

Title IX Advisor Interim Report

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Section I Introduction

This report arises from my work as the University of Colorado (“CU”) at Boulder’s Title IX Advisor for the past year. Although I have communicated extensively with the Chancellor and the University’s counsel within the scope of our attorney-client relationship, we agreed that it would be beneficial to provide a summary public report on the relationship, as it has developed, and the efforts to date.

This report is not a “final” report because the ongoing Title IX review will span a five year period. Instead, this report is intended to describe my CU’s efforts to abate sexual harassment and assault, as well as my activities as the Title IX Advisor. Together, CU and I are still collecting data, reviewing the effectiveness of certain policies, and considering ways to make changes, particularly in light of the fiscal concerns that many colleges and university are currently facing. I will continue to provide further analysis as new programs are considered and implemented. I will also continue to monitor existing programs and respond to events that occur during the course of our relationship.

Section II Context of Title IX Consulting Relationship

This report addresses CU’s efforts to comply with Title IX of the Education Amendments of 1972. Title IX is a law that prohibits discrimination in educational programs receiving federal financial assistance.

Title IX’s statutory language does not address sexual assault or harassment, but the statutes’ requirements and contours have been interpreted and implemented across all three branches of government, including the judiciary. In 1999, the United States Supreme Court rendered its opinion in *Davis v. Monroe County Board of Education*, which held for the first time that an educational institution could be liable for damages under Title IX where the institution knew about sexual harassment by a third-party and responded with deliberate indifference to the risk of harm. Legal liability, in other words, was predicated upon the institution’s failure to respond to known sexual harassment and assault.

After an incident where CU students claimed that they were sexually assaulted by CU football players and recruits, the Tenth Circuit Court of Appeals rendered its decision in *Simpson v. University of Colorado*. The Tenth Circuit held that, in addition to the standards that the Supreme Court articulated in *Davis*, an educational institution could be liable under Title IX when “the violation is caused by official policy, which may be a

policy of deliberate indifference to providing adequate training or guidance that is obviously necessary for implementation of a specific program or policy of the recipient.” After *Simpson*, CU must not just respond appropriately to known sexual harassment, it must identify risks in its programs and provide sufficient training to abate the risk.

As part of the settlement between the plaintiff and CU in *Simpson*, the parties created an independent Title IX Advisor position to assess and reduce the risk of sexual harassment and assault on the Boulder campus. In addition, the parties engaged me as a means of providing a system of “checks and balances” to ensure that CU adequately addressed particular cases of sexual harassment and assault. To accomplish these goals, I will provide guidance to the Chancellor, including both policy advice and consultation after investigating when a victim of sexual harassment or assault is dissatisfied with the outcome from CU formal procedures. It is not my role to represent either party in these instances, or to oversee the day-to-day investigations, but to instead to conduct a final review upon request to ensure that CU has appropriately applied its policies and conducted an adequate investigation. In doing so, I am a resource that provides a buffer against concentrated spheres of power or individual influence that might otherwise hinder CU’s formal resolution processes.

Finally, CU made significant policy and personnel changes after the events giving rise to the *Simpson* lawsuit. I will monitor the ongoing efficacy of CU’s efforts to ensure that these positive changes are not lost through the passage of time and change of personnel. I will also review of future policy proposals related to sexual harassment and assault. CU has made significant advancements since the events that gave rise to the *Simpson* lawsuit, but without ongoing vigilance CU might not be able to maintain them.

To facilitate the free exchange of ideas, all communications with me, except those describing an imminent risk of harm, are confidential and protected.

- To allow Professor Hogshead-Makar to most effectively provide her legal services and to encourage candid disclosures to Professor Hogshead-Makar, the parties agree that their relationship is confidential in nature and that Professor Hogshead-Makar will receive and transmit information in confidence during the course of her duties.

Ideally, by examining systemic issues that contribute to sexual assault and sexual harassment, as well as the specific causes that contributed to individual events, CU can be well prepared to prevent future incidents and respond to those that may inevitably arise. As large public university, it is unlikely that CU will be able to eliminate all sexual assault and sexual harassment from occurring on its campus, but it has undertaken significant efforts to build an environment where sexual assault and harassment are not tolerated.

Section III Scope of Relationship

CU and I have defined our relationship and the scope of the work as follows:

- Review and assessment of the University's policies related to issues of sexual assault and sexual harassment, including policies from the Office of Discrimination and Harassment, Office of Judicial Affairs, the University Police Department, COURAGE and other entities that provide services at the University of Colorado related to these subjects.
- To make periodic visits to the University, as necessary, to assess the University's ongoing efforts to comply with Title IX and create a safe campus environment.
- To review potential modifications to the University's policies related to sexual assault and sexual harassment and make recommendations to the Chancellor about the proposed modifications.
- To serve as a resource for University personnel or departments when they see a policy or process related to Title IX that is not being properly administered.
- To serve as a resource to students who claim to have been the subject of sexual assault or sexual harassment, specifically by reviewing cases involving sexual assault or sexual harassment at the conclusion of University investigative and disciplinary processes and by making recommendations to the Chancellor if she believes that the University investigative or disciplinary processes have not been properly administered.

In short, CU has engaged me as its Title IX Advisor to provide a global, ongoing review of its policies and programs related to sexual assault and harassment.

Section IV Formal Policy Review

The first order of business was to review formal policies and procedures, including University Laws and Policies, Regent Policies, as well as state and local non-discrimination laws involving student gender issues. Also reviewed were individual policies from the Office of Discrimination and Harassment, the Office of Judicial Affairs, the Office of Victim Assistance, the Athletics Department, the Wardenburg Health Center, Counseling and Psychological Services, the Ombuds Office, the Women's Resource Center, the COURAGE program, the Office of Public Safety, and Ralphie's Guide, and the University of Colorado Athletics Department Five-Year Gender Equity Plan, dated September 27, 2004.

I should note that many of the policies that I reviewed were not strictly limited to sexual assault or harassment. Naturally, issues of employment, such as faculty recruitment, faculty service requirements, faculty promotion and leadership opportunities, maternity policies, and childcare all relate to Title IX. Similarly, issues related to racial discrimination and sexual orientation discrimination often overlap with issues of gender discrimination. By developing policies that integrating diverse perspectives, CU will more effectively combat sexual assault and harassment. I will discuss the *Gender Violence Prevention Plan*, which details the intersection between many forms of discrimination, later in this report.

Before engaging my services as its Title IX Advisor, CU had done a thorough job of integrating policies from various parts of the institution. The policies are well-layered, meaning that policies addressing distinct audiences and covering specific topics are basically consistent with and relate logically to each other. After I recommended changes to strengthen some of the policies, CU implemented many of them. As a whole, the policies include meaningful efforts to educate students about the dynamics of sexual assault and the effects that sexual attacks impose upon survivors.

As an institutional goal, CU should strive to adopt policies that establish institutional values and create an environment where sexual harassment is not accepted, thereby protecting CU's educational mission. A good description of how a good sexual assault policy accomplishes these goals can be found at STUDENTS ACTIVE FOR ENDING RAPE (SAFER), *WHAT MAKES A BETTER SEXUAL ASSAULT POLICY?* (available at: <http://www.safercampus.org/betterpolicy.html>.) I would also recommend *The Policies Database Project* (available at <http://www.safercampus.org/policies.php>).

Over the years, CU will need to modify some of its current policies to address new situations, which creates a risk that policies in different units will become inconsistent with the main policies over time. The main policies are the University of Colorado Administrative Policy on Sexual Harassment Policy and Procedures, the Student Conduct Policies and Procedures, the University Policy on Amorous Relationships Involving Evaluative Authority, the Campus Violence Policy and the Student Classroom and Course-Related Behavior, and the discussion of consent in the Chancellor's Report on Sexual Harassment/ Sexual Misconduct Response; Attachment B: Student Code of Conduct Standard on Sexual Misconduct, (available at http://www.colorado.edu/chancellor/reports/sexual_misconduct/attachment_b.html). I have suggested that CU adopt one master policy on discrimination and harassment to maintain internal consistency.

Policies addressing sexual assault and sexual harassment are effective only to the extent that the members of the CU community know about them and are able to access them. Therefore, CU must widely disseminate its policies, provide education about them, and make them readily searchable by students and employees online. For the most part, CU's policies and handbooks are available on the internet and are searchable using logical search terms. For example, a victim who wished to report an incident confidentially could locate the procedure for making a report. Nonetheless, CU should

continue to explore ways to make its policies more accessible. For example, a student or employee would have a difficult time locating the “Amorous Relationship” policy without knowing the correct buzz words. Training that is targeted to a particular audience, rather than generalized training, will also assist students and employees in their efforts to comply with the policies.

I have highlighted pregnancy and parenting policies as an area where CU can enhance its current policies and procedures. The Athletics Department has recently enacted a Student-Athlete Pregnancy Policy, but there is not a policy for students generally. Many higher-education institutions across the country need to strengthen their policies in his area because pregnancy discrimination is a form of sex discrimination prohibited by Title IX and other laws. At most institutions of higher education, students with pregnancy-related conditions, and the choices they make as a result of their pregnancy, are legally protected. For example, a student has a right to carry a pregnancy to term, the right to terminate a pregnancy, and the right to parent a child. She also has the right to continue participating in all aspects of the institution’s educational programs, for as long as is medically safe, without harassment or animus. Scholarships or financial awards are usually protected, and their renewal may also be protected. Pregnant students must have the ability to invoke the protections related to pregnancy without fear of retaliation.

Generally speaking, employees understand the legal protections that apply to pregnancy, but students do not have the same level of understanding. Pregnancy is a vulnerable time in a woman’s life, particularly as she attempts to continue her academic progress. If institutional standards regarding protection for pregnancy and pregnancy-related decisions are not clear, such that a pregnant student may believe that her course of study is tenuous or that she may lose her scholarship, she is less likely to be able to assert herself in other areas of concern, such as reporting sexual assault or harassment. I have talked with the Chancellor about these issues, and will be working with CU to assure pregnancy discrimination is included in gender discrimination policies and training.

Section V

Policy Implementation

Strong sexual harassment policies provide a good foundation, but alone they will not prevent sexual harassment and assault. Nor will good policies alone insulate an institution from Title IX liability. Policies are only effective to the extent they are effectively implemented. Effective implementation, in turn, depends on good working relationships, creative thinking, and tailoring individual responses to the many possible situations that can arise. Support from the highest levels of the institution is necessary to respond assertively to sexual harassment.

Concurrent with my review of CU’s policies, I held meetings with over 70 members of the CU community, including group meetings with the Office of Discrimination and Harassment, the Office of Judicial Affairs, the Office of Victim

Assistance, SASH, (Sexual Assault Sexual Harassment Taskforce), the Athletics Department, the Women's Resource Center, the representatives from the Chancellor's Committee on Women, the Boulder Police Department, and numerous offices within the Office of Student Affairs. In addition, I met with many individuals, including the Chancellor, other high-ranking University officials, faculty members, and students. I was able to meet with most of these individuals and groups in person, but conducted some of the meetings by phone and e-mail. I have continued to communicate with several groups on an ongoing basis.

I have reviewed CU's responses to specific acts of sexual harassment and assault, including formal disciplinary processes initiated against alleged perpetrators. Some of these cases were "rumor investigations" where CU responded to potential incidents of sexual assault or harassment that were not reported by the alleged victim. In my review of these cases, I concluded that the investigations were as thorough as possible, but there are some cases where the investigation is necessarily truncated because the complaining party wished to remain anonymous. CU's responses to incidents of sexual assault and sexual harassment were also appropriate and consistent.

In addition to reviewing cases occurring on campus, I observed that CU leaders reacted holistically and promptly to a series of off-campus 2009 sexual assaults perpetrated by a non-CU-assailant. For example, CU leadership provided a reminder of safety precautions and available community resources (available at <http://www.colorado.edu/news/r/13eb3e54ce218fc726b1142fc52a056b.html>). CU leadership also communicated with the parents about these assaults and reaffirmed the wide array of CU resources. These responses demonstrate that CU appreciates the significance of sexual assault upon a community and that it is not limiting its responses to sexual assaults occurring on the campus or between CU students.

I am also pleased that CU has learned from the experience of other universities and proactively updated its practices to avoid problems that occurred on other campuses. For example, a female student-athlete was sexually assaulted at the University of Iowa in October, 2007 by two male athletes. A University of Iowa Special Counsel's Report found numerous and substantial flaws in the University of Iowa's responses, including failures by specific members of its administration to respond to reports of sexual assault. Although Iowa had policies for responding to sexual assaults, there was no single coordinating office or procedure detailing how the university should respond to sexual assaults. To avoid this problem, CU created and formalized its Response, Support and Communication Plan, which is spearheaded by the Office for Student Affairs and the Chancellor. The plan identifies the offices and individuals to be brought into decision-making after a crisis. The plan makes it far less likely that the experience at the University of Iowa will be repeated at CU.

Section VI

A Holistic Approach to Preventing Sexual Harassment and Assault

Although working toward technical Title IX compliance is both necessary and desirable, CU's ultimate goal is to create an environment free of sexual violence. Preventing gender violence requires a cultural shift beyond policy drafting and education. It also requires addressing sexual assaults rapidly and effectively, both of which are critical components of CU's approach. CU must adopt a holistic approach where healthy and caring attitudes and practices are the norm, particularly as they relate to sex role stereotyping and sex generally. As the American College Health Association has detailed in its report, "Shifting the Paradigm: Primary Prevention of Sexual Violence," (available at http://www.acha.org/sexualviolence/docs/ACHA_PSV_toolkit.pdf) this type of effort requires on-going educational efforts for the entire CU community.

In 2008, Chancellor Peterson empowered a multidisciplinary taskforce, known as the SASH Taskforce ("Sexual Assault Sexual Harassment Taskforce"), to carry out CU's re-envisioning of sexual violence prevention. SASH members include a broad range of members from throughout CU, including Student Affairs, Student Housing, Student Orientation, the Women's Center, Victim's Assistance, Gay Lesbian Bisexual Transgender Resource Center, the Interactive Theater Project, and the Alcohol and Other Drugs Program. Prior to this charge by the Chancellor, SASH had perceived a disconnect between its role in policymaking and its ability to educate students about those policies. SASH needed to have a greater ability to engage with the higher levels of the administration. Not only will this allow SASH to communicate its priorities to the administration, but it allows SASH to obtain the benefit of the administration's perspective.

Although the current composition of SASH conforms with national practices in counterpart institutions, I believe that SASH needs a strong faculty presence. SASH members have considerable expertise and produce good educational materials, but need to have a faculty presence to assist in the integration of those materials throughout the institution, including the curriculum. Chancellor DiStefano is receptive to exploring opportunities to increase faculty involvement.

In September 2008, SASH began working on its *Gender Violence Prevention Plan*, which it released in March 2009. The GVP Plan recognizes, consistent with accepted theory, that an institution will be able to prevent sexual assault and harassment if it adopts a multi-pronged, multi-layered approach to change the cultural norms that underlie sexual violence. Rather than centralizing the responsibility for preventing sexual violence in one position or one office, the GVP Plan advocates that CU must integrate the materials and messaging discouraging sexual aggression throughout the campus. CU must incorporate its messages in various programming including orientation, housing, classroom discussions, health promotion programs, media campaigns, peer education programs, and discussions during student health and counseling services visits.

The GVP Plan includes roles for the entire CU community to play in creating a campus culture of mutual respect and civility. The GVP Plan advocates that the institution support efforts that oppose all aspects of sexual aggression. The GVP Plan is truly laudable as a national leader and has great possibilities for the entire CU campus. The Chancellor has received the GVP Plan, endorsed its goals and purposes, and is exploring how the campus can implement it, given the current budget shortfalls facing higher education.

I have attached the GVP Plan as an appendix to this report.

Section VII Targeted Prevention Efforts

In addition to the holistic approach taken by the GVP Plan, specific targeted measures need to be taken to address specific risks of sexual harassment and assault. As noted above, CU must identify obvious risks of sexual harassment, and abate the risk through training.

Identification of Peer Perpetrators:

As a place to focus its training efforts, CU's research, as well as its own experience, identified male student-athletes as an enhanced risk. CU's identification of this risk corresponds with a large body of research demonstrating that male-student athletes are involved in a disproportionate number of incidents of sexual assault and sexual harassment. Although most male student-athletes abide act honorably and bring distinction to their universities, the incidence of sexual assault and harassment in this group requires universities to think systemically and not treat sexual assaults and harassment as isolated events occurring between individual perpetrators and victims. Instead, universities must discourage a culture that tacitly fosters misconduct. As described below, CU has engaged in targeted training of its student-athletes, including training through its coaches, in an effort to mitigate the risk of sexual assault and harassment perpetrated by male student-athletes.

CU has also identified fraternities as posing an enhanced risk, which is consistent with cases across the United States where fraternity members have engaged in sexual assault and harassment. This group poses a unique challenge at CU because the administration does not currently recognize fraternities as official organizations due to ongoing disputes about alcohol usage and freshman rush. CU does, however, maintain a Greek Advocate, to advocate for and advise the fraternities. CU should continue to engage in outreach to the fraternities, their national organizations, and alumni about issues of sexual assault and harassment, as well as engage in effective investigation and discipline when sexual assault or harassment occurs in the fraternity setting.

CU has also identified out-of-state students who are not performing well academically as posing an enhanced risk. Having identified this particular group of

students, however, requires CU to take efforts to address the risk. CU is currently evaluating the means of providing additional training to these students.

Athletic Equality:

While the *Simpson* lawsuit was pending, CU began integrating the Athletics Department into the CU campus umbrella, rather than treating it as a satellite operation. It continues this process of integration. I reviewed the operations of the Athletics Department for compliance with Title IX's requirements regarding specific risks for sexual harassment and assault, as well as for along with athletic participation opportunities, scholarships and treatment for men and women. As Holly Hogan, a Title IX Scholar, observed:

When athletes commit sexual harassment and assault, the conflation of gender-based discrimination is a particularly profound problem. When schools violate Title IX principles by privileging male athletes over female athletes, it creates an environment of privilege and entitlement for males and second-class citizenship for females.

Diane L. Rosenfeld, *Concluding Remarks*, 31 HARV. J.L. & GENDER 407, 414-15 (2008) (quoting Holly Hogan, Conference Transcript, 31 HARV. J.L. & GENDER 383 (2008)).

In an Athletics Department where male athletes disproportionately receive first-class treatment, it reinforces the counterproductive concepts of male privilege and superiority. As noted above, because scholars have identified a heightened risk of sexual assault by athletes, CU must provide substantive equality in its athletics programs as a means of combating sexual harassment and assault. CU institutional choices about how it prioritizes assets between men's programs and women's program visibly demonstrate its commitment to a culture of equality. If institutions tell male student-athletes to treat women as equals, but do not treat female student-athletes as equals, it cannot expect male student-athletes to follow its instructions.

Sexual Harassment Training in Athletics:

Specific training for student-athletes at CU has been expanded from the football team to athletes in the entire Athletic Department. A number of CU football players were arrested in 2008 (these incidents were of a non-sexual nature) and the department has addressed many of the underlying issues. New drug testing policies have been implemented in Athletics. In addition, Athletics saw the need for more attention on athlete wellness, and created the director of Student-Athlete Wellness position. She has expertise counseling a wide array of issues. She is now a member of SASH and has coordinated her efforts with the department of Alcohol and Other Drugs.

CU Recruiting Policy:

The recruiting policy implemented in the Fall of 2004 appears to be functioning well. By all accounts, recruits are receiving an enjoyable opportunity to evaluate CU athletic opportunities, educational opportunities, and its campus without being in the presence of alcohol or drugs. The recruits are finished with team-related activities by midnight. The student-athlete hosting a recruit is disciplined if the policy is violated. CU continues to enforce this provision.

Identification of Supervisor/ Faculty Perpetrators:

Faculty/student sexual harassment is another area of known risk. Opportunities for sexual harassment in the educational context include internships, office hours visits, and during overseas educational programs. A common feature of these higher-risk contexts is that they provide opportunities for less structured interaction and less direct supervision. Because these less structured interactions with faculty are often a valuable part of the teaching/ mentoring process, the Office of Discrimination and Harassment has not sought to discourage them, but instead has been targeting them for additional training.

High Risk Locations:

High-risk locations for sexual assault and harassment include the residence halls and fraternity houses. The administrators in Judicial Affairs and Housing, including Residence Advisors, are well-aware of this risk, and are providing training to mitigate the risks.

Alcohol as a Risk Factor:

Alcohol use/abuse is not a direct cause of gender violence, but it has been identified as a statistically relevant factor in studies of campus sexual assaults. Women who have been drinking are more likely to become victims of sexual assault, and men who have been drinking have an increased likelihood of perpetrating sexual assault. The CU campus is in an “alcohol dense” city, which means that Boulder has a high number of establishments with alcohol licenses per resident.

CU is aware of the problems that alcohol can create in a university community. CU operates an Alcohol and Other Drugs Program designed to educate students about alcohol and its effects. All students are asked to participate in a two-part course, known as AlcoholEDU, as part of the campus-wide alcohol prevention program, which includes information about sexual conduct under the influence of alcohol. Awareness initiatives related to alcohol use/abuse and its relationship to sexual violence need to be consistent and comprehensive across policy, education, and role modeling. Initiatives include the Parent’s Association and Alumni Associations.

Section VIII

Review of Current Training and Education

Employees and ODH.

Employees receive regular training from the Office for Discrimination and Harassment. ODH reports that it has provided sexual harassment training to 18,000 employees face-to-face, which includes student-employees and teaching assistants. The office provides comprehensive training on many aspects of sexual violence, specifically as they relate to the policies that ODH enforces. Training sessions are tailored to departments and specific audiences.

I reviewed an ODH training session and found that it was clear, comprehensive, and direct. The training could still be adapted to reach more learning styles, increase interactions and increase participant retention. The ODH could benefit from the expertise housed in the Faculty Teaching Excellence Program to amplify its long-term value to participants.

The ODH has initiated a campus-wide campaign on discrimination has been successfully implemented, with large, graphic signage throughout the campus.

Students and Judicial Affairs.

The new GVP Plan would substantially expand these types of trainings to students, specifically including gender violence *prevention*, along with students' responsibility as a member of the CU community.

Role of the Classroom:

Classrooms provide unique opportunities to share research and establish critical thinking skills to assist students in making healthy decisions that will decrease sexual harassment. CU-101, a course that would be mandatory for all incoming students, was reviewed as a possible method of inculcating a set of values that drive student conduct. I understand that CU has not adopted CU-101 on a going-forward basis, and I would encourage CU to consider avenues like CU-101 in the future. Even in the absence of a specific course like CU-101, faculty can infuse healthy sexuality messages into the curriculum more broadly, including women's studies, biology, health sciences, religious studies, sociology, psychology, ethnic studies, and ethics, to name a few.

While administrators do not and should not be dictating classroom materials, many faculty appreciate knowing where they can turn for expertise and resources when issues of gender and sexuality arise in their classes. A good discussion of this issue is contained in The American College Health Association's *Shifting the Paradigm: Primary Prevention of Sexual Violence* (available at: http://www.acha.org/sexualviolence/docs/ACHA_PSV_toolkit.pdf). In my discussions to CU administration, CU's Faculty Teaching Excellence Program has been identified as

another resource available to faculty for them to easily acquire this sort of expertise. Options include integrating appropriate messages into syllabi, identifying teachable moments by effectively reinforcing the CU community norm of respect for all members, among many other possibilities. Faculty can access some of these resources through Academic Affairs at <http://www.colorado.edu/UCB/AcademicAffairs/ftcp/index.html>.

Conclusion

Much has occurred in the year since I undertook the responsibilities as CU's Title IX Advisor. This report describes the relationship as it has evolved, some of the accomplishments within the CU community, and future areas for further ongoing diligence and improvements. I have developed a level of rapport with CU community members that allows for information and ideas to be shared.

The report lists many of the risks of sexual harassment and assault on the Boulder campus that have been identified and monitored, including reviews of CU official actions. Policies continue to be reviewed thoroughness, consistency, clarity, and ease of access. The SASH Report, *Gender Violence Prevention Plan*, holds great promise as a leading national program.

Only by examining the recurring causes that contribute to isolated occurrences of sexual harassment can CU be well prepared to prevent future incidents and respond appropriately to those that arise. I am continually struck by the degree of investment people had in a positive outcome for students and for the community as a whole. I look forward to continuing this dialogue with CU.