Assault](#)
- [2013 SUNY Voluntary Resolution Agreement](#)
- [2014 Tufts Voluntary Resolution Agreement](#)
- [2014 Virginia Military Institute Voluntary Resolution Agreement](#)
- [2014 Ohio State University Voluntary Resolution Agreement](#)

#### The Clery Act

- [Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092 \(f\)](#)
- [Regulation Implementing the Clery Act, 34 C.F.R. 668.46](#)
- [Clery Handbook](#)

#### The Violence Against Women Reauthorization Act of 2013 (Campus SaVE Act):

- [2013 Campus SaVE Act \(see section 304 – p. 36\)](#)
- [10/20/2014 VAWA Negotiated Regulations](#)

#### April 2014 White House Task Force Recommendations

- [Not Alone, The First Report of the White House Task Force to Protect Students From Sexual Assault](#)

# **APPENDIX V**

3000 Two Logan Square  
Eighteenth and Arch Streets  
Philadelphia, PA 19103-2799  
215.981.4000  
Fax 215.981.4750

Gina Maisto Smith  
direct dial: 215.981.4490  
smithgm@pepperlaw.com

April 30, 2013

President Jonathan Veitch  
Occidental College  
Arthur G. Coons Administrative Center,  
3rd Floor  
1600 Campus Road  
Los Angeles, CA 90041

Re: Initial Recommendations

Dear President Veitch:

Thank you for the opportunity to communicate directly with the members of the Occidental College community about our work to date. As professionals who have spent decades witnessing firsthand the impacts of sexual assault on individuals and communities, we are privileged to have the opportunity to assist the College in providing informed and sensitive responses to sexual misconduct issues that affect the Occidental community.

In late March 2013, we began an external audit of policies and procedures regarding sexual harassment and misconduct. This is a task that we perform at many campuses across the nation. It includes community engagement to gather feedback and evidence-based information, a review of past cases, and a detailed understanding of the College's structure, personnel and implementation of its Title IX response.

### **Our Work to Date**

We have had the opportunity to review the following documents:

- Sexual Misconduct Policy (for Students)
- Code of Student Conduct, Student Handbook
- Sexual Harassment Policy, Student Handbook
- Sexual Harassment Policy, Employee Handbook

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- Sexual Harassment Policy, Faculty Handbook
- 2012 Annual Security Report
- 2009 Faculty Hearing Board Report
- Letters to the Campus Community from the President's Office
- Materials from the Oxy Sexual Assault Coalition ("OSAC")
  - OSAC Dozen, or the 12 Demands
  - Timeline
  - Survivor Stories
  - Occidental College Sexual Assault Policy Evaluation May 15, 2012
  - Sexual Assault on Campus: Overview and Best Practices by Caroline Heldman, PhD and Lisa Wade, PhD
  - OSAC Informational Session
  - Reworked Policy and Procedures 9/25/2012
  - Communications to the Community from OSAC
- Relevant articles from the *Occidental Weekly*
- Minutes from the Sexual Assault Task Force
- Information from the March 21 Town Hall Meeting

We have also had the opportunity to spend five days on campus: April 2, 3, 21, 22, and 23, 2013. During that time, we have met, individually and in groups, with a broad cross-section of students, staff and faculty. In our five days on campus, we met with the following individuals or groups: former Title IX Coordinator and History Professor Maryanne Horowitz; current Title IX Coordinator and Associate Dean Erica O'Neal Howard; Deputy Title IX Coordinator and Music Professor Irene Girton; Deputy Title IX Coordinator and Athletic Director Jamie Hoffman; Faculty Council; ASOC President, Senate and other members; members of the College's communications team; Director of Campus Safety Holly Nieto; Associate Dean of Students Tim Chang; members of OSAC, including professors Caroline Heldman, Danielle Dirks, Lisa Wade, Richard Mora, and student members; a group of male athletes; Occidental Men Against Rape (OMAR); Dean of Students Barbara Avery; the Sexual Assault Task Force; President Jonathan Veitch; College counsel Carl Botterud; representatives from Greek Life; Senior Staff; current and past investigators and adjudicators; a special faculty meeting; Naddia Palacios; the Student Life and Audit Committees of the Board of Trustees; the Alumni Board of Governors, and a number of individual survivors, students, staff and faculty members who have attended open sessions or contacted us directly. These have been primarily introductory conversations designed to orient us to the structure, practice and personnel at Occidental, and to begin to understand how policies and procedures are implemented, and significantly, how that implementation impacts individuals and the broader campus climate.

While our time on campus has been instructive, we recognize that we have not had the opportunity to hear from all concerned individuals or to complete a systemic review of the

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College's response to allegations of sexual assault. As a caveat to this initial communication, we recognize that there is much more to be learned before we are in a position to offer final recommendations.

### **Initial Recommendations**

In the interim, we are able to offer some initial observations and recommendations, and urge the College to implement these recommendations as soon as possible and to commit the necessary resources and personnel to accomplish these goals.

We entered this conversation with an open mind and an earnest intent to understand the many perspectives and voices on campus. What has emerged in our listening is a range of responses encompassing strongly held convictions; emotions of anger, disappointment and frustration; concerns about the administration's response to issues of sexual misconduct; and in some cases, an erosion of trust and faith in specific members of the administration. Despite these challenges, we have also seen a community committed to dialogue and conversation about how to effect change, to foster a culture free from sexual violence, to develop sensitive, trusted, and equitable responses to incidents that occur within our community, and to be a leader in education, prevention, policies and practices.

We note that we are latecomers to this conversation – a conversation that has existed in various forms and voices since 2007 – and that our initial impressions may be limited at this early stage in our relationship with Occidental. As we continue our engagement, and in particular, delve into past cases, we expect that our understanding of the challenges facing Occidental will be informed by an evidence-based understanding of the experiences of survivors, respondents, implementers, and adjudicators on campus.

As a starting point, however, based on the scope of our knowledge to date, we are confident in the following recommendations:

#### **1) Title IX Coordinator**

We recommend creating an independent Title IX Office, with a direct report to a member of Senior Staff and/or the President. This office should be staffed by a full-time Title IX Coordinator and receive appropriate administrative support.

We recommend that the position be filled immediately with an interim coordinator, and that a national search be conducted to fill this position prior to the fall semester. The national search should involve a search committee composed of students, staff, faculty and members of the Board of Trustees.

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The Title IX Coordinator will be charged with oversight of the College's centralized review, investigation and resolution of reports of sexual harassment and misconduct under the College's complaint processes to ensure compliance with Title IX.

Over the course of the summer, we recommend that the Interim Title IX Coordinator work closely with campus administrators, members of OSAC and representative community members to revise policy and procedures, implement structural changes, sequence the institutional response, map out the roles and responsibilities of all implementers, develop template forms and communications, and design a training and education calendar for the upcoming academic year.

**2) Deputy Title IX Coordinators**

We recommend that the College review the current structure for Deputy Title IX Coordinators and consider expanding the use of Deputy Title IX Coordinators to ensure adequate representation of diverse constituencies on campus: students, staff, faculty, LGBTQ, Athletics, and Greek Life. We recommend identifying these individuals by mid-summer, and providing appropriate training over the course of the summer to ensure that they are an effective part of implementation and training efforts beginning in the fall semester.

**3) Advocacy**

We recommend that the College provide a dedicated advocate for survivors of sexual assault and other forms of sexual misconduct. The advocate's role will not only be limited to individual cases, but will also play an integral part in ongoing prevention and education efforts.

**4) Policy**

We recommend the College review current policies with the goal of creating holistic responses that best serve the well-being of the Oxy Community. The policy review should consider the policy recommendations by OSAC (Sexual Assault Policy Evaluation, May 15, 2012) as they reflect careful attention to detail and an understanding of promising practices. Additionally, we recommend changes to the policy to address structure, tone, content, organization and clarity. Our goal is to achieve ease of use and remove barriers to reporting.

As an initial step, we recommend the development of policy that unites the now disparate policies on sexual harassment for faculty, sexual harassment for staff, sexual harassment for students, and sexual misconduct policy for students. Although the College may

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retain separate procedures for each constituency, the overriding principles and definitions are common to all and should be reflected as such.

We further recommend that the Interim Title IX Coordinator work with designated individuals to revise policy and seek the input of relevant campus constituents over the course of the summer with the goal of launching a revised policy for the fall semester.

Finally, we agree with OSAC that the revised policy should be widely distributed. The launch of the new policy should be accompanied by educational programming to ensure that all members of our community are familiar with our Title IX grievance procedures.

#### **5) Education and Training**

We recommend that the Title IX Coordinator work closely with the Dean of Students Office, Project SAFE, OSAC and OMAR to plan coordinated and structured educational programming for the 2013-14 school year. This plan should include, at a minimum:

- A summer communication, not only to all incoming first-year students and their parents/guardians, but to all returning sophomores, juniors, and seniors;
- A relevant and meaningful mandatory educational program to be held during Orientation;
- Additional prevention programming during the first six weeks of school for every residential student; and,
- Continued education on a monthly basis to address sexual misconduct and related topics.

We also recommend training for all staff, faculty and student volunteers and employees charged with the welfare of students. This training should include clear delineation of employee responsibilities under our policy in accordance with the role of the responsible employee per Title IX, the campus security authority per the Clery Act, and of a mandatory reporter per California child protective services laws.

#### **6) Continued Community Engagement**

Recognizing that the semester is drawing to a close, we would like to offer ongoing opportunities for community members to be heard over the course of the summer. We recommend that the College create a suggestion box on the Sexual Assault Resources & Support website to allow all individuals who wish to do so to voice their concerns and ideas directly to us as we continue our review process.

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### Next Steps

Our engagement over the next several months will encompass the following tasks: policy development, assistance in the implementation of policy and procedure and a review of past cases.

Over the course of the next two months, we will be reviewing Occidental's response to sexual harassment and assault allegations through the lens of previously adjudicated cases. We have been provided with all of the cases for the past two years. As part of that review, we will seek to speak with Complainants, Respondents, third-party witnesses and the implementers and adjudicators for a selected sample of cases.

Our goal is to understand how the College's policies, procedures and the role of implementers have served – or failed to serve – Occidental's students in the past, and to identify areas where policies and procedures can be improved. We will deliver our final report on this matter directly to the community by end of summer. Because of FERPA and individual privacy considerations, we will not be commenting on specific cases or factual allegations. Instead, we will share aggregate information, and importantly, our recommendations based on that assessment.

We thank you for the opportunity to serve Occidental.

Sincerely,



Gina Maisto Smith



Leslie Gomez

GMS/lmg

# **APPENDIX VI**

# RUTH JONES

## LEADERSHIP PROFILE

- ❖ Attorney with track-record of instructional and administrative leadership; independent thinker who values fairness and finds pragmatic ways to negotiate, resolve disputes and manage change; familiar with post-secondary institutions and their operating protocols;
- ❖ Self-starter who identifies potential challenges ahead of time and designs cost effective methods to address them quickly and completely;
- ❖ Results-driven team leader who supports capacity-building and treats others with professional respect; adept at devising customized programs to implement best practices;
- ❖ Engaging educator with a gift for asking probing questions, inviting students to investigate issues and for finding innovative strategies to develop critical thinking skills in others;
- ❖ Resourceful mentor who serves as a “go-to” person for junior faculty and students; actively supports capacity building at all levels and promotes excellence and achievement;
- ❖ Skilled media presenter and communicator who has made numerous appearances on national and local television networks, public speeches and lectures on legal themes; and
- ❖ Published author experienced at translating complex ideas for diverse audiences.

## PROFESSIONAL SUMMARY

UNIVERSITY OF THE PACIFIC, MCGEORGE LAW SCHOOL

1996 to 2013

*Professor of Law, 2002 to 2013*

*Associate Dean for Scholarship, 2010 – 2012*

Provided leadership and coordinated programs to develop and support faculty scholarship. Mentored faculty by reviewing drafts and securing institutional and external resources to support scholarship projects, arranged presentations for internal and external speakers, chaired Scholarship Strategic Planning Committee and served as a resource for law school committees on scholarship matters, interfaced with university administration and faculty on scholarship matters, promoted scholarly achievement both internally and externally, including developing marketing efforts for faculty scholarship.

### SELECT HIGHLIGHTS:

- Chaired Scholarship Strategic Planning Committee responsible for developing and drafting strategies to increase the quality and quantity of scholarship and the institution’s scholarly reputation;
- Revamped work-study and summer research stipend programs in light of reduced funding; created processes which allowed the institution to fully fund all timely faculty requests for research assistants;
- Proposed reporting requirements and other revisions to sabbatical policy that were adopted by the faculty; organized sabbatical informational program and mentored individual faculty on how to maximize sabbatical plans;
- Organized weekly faculty development speaker series for external and internal speakers, informational sessions and all campus scholarly presentations which increased internal faculty participation and external opportunities to present scholarly work;
- Created faculty development Sakai site to provide on-line access to institutional polices and scholarship resources which was later utilized by other institutional programs and initiatives;
- Established the University of the Pacific, McGeorge Law School Research Paper Series, with the Social Science Research Network (SSRN), an e-library that posts scholarly abstracts and articles;
- Mentored individual faculty by reviewing drafts, and identifying resources, and publication and speaking opportunities;

- Promoted scholarship internally and externally by e-mail announcements about scholarly achievements and arranged internal events to publicize and affirm faculty research and writing; and
- Redesigned faculty scholarship brochure to include presentations, conferences, teaching activities and graphic content.

*Associate Dean for Faculty Scholarship,  
Associate Professor of Law  
Assistant Professor of Law*

*Winter 2010 to Summer 2012  
2000-2002  
1996-1999*

#### **ADMINISTRATIVE LEADERSHIP AND COMMITTEES**

*Director, Criminal Justice Concentration, 2010-2012*

- Responsible for organizing and coordinating the criminal justice curricular program; and coordinated faculty meetings to share resources; proposed curricular changes and provided individual mentoring to students regarding course selection and career planning.

*Co-Chair, University Promotion and Tenure Committee, 2011-2012; Committee Member 2009-2012*

- Committee reviewed and made recommendations regarding faculty promotion and tenure; and drafted committee report on proposed revisions to promotion and tenure procedure and best practices for faculty evaluations; arranged information sessions for untenured members of Sacramento faculty and the Chair of the law school Employment, Promotion and Tenure Committee to discuss University promotion and tenure process.

*Chair, Employment, Tenure and Promotion Scholarship Committee, 2005-2006*

*Evaluation Subcommittee, 2006-2007*

- Responsible for hiring and evaluating faculty; chaired Scholarship Subcommittee responsible for securing external evaluations of faculty scholarship for tenure and promotion process; and served on the Retention, Tenure, and Promotion Subcommittees; drafted reports evaluating faculty teaching, scholarship and community service.

*Chair, Teaching Methods Committee, 2001-2011*

*Chair of Committee 2001-2002; Member 2008-2009, 2010-2011*

- Developed faculty programs on teaching methodology, course design and class discipline; developed assessment process for the Academic Enrichment Program (AEP), a student tutor program; coordinated assessment process and drafted committee report to the faculty; and delivered presentations on critical thinking and course assessments for law students.

*Law School Assessment Committee, 2010-2011*

- Provided assessment resources; identified and arranged speakers to assist with developing institutional learning objectives and creating mapping process; co-drafted institutional learning objectives; created a process for mapping curriculum; and delivered presentations on key topics related to internal program development.

*Co-Chair Post-Tenure Review Committee, 2011-2012*

- Researched literature and post-tenure procedures from other schools; and created timeline of committee activities to produce recommendations for changes to current post-tenure review process by fall of 2012.

*University Task Force to Review Sexual Harassment Policies, 2011-2012*

- Reviewed harassment and other anti-discrimination policies to ensure an effective process and compliance with the law.

*Presiding Member Student Disciplinary Committee, 2009-2010*

- Faculty-and-student committee responsible for the adjudication of putative violations of the student code; implemented adjudication process consistent with institutional policy and the law; presided at disciplinary hearing; ruled on motions and drafted decisions and committee reports.

*Dean Search Committee, 2000-2001; 2001-2002*

- Identified outreach strategy to minority communities to increase applicant pool diversity; and developed interview process by drafting appropriate questions for the committee to gather core information and create accurate candidate profiles.

**DEPAUL UNIVERSITY COLLEGE OF LAW**

*Visiting Professor of Law*

*Spring 2008*

**SUFFOLK UNIVERSITY SCHOOL OF LAW**

*Visiting Professor of Law*

*Fall 2007*

**FORDHAM UNIVERSITY SCHOOL OF LAW**

*Adjunct Clinical Professor of Law*

*1994-1996*

Designed domestic violence clinic and supervised students representing battered women in family court. Taught substantive courses on violence against women, trial advocacy skills and summer judicial extern seminar. Faculty member in New York City Corporation Counsel trial advocacy training program. Keynote commentator on criminal justice and gender issues on CBS news programs, Court TV, and various cable and local news programs.

**NOW LEGAL DEFENSE AND EDUCATION FUND**

*Staff Attorney*

*1990-1994*

Conducted litigation, legislative advocacy, writing and public speaking on women's rights. Vice-Chair of National Task Force on Violence Against Women, a group dedicated to the initial passage of the "Violence Against Women Act." As Task Force Vice-Chair, submitted legislative drafting recommendations, chaired task force meetings, drafted committee meeting minutes and other written updates on task force activities and the legislative progress. Built durable relationships with task force members. Organized national conference on violence against women and represented abortion providers in civil rights action against anti-choice organizations. Served as advocate of high school girls in Title IX complaint filed with the Department of Education, Office of Civil Rights alleging sexual harassment in school. Served as co-counsel in litigation seeking injunctive relief to prevent Detroit public schools from excluding girls. Provided technical assistance nationwide on employment discrimination, gender equity in schools and reproductive rights litigation. Testified before the United States Senate Judiciary Committee regarding stalking laws and presented analysis of cases at Supreme Court briefing for journalists.

**NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE**

*Assistant District Attorney*

*1983-1988*

Trial assistant responsible for the prosecution of felony cases. Specialized in domestic violence and child abuse cases. Conducted grand jury presentations, hearings, and trials. Argued criminal court motions and appeals in the state appellate court system.

**PUBLICATIONS**

- Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser, 88 GEORGETOWN L. J. 605 (2000).
- Male Victims of Statutory Rape: Why Must They Pay Child Support, 36 GA. L. REV. 411 (2002).

- The Extrajudicial Resolution of Sexual Abuse Cases: Can the Church Be A Resource for Survivors? 38 SUFFOLK L. REV. 351 (2005).
- Teaching Rape Law ( work in progress)
- The Institutional Response to Child Sexual Abuse ( work in progress)

### PRESENTATIONS

- On-Air Trial Consultant, Court TV Network, 1992-1997; CBS News, 1997
- Media appearances on local and network news on criminal justice and gender issues, 1992-Present
- Stalking Laws, United States Senate Judiciary Committee, 1994
- Guardianship for Battered Women, XXIV International Congress on Law and Mental Health, Sienna, Italy, 1999
- Using Clinical Methodology for at Risk Students, Gonzaga University Institute for Law School Teaching, 1999
- Playing the Race Card at Trial?, American Bar Association (ABA) Annual Meeting Presidential Showcase, 1999
- Status of African American Law Students After Affirmative Action, Wiley Manuel Bar Association Meeting, September 2000
- Scholarship and the Faculty Hiring Process, Western Law Professors of Color Conference, 2002
- Legal Responses to Terrorism, Criminal Law Responses, McGeorge Law School, 2002
- The Extrajudicial Resolution of Sexual Abuse Cases, Beyond Prosecution: Sexual Assault Victims' Rights in Theory and Practice, Suffolk Law School, 2004
- Response to Keynote Address and Workshop Presentation, Criminal Justice Response to Domestic Violence, Town of Castle Rock v. Gonzales: Some are Guilty-All are Accountable, Accountability in the Age of Denial Conference , University of Denver Strum College of Law, 2006
- Domestic Violence the Third Wave, Victim Rights Conference, McGeorge Law School, 2007
- Response to Domestic Violence, What Is a Family to Do, Training Session Heath Care System, 2007
- SALT Teaching Conference, Teaching Students Resistant to the Experience of Other Students, 2008
- Rape Law and Colleges: Choices and Consequences of Student Behavior, University of the Pacific, 2009
- Assessment and Legal Education, American Bar Association Committee on Legal Education, ABA Annual Meeting, 2011
- Institutional Impediments to Preventing Sexual Abuse of Children, Women Lawyers of Sacramento, 2012
- Hosted, "Indivisible" Mayor Kevin Johnson's Community Meeting on Education, 2012
- Assessment and Legal Education, The State and the Future of Legal Education, Law Review Symposium, McGeorge Law School, April 2013.

### PROFESSIONAL SERVICE

*Association of American Law Schools (AALS) Scholarship Selection Committee 2010-2011*

Reviewed approximately 35 articles and facilitated discussion with other committee members to select award winners; drafted description of winning entry used in press release and other announcements.

*American Bar Association (ABA) Accreditation Site Team and Association of American Law Schools (AALS) Site Team Reporter, 2011*

Conducted interviews and document analysis during law school visit; prepared reports for ABA accreditation process and AALS membership review.

*Association of American Law Schools (AALS) Teaching Method Program Chair, Executive Committee, 2010-2011*  
Selected presentations from proposals submitted to the AALS Teaching Methods Program and presented at the Annual Meeting. Organized the program, coordinated speaker requirements with AALS and moderated panel entitled, "Sharing Methods and Materials for Collaborative Teaching Methods."

*American Association of Law Schools (AALS), Section on Women in Legal Education Executive Committee and Proposal Planning Committee, 2009-2011*

Drafted section of proposal submitted by the section for the professional development program proposal for the 2011 Section Mid-Year Conference, "Women Rethinking Equality."

*Faculty Supervisor Restoring Justice Pro Bono Project New Orleans, 2006*

Traveled to New Orleans after Hurricane Katrina with McGeorge students to provide legal assistance with backlog of criminal cases. Supervised students, ascertained case status and filed motions.

### **EDUCATION**

#### **UNIVERSITY OF CALIFORNIA-LOS ANGELES SCHOOL OF LAW, J. D. 1983**

Staff Editor, Black Law Journal

Case Note: *Plyer v. Doe*-Education of Illegal Alien Children, 8 BLACK L. J. 132 (1983)

President, UCLA chapter of the Black American Law Students Association (BALSA), 1981-82

#### **SMITH COLLEGE NORTHAMPTON, MASSACHUSETTS, A. B. 1980**

High Honors in Philosophy, Dean's List, 1978-79, 1979-80, McKeel Prize in Philosophy

Honors Thesis on the Theory of Oppression (High Honors)

President, Student Government Association, 1979-1980

### **PROFESSIONAL CERTIFICATION, AWARDS AND MEMBERSHIP**

California State Bar, New York State Bar, the Bar of the Eastern District of Michigan, the Bar of the Southern District of New York, the Ninth Circuit Court of Appeals and the Bar of the Supreme Court of the United States

- New York County Lawyer's Association Public Interest Award, 1992
- New York County Lawyer's Association Certificate of Merit, 1991
- Harvard Law School, Wasserstein Fellowship Recipient, 1994
- American Prosecutor's Research Institute's Sexual Assault Advisory Group, 1996-1997
- New York City Bar Association, Education and Law Committee, 1992-93
- New York County Lawyers Association, Women's Rights Committee, 1993-1996
- Feminist Majority Task Force on Women and Girls in Sports, 1993-1994
- Smith College Board of Trustees, 1980-1982

# **APPENDIX VII**

**Appendix VII:**

**Training and Education Guide**

**I. Title IX Training Mandates**

Title IX requires training of all community members regarding what constitutes sexual harassment and sexual violence, the institution's policies and disciplinary procedures and the consequences of violating those policies.<sup>74</sup> Moreover, all implementers (persons involved in implementing the grievance procedures, including the Title IX Coordinator, investigators and adjudicators) must have training or experience in responding to complaints of sexual harassment and sexual violence and in the institution's grievance procedures.<sup>75</sup>

On April 29, 2014, in its Questions and Answers on Title IX and Sexual Violence, OCR provided further guidance regarding the Title IX and sexual violence training that institutions should provide to their employees. OCR noted that, while there is no minimum number of hours required, training should be provided on a regular basis.<sup>76</sup> Each school should determine, based on its particular circumstances, how training should be conducted, who has the relevant expertise required to conduct the training and who should receive the training, to ensure that the training adequately prepares employees, particularly responsible employees, to fulfill their duties under Title IX.<sup>77</sup> Training should cover the following areas:

- Responsible employees with the authority to address sexual violence need to know how to respond appropriately to reports of sexual violence, and need to know that they are obligated to report sexual violence incidents to the Title IX coordinator or other appropriate official. This reporting includes the names of the alleged perpetrator and student involved in the sexual violence, as well as relevant facts including the date, time and location, although efforts should be made to comply with requests for confidentiality from the complainant. All other employees should know how to respond to reports of sexual violence.<sup>78</sup>
- Responsible employees should understand that they do not need to determine whether the alleged sexual harassment or sexual violence actually occurred or that a hostile environment has been created before reporting an incident to the school's Title IX coordinator. Because the Title IX coordinator should have in-depth knowledge of Title IX and Title IX complaints at the school, the coordinator is likely to be in a better

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<sup>74</sup> 2011 DCL at 14-15.

<sup>75</sup> *Id.* at 12

<sup>76</sup> Title IX Q&A at 39.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 38.

- position than the employee to evaluate whether an incident of sexual harassment or sexual violence creates a hostile environment and how the school should respond.<sup>79</sup>
- Professional counselors, pastoral counselors and non-professional counselors or advocates must understand the extent to which they may keep a report confidential.<sup>80</sup>
  - All employees likely to witness or receive reports of sexual violence (including teachers, professors, school law enforcement unit employees, school administrators, school counselors, general counsel, athletic coaches, health personnel and resident advisors) should receive practical information including:<sup>81</sup>
    - how to prevent and identify sexual violence, including same-sex sexual violence;
    - the behaviors that may lead to and result in 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 and the impact of trauma on victims;
    - the person(s) to whom such misconduct must be reported;
    - responsible employees' reporting obligations, including what should be included in a report and any consequences for the failure to report, and the procedure for responding to students' requests for confidentiality, including providing the contact information for the school's Title IX coordinator;
    - information on how to inform students of the reporting obligations of responsible employees;
    - students' option to request confidentiality and available confidential advocacy, counseling or other support services; and

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

- rights to file a Title IX complaint with the school and to report a crime to campus or local law enforcement.<sup>82</sup>

All persons involved in implementing a school's grievance procedures (e.g., Title IX coordinators, others who receive complaints, investigators and adjudicators) must have training or experience in handling sexual violence complaints and in the operation of the school's grievance procedures.<sup>83</sup> OCR also notes:

In rare circumstances, employees involved in implementing a school's grievance procedures may be able to demonstrate that prior training and experience has provided them with competency in the areas covered in the school's training. For example, the combination of effective prior training and experience investigating complaints of sexual violence, together with training on the school's current grievance procedures, may be sufficient preparation for an employee to resolve Title IX complaints consistent with the school's grievance procedures. In-depth knowledge regarding Title IX and sexual violence is particularly helpful. Because laws and school policies and procedures may change, the only way to ensure that all employees involved in implementing the school's grievance procedures have the requisite training or experience is for the school to provide regular training to all individuals involved in implementing the school's Title IX grievance procedures, even if such individuals also have prior relevant experience.<sup>84</sup>

The training for implementers should include:

- information on working with and interviewing persons subjected to sexual violence;
- information on particular types of conduct that constitute sexual violence, including same-sex sexual violence;
- the proper standard of review for sexual violence complaints (preponderance of the evidence);
- 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, complainant and school community;

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<sup>82</sup> *Id.* at 38-39.

<sup>83</sup> *Id.* at 40.

<sup>84</sup> *Id.*

- 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; and
- cultural awareness training regarding how sexual violence may impact students differently depending on their cultural backgrounds.<sup>85</sup>

Schools should provide age-appropriate training to their students regarding Title IX and sexual violence.<sup>86</sup> Training may be provided separately or as part of the school's broader training on sex discrimination and sexual harassment.<sup>87</sup> However, sexual violence is a unique topic that should not be assumed to be covered adequately in other educational programming or training provided to students.<sup>88</sup> The school may want to include this training in its orientation programs for new students; training for student athletes and members of student organizations; and back-to-school nights.<sup>89</sup> A school should consider educational methods that are most likely to help students retain information when designing its training, including repeating the training at regular intervals.<sup>90</sup> OCR recommends that, at a minimum, the following topics (as appropriate) be covered in this training:

- 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;

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 41.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

- 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; and
- Title IX’s protections against retaliation.<sup>91</sup>

The training should also encourage students to report incidents of sexual violence and should explain that students (and their parents or friends) do not need to determine whether incidents of sexual violence or other sexual harassment created a hostile environment before reporting the incident.<sup>92</sup> OCR recommends that a school inform students that the school’s primary concern is student safety, and that use of alcohol or drugs never makes the survivor at fault for sexual violence.<sup>93</sup> It is also important for a school to educate students about the persons on campus to whom they can confidentially report incidents of sexual violence, including the offices or individuals who can provide resources such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services and legal assistance.<sup>94</sup>

## **II. VAWA Training Mandates**

The Violence Against Women Reauthorization Act of 2013 (VAWA) also requires schools to develop education, primary prevention and awareness programs for all incoming students and new employees, and ongoing prevention and awareness campaigns for students and faculty.<sup>95</sup> VAWA requires education programs to promote the awareness of rape,

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 41-42.

<sup>93</sup> *Id.* at 42.

<sup>94</sup> *Id.*

<sup>95</sup> Section 304 of the VAWA, Pub. L. 113-4, Violence Against Women Reauthorization Act of 2013 (Mar. 7, 2013).

acquaintance rape, sexual assault, domestic violence, dating violence and stalking.<sup>96</sup> Under VAWA, educational and training programs must include:

- a statement that the school prohibits the offenses of domestic violence, dating violence, sexual assault and stalking;
- the definition 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 such individual;
- information on risk reduction to recognize warning signs of abuse behavior and how to avoid potential attacks;
- possible sanctions or protective measures that the school may impose following a final determination of an institutional disciplinary procedure regarding sexual assault, domestic violence, dating violence or stalking;
- procedures victims should follow if a sex offense, domestic violence, dating violence, sexual assault or stalking has occurred, including information in writing about:
  - the importance of preserving evidence as may be necessary to the proof of criminal domestic violence, dating violence, sexual assault or stalking, or in obtaining a protection order;
  - to whom the alleged offense should be reported;
  - options regarding law enforcement and campus authorities, including notification of the victim's options to:
    - (1) notify proper law enforcement authorities, including on-campus and local police,
    - (2) be assisted by campus authorities in notifying law enforcement authorities if the victim so chooses and
    - (3) decline to notify the authorities.

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<sup>96</sup> *Id.*

- 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;
- procedures for institutional disciplinary action in cases of alleged domestic violence, dating violence, sexual assault or stalking, which shall include a clear statement that the proceedings shall:
  - (1) provide a prompt, fair and impartial investigation and resolution;
  - (2) 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;
  - (3) assure that the accuser and the accused are entitled to the same opportunities to have others present during an institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice;
  - (4) both the accuser and the accused shall be simultaneously informed, in writing, of:
    - (a) the outcome of any institutional disciplinary proceeding that arises from an allegation of domestic violence, dating violence, sexual assault or stalking;
    - (b) the institution's procedures for the accused and the victim to appeal the results of the institutional disciplinary proceeding, of any change to the results that occurs prior to the time that such results become final; and
    - (c) when such results become final.

In addition, VAWA requires annual education of implementers 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.

On October 20, 2014, the final VAWA Negotiated Regulations were published. The regulations seek to implement the concepts outlined above.<sup>97</sup>

### **III. Additional Considerations for Prevention, Education and Training**

We recommend that educational institutions proactively engage in the education and prevention of sexual and gender-based harassment and violence, including sexual assault, domestic violence, dating violence and stalking. Education and prevention requires an integrated

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<sup>97</sup> <https://www.federalregister.gov/articles/2014/10/20/2014-24284/violence-against-women-act>.

communications plan to effectively share institutional policies, prevention efforts, reporting options and resources with all community members. Clear communication in all training and education programs is critical for a Title IX team to be successful and compliant. In a coordinated and integrated approach to the evolving training requirement, it is critical for a designated administrator, or prevention and education team, to outline the tone (balanced, sensitive, informed, and impartial), content (legally compliant and psychologically informed) and timing (early and ongoing) of the Title IX team's communication strategy and maintain consistency in all training and education programs.

All communications platforms should be developed with the core constituents in mind – students, faculty, and staff, while considering the perspective of additional interested constituencies – administration, board, alumni, community partners, and regional Offices for Civil Rights.

A balanced and sensitive tone should frame the delivery of legally informed content and will set the stage for all subsequent materials and messages. The Title IX team should develop a communications campaign that brands Title IX education and prevention materials with a sensitive and impartial tone. Any spokespersons, web materials, written copy, collateral and broadcast materials should be consistent and reinforce the chosen tone and content. In developing the campaign, consider concepts of primacy, repetition, and branding in developing relevant messages that can be heard and will resonate with listeners.

Recognizing that there are as many different learning styles and communication modes on campus as there are community members, the communications plan should include a diversified portfolio to reach all constituencies. This portfolio should provide many different access points, including: in person, both in small, targeted settings like residence halls or classes and in broader more community-based presentations; listening sessions; through the use of online technology, including trainings, e-mails communications, and a web page dedicated to sexual respect; through student media, including daily and monthly publications; and anonymously, through ethics point or an anonymous hotline/suggestion box. The goal is to provide a safe and supported space for conversation, to embrace the tension these issues naturally engender, and to allow the campus climate and culture to both shape the conversation, and importantly, to be shaped by the conversation.

Education and prevention must be an institutional priority that involves high-level administrators, faculty members, and coaches alike. We recommend that schools consider creating an educational seminar designed by faculty members and administrators that addresses issues of sexual violence, gender equity, tolerance and diversity, alcohol and substance abuse, intimacy, consent, the “hook up” culture, social media, bullying, hazing, classism, racism, and other issues that can impact the campus culture and the development and education of students. This direct educational approach – a for-credit seminar that utilizes the skills of our most effective and engaging educators – is a cutting edge practice in changing culture that demonstrates the school's commitment to student welfare and development.

Education and prevention must also actively engage students in the development of educational programming. This may include residence life campaigns, art or design contests,

competitions for the best alternative social events, and other creative ideas shaped by the engaging and entrepreneurial minds of our student population. The direct involvement of our students can engender responsibility for self and others, ownership of prevention and education, and a more closely connected campus culture through programs like bystander intervention training, peer advisors, and other student-run initiatives.

Any education and prevention program must involve widespread and ongoing campus initiatives throughout the academic year. Programming must be consistent, ongoing and repeated in many formats and forums, not simply limited to new student orientation. The goal of this scaffold approach is to foster a climate that encourages reporting by providing consistency in message, policy, procedure, and outcome. Empowering students to respect themselves and one another and to confront difficult issues with openness and transparency has the potential to directly impact culture. Similarly, identifying and addressing barriers to reporting through education efforts can help to instill confidence across the campus community that allegations will be investigated, evaluated, and adjudicated in a fair and equitable manner that is supportive to both complainant and respondent.