

HUSCH BLACKWELL

HIGHER EDUCATION GROUP

TEXAS A&M UNIVERSITY

REVIEW OF TEXAS A&M UNIVERSITY'S TITLE IX-RELATED POLICIES

AUGUST 2018

TABLE OF CONTENTS

3 EXECUTIVE SUMMARY

4 BACKGROUND

4 OVERVIEW OF APPLICABLE AUTHORITIES CONSIDERED

4 TITLE IX

5 VAWA

5 EMERGING CASE LAW TRENDS

6 PEER BENCHMARKING

6 COMPLIANCE WITH TITLE IX AND VAWA

6 POLICIES CONSIDERED

7 TITLE IX REQUIREMENTS

13 VAWA REQUIREMENTS

16 FAIR AND EQUITABLE POLICY STATEMENTS

18 CASE LAW TRENDS

21 CONSENSUAL RELATIONSHIP POLICIES

22 CONCLUSION

EXECUTIVE SUMMARY

Texas A&M University ("TAMU" or "the University") has engaged Husch Blackwell to conduct a Title IX program review related to its efforts to address and prevent sexual misconduct. We understand that TAMU's goal is to provide its community with a Title IX program that sets the standard in this area. Specifically, the University seeks to offer robust programming to prevent sex discrimination and sexual misconduct. It also wants to ensure that the manner in which it addresses complaints is equitable, trauma-informed, fair, thorough and swift, while at the same time, reflects its values of cultivating and educating its community, and ensuring a welcoming and safe environment for all.

This report includes a detailed review of the University's Title IX-related policies to determine whether they meet current compliance and legal requirements, and whether they align with best practices. This report is limited to the documents that, taken together, serve as the foundation of the University's Title IX program. As outlined in more detail below, these documents include institutional policies, statements of administrative procedure, as well as system-wide regulations that impact the consortium members that form the Texas A&M University System, including 11 universities, 7 state agencies, and a system office.¹

Of course, Title IX-related policies, such as those reviewed in this report, are only one aspect of an effective Title IX program. Through additional components of our work with the University, we will evaluate other critical aspects of the University's Title IX program, which may include procedures for evaluating reports of policy violations, (e.g., intake, investigation, adjudication, sanctions and appeals), coordination of Title IX and Clery Act compliance, campus climate, and the availability and effectiveness of training, prevention programming, outreach efforts and support services.

Altogether, our continued work with the University will assess not only how it explains its adherence to Title IX through its policies, but how it may improve upon the implementation of its Title IX program. This continued work will include a detailed review of relevant materials, and most importantly, extensive discussion with University community members this fall so that we may gather critical feedback and input directly from TAMU's campus community. This work is already underway, as we had the opportunity to have initial meetings with a number of University and student leaders, administrators and staff working on Title IX matters, as well as students from student government, Greek life, and women's advocacy groups. Much of that preliminary feedback

is reflected in this report, and much of it will also inform additional work ahead. In the coming weeks, we look forward to continuing these discussions and scheduling time with faculty, staff and students so we can listen to their concerns and recommendations.

It is worth noting that our work is just one part of a broader Title IX review commissioned by President Young that also includes an internal review team working to identify areas for improvement in TAMU's Title IX policies and practices. We recognize that there may be some degree of overlap between our work and that of the internal review team. However, utilizing a multi-front approach with teams of varying perspectives will yield value in terms of more comprehensive, thorough and credible community feedback, as well as more options for consideration. As meaningful changes and areas for improvement are identified, we appreciate that TAMU will begin implementing those on a rolling basis and will ensure that our work does not impede or delay those efforts.

To summarize the findings in this report, we believe that TAMU must enhance the policies that underlie its Title IX program to meet its goals in this area. While the University's policies are generally compliant with applicable Title IX requirements and federal agency guidance, to raise the bar, they must be improved to better align with best practices and current trends, as well as core principles articulated through recent Title IX case decisions.

For instance, while the University defines key terms in its policies, some definitions may not be as clear or accessible as they could be. Likewise, the University's statements and expectations relating to Title IX processes are unusually segmented across a number of policies and rules, making them difficult to access and understand. We appreciate that this segmentation may be the result of a combination of factors, including the overlay of system-specific requirements onto University-specific policies, as well as an interest in providing different populations (e.g., students, staff and faculty) with information that is customized for those audiences. In our view, a single policy relating to all aspects of sex discrimination would be easier to follow, and would therefore better serve the University's community. Nonetheless, after a thorough review of the applicable policies, we feel Texas A&M University has a strong foundation to build upon, and that adopting recommendations in this report will significantly advance the University's goal of elevating its program as one that best serves its community and is held out as a model for other institutions.

¹ Though we may refer to each policy, regulation or SAP separately throughout this report, we also collectively refer to these various documents as "Title IX-related policies."

BACKGROUND

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

This focus shifted in 2011 when the primary agency charged with enforcing Title IX, the U.S. Department of Education’s Office for Civil Rights (“OCR”),² issued the first of several guidance documents that established extensive new compliance expectations for how colleges and universities prevent and address allegations of sexual misconduct. As a result, colleges and universities across the country have worked over the last 7 years to develop a Title IX infrastructure that supports their efforts in the areas of: prevention, awareness, and educational programming; resources for impacted parties; and investigation and adjudication of complaints.

After this period of increased vigilance by the higher education sector, in September 2017, OCR withdrew two critical guidance documents that have largely shaped institutions’ Title IX programs.³ OCR also announced its plan to develop new Title IX regulations through the notice and comment rulemaking process. To date, OCR has not issued proposed rules. In addition to these changes in OCR guidance, we have seen significant case law developments through federal court decisions on Title IX-related disputes that are also driving changes to the way institutions respond to and

investigate complaints. The state of Title IX is undoubtedly in flux. In our view, some Title IX compliance requirements are precise and specific, while others are subjective. Indeed, the federal courts that adjudicate Title IX lawsuits, and the OCR that enforces the law administratively, are not always consistent or clear in their interpretation of Title IX.

For that reason, it is our view that there is no panacea for sex discrimination and sexual misconduct. There is no one policy, no single training, and no specific investigation model that is “right” or “best.” Instead, each institution must use its own expertise, authority and deference to develop a Title IX program that works for its community. In other words, Title IX policies and programs must not only address compliance requirements, but should also reflect the culture, educational values and community expectations, and they must be administratively achievable.

Given this, the Title IX policies and practices of colleges and universities are ever-evolving and improving. While institutions of higher education have embraced a culture of continuous improvement in this area, a number of trends and best practices have emerged. It is against this backdrop that we offer to Texas A&M University recommendations to better demonstrate compliance with applicable requirements and help this institution better serve its community. We note that while some recommendations may relate directly to Title IX compliance requirements, other suggestions may be entirely discretionary and should be considered by TAMU against its broader goals, culture, and educational values, as well as administrative resources and community expectations.

OVERVIEW OF APPLICABLE AUTHORITIES CONSIDERED

TITLE IX

Title IX is a federal law that prohibits discrimination on the basis of sex in educational programs and activities at colleges and universities that receive federal financial assistance. Sexual misconduct committed by students and employees can constitute prohibited sex discrimination if it is sufficiently severe so as to interfere with a person’s participation in a school’s programs and activities (i.e., it creates a “hostile environment”). Therefore, under Title IX, schools that receive federal funds have an obligation to respond to reports of sexual misconduct occurring in their programs and activities and to redress sexual misconduct that has occurred, and prevent its recurrence.

Institutions of higher education are subject to Title IX’s legal and regulatory requirements as recipients of federal financial assistance. Because TAMU accepts federal financial assistance, namely federal student loans and grants under the Title IV student aid program, TAMU is subject to Title IX.

Our analysis of the University’s compliance is rooted in the Title IX statute and regulations, as well as currently applicable OCR guidance. OCR has published several significant guidance documents discussing institutions’ obligations under Title IX. As mentioned above, last year OCR withdrew extensive guidance that was issued during the Obama administration. Key OCR guidance documents on Title IX issues and the status of those documents are listed below. We have included the recently withdrawn guidance to the extent that it remains instructive as to current and best practices. In addition, some of the principles in the withdrawn

² The U.S. Department of Justice shares enforcement authority over Title IX with OCR. See: 2015 Resource Guide, FN 1, page 1, <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201501.pdf>. Other federal agencies also enforce Title IX, to the extent that they offer federal financial assistance to an entity providing an education or training program.

³ OCR’s 2017 Dear Colleague Letter can be found at: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>; its 2017 Q&A Guidance can be found at: <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

guidance documents may be reinstated in the anticipated regulations that are expected to be released in proposed form, sometime in 2018.

APPLICABLE

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

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

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

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

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

WITHDRAWN

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

A guidance document, in Question-and-Answer format, published in April 2014 (“Q&A Guidance”).¹⁰ In large part, the Q&A Guidance supplements the 2011 DCL by summarizing

or further clarifying key points discussed in the 2011 DCL. The Q&A Guidance also provides additional information that an institution must consider when evaluating its Title IX compliance.

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

VAWA

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

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

EMERGING CASE LAW TRENDS

Our work was also informed by our review of court decisions involving relevant Title IX and constitutional due process issues within the Fifth Circuit Court of Appeals, which includes Texas, as well as other circuits. These cases focus primarily on three trends in Title IX civil claims: deliberate indifference, biased process/erroneous outcome, and due process.

It is important to keep in mind that federal court decisions resolve injunctive or money damages claims asserted by a plaintiff against an institution. That said, in many cases, the standard for civil

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

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

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

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

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

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

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

¹¹ VAWA’s regulations, which took effect on July 1, 2015, can be found at: <http://ifap.ed.gov/registers/attachments/FR10201-FinalRuleViolenceAgainstWomenAct.pdf>.

liability is not the same as the standard for regulatory compliance (i.e., compliance with Title IX regulations or sub-regulatory guidance). For example, courts have often held that a failure to comply with Title IX regulations does not necessarily establish deliberate indifference sufficient to recover money damages under *Davis v. Monroe County Board of Education*.¹²

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

COMPLIANCE WITH TITLE IX AND VAWA

POLICIES CONSIDERED

Student Policies

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

Student Rule 47: Investigation and Resolution of Complaints Against The University Students for Sexual Harassment, Sexual Assault, Dating Violence, Domestic Violence, Stalking, and Related Retaliation (SSDDSR) (<http://student-rules.tamu.edu/rule47>)

- ▶ Student Rule 47 references other rules, including:
 - » Various subsections of Student Rule 24: Student Conduct Code (<http://student-rules.tamu.edu/rule24>)
 - » Student Rule 26: Student Conduct Proceedings (<http://student-rules.tamu.edu/rule26>)
 - » Student Rule 27: Sanctions (<http://student-rules.tamu.edu/rule27>)
 - » Student Rule 51: Student Conduct Separation and Appeal (<http://student-rules.tamu.edu/rule51>)
 - » Student Rule 58: University Disciplinary Appeals Panel (<http://student-rules.tamu.edu/rule58>)

PEER BENCHMARKING

Our work also included benchmarking key components of the University's policies in comparison to peer institutions. For purposes of these comparisons, we relied upon a cohort of fourteen (14) university peers: University of Florida, University of Georgia, University of Michigan, University of Minnesota, Purdue University, University of North Carolina at Chapel Hill, University of Texas at Austin, Indiana University, University of Illinois, University of Maryland, University of California Los Angeles, University of Washington, Arizona State University, and University of Virginia.

Due to the degree of variation and nuance within each institution's Title IX-related policies, our analysis necessarily relied upon estimation in order to categorize similar approaches. For this reason, our results identify broad trends and are presented in aggregate form. While we anticipate that the University will find our comparisons instructive, we have not identified institutions, as those universities are in the best position to speak to the specifics of their Title IX-related policies.

- ▶ System Regulation 08.01.01 (<http://policies.tamu.edu/08-01-01.pdf>)
- ▶ Civil Rights Compliance 08.01.01.M1 (<http://rules.tamu.edu/PDFs/08.01.01.M1.pdf>)

Employee Policies for Faculty and Staff

In addition to these policies applicable to students, we also reviewed the following University rules and procedures that address the investigation and resolution of discrimination complaints against faculty members, non-faculty employees and third parties.

- ▶ System Regulation 08.01.01 (<http://policies.tamu.edu/08-01-01.pdf>)
- ▶ Civil Rights Compliance 08.01.01.M1 (<http://rules.tamu.edu/PDFs/08.01.01.M1.pdf>)
- ▶ Investigation and Resolution of Complaints Against Non-Faculty Employees and Unrelated Third Parties for Illegal Discrimination, Sexual Harassment, or Related Retaliation Charges 08.01.01.M1.01 (<http://rules-saps.tamu.edu/PDFs/08.01.01.M1.01.pdf>)
- ▶ Investigation and Resolution of Complaints Against Faculty Members for Illegal Discrimination, Sexual Harassment, or Related Retaliation Charges 08.01.01.M1.02 (<http://rules.tamu.edu/PDFs/08.01.01.M1.02.pdf>)

¹² 526 U.S. 629 (1999).

These procedures reference related University policies, rules, and standard administrative procedures as follows:

- ▶ **Complaint and Appeal Procedure for Faculty Members** 32.01.01 (<http://policies.tamus.edu/32-01-01.pdf>)
- ▶ **Complaint and Appeal Process for Non-Faculty Employees** 32.01.02 (<http://policies.tamus.edu/32-01-01.pdf>)
- ▶ **Discipline and Dismissal of Non-Faculty Employees** 32.02.02 (<http://policies.tamus.edu/32-02-02.pdf>)
- ▶ **University Rule 12.01.99.M2** (<http://rules-saps.tamu.edu/TAMURulesAndSAPs.aspx>)

Nondiscrimination Statements

In addition, the University also has two nondiscrimination statements, as follows:

- ▶ **University Statement on Harassment and Discrimination** (<http://student-rules.tamu.edu/statement>)
- ▶ **Notice of Nondiscrimination and Abuse** (<http://vpfa.tamu.edu/media/642261/NoticeOfNonDiscrimination.pdf>)

TITLE IX REQUIREMENTS

Notice of Nondiscrimination

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

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

Importantly, the University's Notice of Nondiscrimination and Abuse is linked on the University's homepage and meets the requirements above. The University Statement on Harassment and Discrimination¹⁴ does not meet the Title IX requirements noted above and thus does not independently satisfy the requirement for a notice of nondiscrimination. Specifically, the notice does not identify the contact information for the designated Title IX

Coordinator, and the notice does not specifically state that the University's non-discrimination obligation extends to employment and admissions.

The Title IX Coordinator

Institutions are also required to designate at least one individual to coordinate its Title IX compliance efforts and to receive complaints of sexual misconduct.¹⁵ TAMU has done this by designating Jennifer M. Smith as its Title IX Coordinator, and providing clear access to her contact information by posting it on the University's Title IX website.¹⁶

Based upon our review of the University's policies, however, we believe the role of this individual should be emphasized to align with applicable Guidance. Although other guidance has been withdrawn by the current administration, the 2015 DCL and accompanying resource guide regarding the expected role of Title IX Coordinators remain in effect. Ideally, the University's Title IX-related policies should make it clear that the Title IX Coordinator is expected to fulfill essential functions. This is discussed in more detail below.

Similarly, in largely relying on the Student Conduct process to resolve sexual misconduct allegations, the role of the Title IX Coordinator in providing essential oversight of the process is notably unclear in the policies related to student sexual misconduct. For example, the Student Conduct Code includes information about the various responsibilities of the Student Conduct Administrator (the Vice President of Student Affairs or a designee), but never mentions the involvement of the Title IX Coordinator when matters of sexual misconduct are at issue. It is also not clear what the Title IX Coordinator's responsibilities are for overseeing the investigation process under Student Rule 47. These responsibilities should be delineated in the policies and should address the key areas of oversight identified in the 2015 DCL.

Training and Education Programs

Training and educational programming designed to prevent sexual misconduct in the first instance is an important component of a strong compliance program. Indeed, OCR has continually conveyed the importance of training and educational programming in the realm of Title IX.¹⁷ These expectations overlap with training and educational programming requirements imposed by VAWA.¹⁸ Through training required under applicable federal law, the University trains and educates its community about its policies and commitment to investigating and resolving sexual misconduct complaints, as well as preventing sexual misconduct. Effectiveness of such training will be evaluated in future components of our review.

¹³ See 31 C.F.R. § 106.9; OCR Fact Sheet (August 2010), available at: <http://www2.ed.gov/about/offices/list/ocr/docs/nondisc.html>

¹⁴ See <http://student-rules.tamu.edu/statement>.

¹⁵ See 31 C.F.R. 106.8(a); See also: 2015 DCL and 2015 Resource Guide; See also: 2017 Q&A Guidance, Answer, Question 1.

¹⁶ See <https://urc.tamu.edu/title-ix/>.

¹⁷ See 2015 DCL, (discussion of training for Title IX Coordinators).

¹⁸ See VAWA regulations 31 C.F.R. 668.16(k)(2)(ii) (discussion of training for officials involved in investigations and final decisions relating to disciplinary actions of alleged dating/domestic violence, stalking or sexual assault).

Key Statements of Policy

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

*An adequate definition of sexual harassment.*¹⁹

- ▶ The definition of sexual harassment is found in Student Rule 47.11 and in the "Definitions" section of System Regulation 08.01.01. These definitions are not entirely consistent. In addition, there are inconsistencies with the following terms: "dating violence," "domestic violence," and "stalking." We recognize that in many cases, definitions in the Student Rules may be more restrictive and specific than the System Regulations, which may be intended to set a simpler standard for a broader set of agencies. However, listing definitions in multiple locations may create confusion and redundancy, thereby making the policy less readable. In addition, defining terms in multiple policies leads to the potential for inconsistencies in definitions, particularly over time as definitions may be updated in one location but not in the others.

*An explanation as to when sexual harassment creates a hostile environment.*²⁰

- ▶ Student Rule 47.11 adequately introduces the concept of hostile environment sexual harassment. However, the rule does not explain what factors the University will consider in determining whether conduct rises to the level of creating a hostile environment. This deficiency can be addressed by including System Regulation 08.01.01's definition of "hostile environment" within the "Definitions" section in Student Rule 47.11. While the System Regulation can also be cross-referenced, we have concern that this is not a clear way to present information to a reader. Instead, an alternative is to directly incorporate the definition of hostile environment into the Student Rule itself for ease of use.

*Examples of the types of conduct that constitute sexual harassment.*²¹

- ▶ While the definition of sexual harassment describes in concept what sexual harassment is, it does not provide any concrete examples.

BENCHMARKING NOTE: Of the 14 schools evaluated, only 2 do not offer clear examples of sexual harassment in their policies. Most institutions have robust lists of examples, while only 3 of the 14 with examples have very brief examples.

EXAMPLES: Unreasonable pressure for a dating, romantic, or intimate relationship; unwelcome touching, kissing, hugging, rubbing, or massaging; unnecessary references to parts of the body; sexual innuendos, jokes, humor, or gestures; displaying sexual graffiti, pictures, videos or posters; using sexually explicit profanity; asking about, or telling about, sexual fantasies, sexual preferences, or sexual activities.

*An adequate definition of sexual violence.*²²

The University satisfies this requirement.

- ▶ We note that the definition of sexual assault in System Regulation 08.01.01 is potentially broader than the definitions included in Student Rule 24 and 47, as it references the FBI's Uniform Crime Reporting program. 34 CFR 668.46(a).

*An adequate definition of "consent" (as it relates to sexual misconduct).*²³

- ▶ A definition of consent can be found in Student Rule 47.11, Student Rule 24.1.6, and in the "Definitions" section of System Regulation 08.01.01. The two Student Rules define consent in the same way, but the term is defined differently in the System Regulation. This inconsistency should be addressed.
- ▶ In the definition of consent contained in Student Rules 47.11 and 24.1.6, incapacitation is mentioned, but the term incapacitation is not defined. Because there is a definition of incapacitation found in Student Rule 24.1.10, we recommend either including the definition verbatim in Student Rules 47.11 and 24.1.6, or including a specific cross-reference (i.e., "a person who is incapacitated (see student Rule 24.1.10 for definition) clearly and visibly is not able to give *consent* to sexual activity"). Again, as stated above, we are concerned, however, that a cross reference is not the most effective way of presenting this information.
- ▶ Further, Student Rule 47.11 and Student Rule 24.1.6 state that, for incapacitation to disable a person's ability to consent, the incapacitation must be "clear" and "visible" (i.e., "A person who is *clearly and visibly* incapacitated . . ."). The Guidance makes no distinction between incapacitation and incapacitation that is clear and visible. If the intent of the current language is to afford fairness to an alleged perpetrator where the incapacity is not apparent, we suggest revising the language as follows: "A person that a reasonable person would recognize as incapacitated is not able to give *consent* to sexual activity." In our experience, it is also useful to provide examples of potential signs of incapacitation such as slurred or incomprehensible speech, vomiting, inhibited physical

¹⁹ 2001 Guidance, discussion on the definition of harassment, p. v.

²⁰ *Id.*

²¹ 2001 Guidance, discussion on quid pro quo and hostile environment and accompanying examples, pp. 5-7.

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

²³ *Id.*

faculties (i.e. stumbling, inability to hold items), and incontinence.

- ▶ Many institutions' policies emphasize that consent means freely agreeing to sexual activity, rather than submitting to it as a result of force or coercion. Although force and coercion are included in the definition of sexual abuse, we recommended adding a statement to the consent definition that consent cannot be obtained from the use of physical force, intimidation, or coercion if these actions prevent an individual from freely choosing whether to have sexual contact.

BENCHMARKING NOTE: Seven universities of the 14 evaluated include definitions of coercion in their policies. Further, all but 3 institutions' policies expressly state that consent can be withdrawn.

EXAMPLES: "The use of an unreasonable amount of pressure to gain sexual access. Coercion is more than an effort to persuade, entice, or attract another person to have sex. In evaluating whether coercion was used, the University will consider: (i) the frequency of the application of the pressure, (ii) the intensity of the pressure, (iii) the degree of isolation of the person being pressured, and (iv) the duration of the pressure."

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

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

- ▶ Finally, many institutions' definitions of consent include the point that consent can be withdrawn any time during a sexual encounter. We recommend adding language to clarify that consent can be withdrawn, and that sexual activity must cease if consent is withdrawn by clear, outward communication, verbal or otherwise.

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

The University satisfies this requirement.

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

- ▶ While we understand that the University prohibits sexual misconduct regardless of the sex of the parties, we recommend making this prohibition explicit given

applicable Guidance on this point. In our experience, OCR has historically reviewed institutions' policies for specific prohibitions in this regard.

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

- ▶ Guidance has long taken the position that gender *stereotyping* is a form of sex discrimination, and courts have generally agreed with this view. Accordingly, we recommend that TAMU include within its policies a list of example acts of sexual harassment that illustrate the concept of gender stereotyping.

Title IX protects all students regardless of national origin.

- ▶ The 2015 Resource Guide specifically provides that Title IX protections apply regardless of national origin. Notably, OCR's Withdrawn 2014 Q&A Guidance specifically extended to individuals irrespective of national origin, immigration status or citizenship. While this guidance has been withdrawn, an individual's immigration status and citizenship should have no impact on an individual's ability to be protected from misconduct, and, given the commitments clearly expressed in the policy, we have no reason to believe the University is not applying the policy equally to community members regardless of national origin, immigration status, or citizenship status. We recommend, however, that the University consider including a short statement explicitly addressing this standard.

*Retaliation is prohibited.*²⁷

The University satisfies this requirement in Student Rule 47 and System Regulation 08.01.01.

- ▶ While the policies clearly state the prohibition on retaliation, the term is not defined. We recommend that TAMU consider including a definition of retaliation in its policies.

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

²⁴ 2015 Resource Guide, discussion on sex-based harassment, p. 15.
²⁵ 2001 Guidance, discussion of harassment by parties of the same sex as the victim, pp. 25-26, FN 11.
²⁶ *Id.*
²⁷ 34 C.F.R. § 106.71 (incorporating by reference 34 C.F.R. § 100.7(e)); and 2015 Resource Guide, p. 21.

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

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

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

- ▶ While this information is provided online,²⁹ which is linked to the online version of Student Rule 47, it should also be included in the University's policies.

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

- ▶ As noted above, we have concerns about whether the policies reflect a University practice ensuring that Title IX Coordinator is fulfilling critical oversight roles. In addition to the examples above, the Title IX Coordinator does not apparently have responsibility for overseeing complainant requests for confidentiality. Balancing complainant requests for confidentiality with the University's responsibility to maintain an environment free from sex discrimination as a result of a reported incident of sexual misconduct requires careful consideration and analysis, and the Title IX Coordinator should provide oversight of—if not make—these determinations. Overriding requests for confidentiality can result in complaints from both complainants and respondents. As such, this decision-making process should be explicitly outlined in the policies and the role of Title IX Coordinator on this point should be clear, particularly as it relates to students, as well as faculty and staff. As a practice point, we also recommend that differences between confidentiality and privacy be clearly explained.

- ▶ Information about the Title IX Coordinator's responsibilities is included on-line and is linked to Student Rule 47. There is a short paragraph in the "How do I report Title IX issues?" section describing the responsibilities of the Title IX Coordinator. System Regulation 08.01.01 does not, however, include the Title IX Coordinator's title, contact information or responsibilities. We recommend that a description be included in System Regulation 08.01.01, and, at a minimum, an additional sentence should be added to the policies explaining that the Title IX Coordinator is responsible for identifying and addressing any patterns or systemic problems of sex discrimination at the University. Similar language could also be added to the Notice of Nondiscrimination and Abuse.

A school should make clear to all of its employees and students which employees have an obligation to report sexual misconduct so that students can make informed decisions about whether to disclose information to those employees and so the employees know of their reporting obligations.³⁰

- ▶ Technically, under Title IX, only a school's "responsible employees" have an obligation to report incidents of sexual misconduct. The 2001 Resource Guide specifies responsible employees as those (1) who have the authority to take action to redress sexual misconduct; (2) who have been given the duty of reporting incidents of sexual misconduct or any other misconduct by students to the Title IX Coordinator or other appropriate school designee; or (3) who could reasonably be believed to have this authority or duty. In lieu of designating "responsible employees," some institutions choose to require, as a matter of institutional policy, that all of its employees report information about sexual misconduct. In our experience, requiring all employees to report sexual misconduct, as opposed to identifying responsible employees, eliminates confusion about who must report and in what circumstances. This universal requirement (excluding confidential reporters) is arguably easier to communicate to employees—clearly articulating the University's expectation that employees fulfill this reporting obligation.
- ▶ Under Title IX, a school has notice of sexual misconduct if a responsible employee "knew or, in the exercise of reasonable care should have known." TAMU requires all of its employees (except designated confidential resources) to report instances of sex discrimination, sexual harassment, and related retaliation. This is discussed in Student Rule 47.4, with a reference to System Regulation 08.01.01. While the information provided is generally appropriate, it would be beneficial to explain to students the implications of all employees being required to report. With that in mind, consider adding a sentence similar to the following: "Students, staff and faculty should be aware that sharing information regarding sex discrimination, sexual harassment, or related retaliation with an employee of the University, other than a designated

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

²⁹ See <https://urc.tamu.edu/title-ix/>.

³⁰ 2001 Guidance, discussion on notice of harassment, p. 13.

confidential resource, will result in that employee sharing the information with an appropriate University official for review and investigation.”

BENCHMARKING NOTE: Although we recommend that universities generally designate all of their employees as responsible employees, we note that of the 14 peer institutions we evaluated, only 6 designate all employees in this way; the remaining 8 are extremely broad in their designation by listing categories of employees (generally administrators, faculty and those in supervisory roles). We believe that TAMU's approach to designate all of its employees as responsible employees is a best practice. Indeed, because every responsible employee must be clearly aware of their reporting obligation, this practice may reduce any confusion about whether an employee is, or is not, a responsible employee.

Key Procedural Elements

Title IX requires that schools adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints of sex discrimination,³¹ including sexual harassment and sexual violence.³² In this section we identify procedural elements required for the University's policies and procedures to align with Title IX guidance.

*A statement of the school's jurisdiction over sexual misconduct complaints. The school will take steps to respond to sexual misconduct that initially occurred off school grounds if such conduct occurred in the context of an educational program or activity, and redress a hostile environment that occurs on campus, even if it relates to off-campus activities.*³³

- ▶ The 2017 Guidance emphasizes a focus on the “programs and activities” analysis when considering whether off-campus conduct falls under Title IX's discrimination prohibition. The Guidance restates OCR's previous interpretation of Title IX that “a university does not have a duty under Title IX to address an incident of alleged harassment where the incident occurs off-campus and does not involve a program or activity.” The Guidance goes on to note, in a footnote, however, that schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities.
- ▶ We recommend that the University include statements about its jurisdiction over off-campus conduct in locations other than Student Rule 24 (Student Conduct Code). Rule 24 states the following:
 - » The Student Conduct Code shall apply to conduct that occurs on University premises and/or at University sponsored activities or any other

activity which adversely affects the University community and/or the pursuit of its objectives (mission). This action may be taken for either affiliated or non-affiliated activities. The University may take action in situations occurring off university premises involving: student misconduct demonstrating flagrant disregard for any person or persons; or when a student's or student organization's behavior is judged to threaten the health, safety, and/or property of any individual or group. Using his/her sole discretion, the Vice President for Student Affairs or his/her designee shall decide whether the Student Conduct Code shall be applied to conduct occurring off campus, on a case-by-case basis.

- ▶ First, a statement of the University's jurisdiction over alleged off-campus sexual misconduct should be included in the other applicable policies (System Regulation 08.01.01 and Student Rule 47). In addition, the absence of any mention of the Title IX Coordinator is notable here, and raises potential concerns. The Title IX Coordinator, not only the Vice President for Student Affairs, should be responsible for decision about the University's jurisdiction over off-campus conduct.
- ▶ In addition, we recommend that the University modify current policy language to clarify whether the University intends to have jurisdiction over alleged sexual misconduct by students who have been admitted to the University but have not yet arrived on campus or begun participating in the University's programs or activities. Student Rule 24 defines the term “student.” Including this definition in Student Rule 47—either verbatim or through cross-reference—would provide greater clarity regarding the scope of Rule 47.

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

- ▶ While System Regulation 08.01.01, Student Rule 47 (and accompanying student rules) and System Administrative Procedures generally outline the processes employed when the University receives reports of sexual misconduct, with the policies relating to sexual misconduct being spread across multiple Student Rules and the System Regulation, the structure can be difficult to navigate and challenging for a lay person—particularly a student—to understand. In general, we recommend the University consider ways to centralize the prohibitions related to sexual misconduct applied to all University community members, while clearly referencing the different resolution applied to various categories of respondent. For example, the University could create an omnibus sexual misconduct policy applicable to all

³¹ 34 C.F.R. § 106.B.

³² 2015 DCL, discussion on sex-based harassment, p. 15.

³³ 2017 Q&A Guidance, discussion at FN 3.

³⁴ 34 C.F.R. § 106.B.

³⁵ 2001 Guidance, p. 19.

campus community members that has a common set of reporting information, definitions of prohibited conduct, and initial investigation procedures but then clearly and succinctly explains what process will be used to determine the outcome depending on the identity of the respondent. Again, the omnibus policy would have one uniform set of definitions and uniform discussion of reporting sexual misconduct, confidentiality, retaliation, interim measures. The University could maintain the student, faculty and staff rules outlined in Student Rule 47 (and other applicable student conduct policies), SAP 08.01.01.M1.02 and SAP 08.01.01.M1.01, but would have a single policy available to all community members outlining the critical information that needs to be consistently communicated to all community members.

BENCHMARKING NOTE: Of the 14 comparator schools we evaluated, 7 have omnibus policies that locate all sexual misconduct related provisions in one student policy. Of the 7 institutions with omnibus policies, 4 consolidate their employee *and* student policies into a single policy.

- ▶ We recommend revision to Student Rule 47 to provide more clarity about the investigation process and about the transition from the investigation process to the Student Conduct process. Although cases will clearly vary in the level of investigation required, we recommend providing more procedural information about the purpose of investigations and what type of activities may be involved. Also, it is unclear from Student Rule 47 how cases move from investigation to charge. We recommend clarifying how cases move from the Investigative Authority to the Student Conduct Administrator.
- ▶ We also have concerns regarding the decentralized reporting structure utilized by the University. In the first instance, there is a question of how clearly the various reporting options are communicated to University community members. We note that the reporting options are more clearly articulated to students on-line than in Student Rule 47. We recommend adjusting the policy to provide more clarity. Also, we note that University Rule 08.01.01.M1 provides detailed information about reporting options for all University community members. We suggest, however, that the University assess how effective this University Rule is in communicating critical reporting information.
- ▶ In addition, having multiple designated individuals to receive reports, other than the Title IX Coordinator, raises questions about the role the Title IX Coordinator is fulfilling in overseeing all reports and investigations of sexual misconduct. The various policies do reference some type of communication with the Title IX Coordinator. For example, 08.01.01.M1.01 states that a supervisor or department will notify the Title IX Coordinator if a complaint alleges sexual harassment or another form of sex discrimination. In our experience, however, the best

practice is for the complaints to be overseen centrally by the Title IX Coordinator, with communication and delegation coming *from* the Title IX Office to the various administrators and others delegated individuals to carry out investigative and resolution functions, as opposed to the reverse.

- ▶ Finally, the University's Title IX-related policies include some inconsistencies in the description of confidential reporting options. We suggest that the University align System Regulation 08.01.01, University Rule 08.01.01.M1 and Student Rule 47.3, so that the same classes of confidential resources are listed in each.

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

- ▶ System Regulation 08.01.01 states that sanctions will be imposed and that sanctions may have educational, restorative and rehabilitative components for employees and/or students. And, Student Rule 27 outlines potential sanctions for Student Conduct Code violations. Because the University does not rely on a stand-alone sexual misconduct policy and instead relies on policies and procedures with broader applicability, some standards required for sexual misconduct cases—like this standard—can be overlooked. We recommend revisions to the University's policies to explicitly state that the University will take remedial and preventative steps to correct discriminatory effects and prevent the recurrence of harassment, which it may already be doing in practice.

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

The University satisfies this requirement.

- ▶ The recent Guidance from OCR highlights the importance of making interim measure determinations on a case-by-case basis and applying them equitably to both parties. Schools should not make interim measures available to only one party, or rely on operating assumptions that favor one party or another. Notably, a current statement in Student Rule 26.2.4 could be interpreted as providing interim measures to only the complainant. We recommend removing this statement from 26.2.4 as the provision of interim measures for students is adequately covered in Student Rule 47.

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

- ▶ Such a statement is found in System Regulation 08.01.01 (Section 4.2.4), but we suggest that the University include a statement to this effect in Student Rule 47 and clarify the

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

³⁷ 2017 Q&A Guidance, p. 5, Q8.

equal opportunity provided to a student complainant to identify witnesses and provide evidence given the Student Conduct Proceedings outlined in Student Rule 26.

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

- ▶ System Regulation 08.01.01 explicitly states that for all investigations, the evidentiary standard will be preponderance of the evidence, as do Rule 26 (Student Conduct Proceedings), and 08.01.01.M1.02. Further, 08.01.01.M1.01 references the System Regulation but does not explicitly state the standard of evidence.

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

- ▶ Student Rule 47.6.3 adequately covers this standard. However, Student Rule 26.2.5 indicates that the complainant will be informed of the outcome of a student conduct conference “upon request.” This is an incorrect articulation of what should occur, as both parties should be informed in writing at the outcome of a Title IX (and VAWA) complaint regardless of whether a request for such is made.
- ▶ In addition, 2017 OCR guidance states that “[t]he parties should have the opportunity to respond to the report in writing in advance of the decision of responsibility and/or a live hearing to decide responsibility.” This standard is neither clearly articulated in System Regulation 08.01.01, nor Student Rule 47.

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

- ▶ Grievance procedures should specify time frames within which: (1) the school will conduct a full investigation of the complaint, (2) both parties receive a response regarding the outcome of the complaint, and (3) the parties may file an appeal (if applicable).
- ▶ The 2017 OCR guidance states that there is “no fixed timeframe under which a school must complete a Title IX investigation.” It does, however, include a provision that schools designate and follow reasonably prompt time frames for major stages of the complaint process. System Regulation 08.01.01 and accompanying Standard Administrative Procedures include various timelines, but the only timeframe discussed in Student Rule 47 is the right to appeal within five business days of the decision. The policies should be revised consistently to meet this standard.

- ▶ Also, on the issue of timing, former SAP 08.01.01.M1.02 includes a statement that a complaint should be filed within 90 days of the most recent incident or it may be deemed untimely filed and dismissed. We understand this SAP is under review and that this provision may not be in line with revised System Regulation 08.01.01. The University may state that delayed reporting could compromise the University’s ability to fully investigate a matter, but it should update this SAP to ensure consistency with the System Regulation and to also clarify that complaints of sexual misconduct may be filed at any time.

VAWA REQUIREMENTS

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

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

The University meets this standard.

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

- ▶ As stated above, the University’s policies relating to sexual misconduct generally include the applicable processes employed depending upon the identity of the respondent. However, as noted elsewhere, there are concerns with clarity, ease of access, and inconsistencies. Anticipated timelines are also lacking throughout the procedures in Student Rule 47, other than the deadline for filing an appeal.

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

The University meets this standard.

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

The University meets this standard.

³⁸ 2017 Q&A Guidance, p. 5, Q8.

³⁹ 2017 Q&A Guidance, p. 6.

The proceedings will be prompt, fair, and impartial from the initial investigation to the final result.⁴⁰

- ▶ While much of this point (as discussed in footnote 16) contemplates how the process is carried out (rather than information that should be provided in a written policy), our opinion is that there should be a direct statement that the proceedings will be prompt, fair, and impartial. Currently, Student Rule 47.4.2 indicates that “[t]he University will respond to complaints in a prompt and equitable manner.” While this language aligns with Title IX guidance, we also recommend including an explicit statement covering this VAWA standard.

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

- ▶ Student Rule 47.6.2 indicates that “[c]onduct proceedings will be conducted by university faculty/staff that are trained annually.” The University should ensure each official involved in implementing any aspect of the procedures is appropriately trained on Title IX/VAWA issues as well as on how to execute their particular roles in the process. Simply training faculty/staff on the implementation of the student conduct proceedings generally is insufficient.
- ▶ We also recommend that System Regulation 08.01.01 be revised to include information about members’ obligation to ensure that individuals with sexual misconduct resolution responsibilities are adequately trained. We understand that this may be occurring in practice, but nonetheless recommend that this be stated in the policies consistently.

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

- ▶ Under VAWA, an institution may not limit the choice of the advisor or presence for either the accuser or the accused in any meeting or institutional disciplinary proceeding; however, the institution may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.

- ▶ Student Rules 26 and 58 reference advisors for the parties. However, a student conduct conference and hearing in front of the appeal panel are not the only two instances in which parties are allowed an advisor. They are entitled to an advisor at any meeting related to the investigation and resolution of the complaint. We understand that TAMU permits advisors to participate in broader activities, but we nonetheless recommend adding information about advisors’ participation in the more general Student Rule 47.
- ▶ In the current discussion of advisors in Student Rules 26.1.5.1 and 58.5.1 there is a statement that attorney advisors are “to behave in the same manner as any other advisor.” We do not find this statement to be particularly useful, as there is no other statement outlining the role of an advisor. On that point, we recommend being clear that an advisor may not actively participate, directly address an investigator or hearing panel member, or advocate on behalf of the party. Also, it should be clearly stated that an advisor may be removed for not abiding by the restrictions imposed or otherwise becoming disruptive. The University may also want to consider having advisors sign a document at the outset affirming their understanding of their role in the process.
- ▶ Finally, this requirement is not limited to students. Employees must be provided with the same opportunities.

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

- ▶ Student Rule 47.6.3 indicates that the parties will be notified in writing of the resolution of the complaint. This covers point (A) in the compliance standard, though we recommend adding the word “simultaneously” in the language.⁴¹ We also recommend including a second sentence in this section covering point (B). The sentence could read as follows: “In the written notification, information regarding appeals will be provided.”
- ▶ One problem identified is that Student Rule 58.9 indicates that, following an appeal, “[a] letter outlining the decision of the panel shall be sent to the appealing party.” Both parties should be notified when an appeal is final, and we recommend revising the language accordingly. In addition, the new language should include a provision

⁴⁰ The VAWA regulations indicate that a prompt, fair, and impartial proceeding includes a proceeding that: (A) is completed within reasonably prompt timeframes designated by an institution’s policy, including a process that allows for the extension of timeframes for good cause with written notice to the accuser and the accused of the delay and the reason for the delay; (B) is conducted in a manner that is consistent with the institution’s policies and transparent to the accuser and accused, includes timely notice of meetings at which the accuser or accused, or both, may be present, and provides timely and equal access to the accuser, the accused, and appropriate officials to any information that will be used during informal and formal disciplinary meetings and hearings; and (C) is conducted by officials who do not have a conflict of interest or bias for or against the accuser or the accused.

⁴¹ The Handbook for Campus Safety and Security Reporting – 2016 Edition (“Clery Handbook”) (available here: <http://www2.ed.gov/admins/lead/safety/handbook.pdf>) provides additional guidance related to VAWA’s requirements for purposes of an institution’s Annual Security Report (“ASR”). On this particular compliance point, the handbook’s explanation extends beyond the ASR and indicates that simultaneous notification “means there can be no substantive discussion of the findings or conclusion of the decision maker, or discussion of the sanctions imposed, with either the accuser or the accused prior to simultaneous notification to both of the result.” See pg. B-22. We are aware of some institutions that would call in the parties individually to provide the notification letter and discuss the outcome with them. Even if this were to occur in a relatively close timeframe (e.g., meet with the respondent and then meet with the complainant right after), it would not align with VAWA guidance. As such, if the University currently engages in such a practice, it should discontinue doing so going forward.

that when being notified of the outcome the notification will include any change to the prior decision. This will cover point (C).

- ▶ Regarding point (D), the language regarding notification at the outcome of the appeal helps meet this compliance point. However, parties should also be notified that the matter is closed when the timeline for filing an appeal has passed without an appeal having been filed.

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

- ▶ The University's Title IX-related policies need to be revised to meet this standard.

How and to whom the alleged offense should be reported.

- ▶ As noted above, Student Rule 47 and University Rule 08.01.01.M1 provide information about various reporting options. We suggest, however, that the University review the current reporting options and consider ways in which it can centralize the reporting structure. The current reporting structure of reporting to various parties depending upon the identity of the accused is cumbersome and may be confusing for University community members. Also, as stated above, the website provides more detailed information to students about their reporting options than does Student Rule 47. The University should ensure that reporting information is clearly communicated—and centralized to the greatest extent possible—in the various documents to which students and other community members may refer to understand that University's process. As noted above, we recommend that all reports be centrally reported to the Title IX Coordinator.

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

- ▶ This is covered in Student Rule 47.2. However, as noted previously, this section should also articulate that the Title IX Coordinator or another appropriate TAMU official will assist an individual in contacting the police if desired. In addition, there should be a clear statement informing a victim of the right to decline to notify law enforcement authorities. System Regulation 08.01.01 states that reporters and complainants may, but cannot be required to, submit a complaint or report with a law enforcement authority.

Explain 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, where applicable.

- ▶ We recommend incorporating the following language into University's policies to meet this standard: "If a

complainant has obtained an ex parte order of protection, full order of protection, or any other temporary restraining order or no contact order against the accused student from a criminal, civil, or tribal court, the complainant may provide such information to the Title IX Coordinator or Dean of Student Life. If provided, the Title IX Coordinator or Dean of Student Life, in conjunction with the TAMU Police Department, will take all reasonable and legal action to implement the order. For more information about how to obtain a protection order in the state of Texas, please consult the Attorney General's website (<https://texasattorneygeneral.gov/cvs/protective-orders>)."

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

- ▶ Student Rule 47.8.1 covers interim measures. This covers the living piece and also generally covers the academic piece by listing "change in class schedule" as an example. The rule should be updated to include transportation and working situations, as well as the other points noted in the compliance standard.
- ▶ The University should add a statement to its Title IX-related policies regarding the confidentiality of accommodations and protective measures.

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

- ▶ Student Rule 47.9 includes a statement regarding the fact that counseling, health, mental health, advocacy, legal and other services are available to TAMU students, and that staff can assist with referring students to appropriate resources. In addition, University Rule 08.01.01.M1 provides a list of confidential reporting options for faculty and staff. While more information is not necessarily required in the policies themselves, we recommend that the University ensure that information about support and advocacy services are clearly provided to community members. An evaluation of the availability and effectiveness of these resources will be discussed in future components of our review.
- ▶ In particular, TAMU should provide information to students about the potential financial aid consequences of a leave of absence related to a sexual misconduct issue, as well as incorporating information about visa and immigration assistance.

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

- ▶ Although we understand that the University does provide a rights and options document to complainants

in practice, we did not locate such a statement in the University's Title IX-related policies and recommend that it be included.

- ▶ The actual rights and options document should cover all of the VAWA requirements listed above. It should also include a statement that the institution will complete publicly-available record keeping, including Clery Act reporting and disclosures, without the inclusion of personally identifying information about the victim.

Upon review of the University's Victim Rights and Options documents, we noted the following:

- ▶ In the section titled "Reporting to Law Enforcement", more clearly state that the individual has a right to decline to notify law enforcement authorities.
- ▶ The "Reporting to Law Enforcement" section includes the following statement: "Law enforcement is able to help survivors understand the process of obtaining orders of protection, no contact orders, restraining orders, or similar lawful order issued by the courts." Our opinion is that this does not fully meet the VAWA standard of providing information regarding the rights of victims and the institution's responsibilities for orders of protection, "no-contact" orders, restraining order, or similar lawful orders issued by a criminal, civil, or tribal court or by the institution.
- ▶ The document should include a statement that the University will complete publicly available record keeping, including Clery Act reporting and disclosures, without the inclusion of personally identifying information about the victim.
- ▶ There are a number of other VAWA standards related to the University's disciplinary proceedings that are not listed directly in the Rights and Options document. Instead, the University appears to be relying on the links in the "Applicable Rules" subsection of the "Conduct Proceedings and Possible Sanctions" section of the document. While there is no direct guidance indicating that this approach is noncompliant, we suggest the inclusion of all required standards directly in the document. Below is a list of standards that are likely covered via the links, but are not currently located directly in the document:

- » Description of the standard of evidence
- » Discussion of sanctions and protective measures
- » A statement that the proceedings will:
 - *Be prompt, fair and impartial from the initial investigation to the final result*
 - *Be conducted by trained officials*

- *Require the simultaneous notification, in writing, to both parties of (a) the result; (b) appeal procedures, if available; (c) any change to the result; (d) when such results become final*

Accused Rights & Options Document (<https://urc.tamu.edu/media/1601262/accusedrro.pdf>)

This is not a required document, though it is recommended as a best practice. The fact that the University appears to be utilizing an Accused Rights & Options Document is a positive compliance point.

FAIR AND EQUITABLE POLICY STATEMENTS

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

*Parties are to have equal procedural rights during the investigation and resolution of a complaint of sexual misconduct.*¹²

- ▶ The University clearly articulates this standard in System Regulation 08.01.01, but the standard could be more explicitly stated in Student Rule 47 and 08.01.01.M1.01 and 08.01.01.M1.02. Additionally, the applicability of both Student Rules 26.1 and 26.2 to Title IX/VAWA situations are unclear. If both are meant to apply, the sections need to be revised to ensure that they reflect equal procedural rights throughout the process, including calling witnesses and providing impact statements.

*A school's investigation is separate from a criminal investigation (a school can find violation even though criminal standard for a conviction cannot be met).*¹³ *Law enforcement investigation does not relieve institution of its duty to resolve complaints promptly and equitably. Schools should not wait for the conclusion of a criminal investigation or criminal proceeding to bring their sexual misconduct investigation.*¹⁴

- ▶ The Withdrawn 2014 Q&A Guidance emphasized institution's obligations to respond promptly and effectively to sexual misconduct complaints regarding of an accompanying criminal investigation. Although the guidance has been withdrawn, the 2001 Resource Guide also addresses the standard and remains in effect.

¹² 2017 Q&A Guidance, p. 1. This concept is reflected more specifically in other compliance points in this section (e.g., the parties must be given similar and timely access to any information that will be used at a hearing).

¹³ 2001 Resource Guide, discussion on differences in legal standards for criminal investigations, p. 21.

¹⁴ *Id.*

- ▶ Both System Regulation 08.01.01 and Student Rule 47 discuss individuals' right to report to law enforcement, but we suggest modifying the policies to align with TAMU's practice and explicitly state that a law enforcement investigation does not relieve an institution of its duty to resolve complaints.

Any real or perceived conflicts of interest between the fact-finder or decision-maker and the parties should be disclosed (and should be eliminated to the extent possible).¹⁵

- ▶ The various applicable policies do not fully address the University's assessment of potential conflicts of interest in resolution procedures. SAP 08.01.01.M1.02 includes a statement about alleged conflicts of interests by administrators and committee members. We recommend the University revise its policies consistently to explicitly state the University's practice of considering and eliminating potential conflicts of interest.

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

- ▶ This principle is covered by VAWA's requirement that the parties be allowed to have an "advisor of their choice" (including attorneys) attend meetings and other proceedings with them. This point is addressed in the VAWA discussion earlier in this report.
- ▶ System Rule 08.01.01 clearly articulates that both complaints and respondents must have an equal right to an advisor, if the right to an advisor is provided. The Title IX-related policies do not, however, explicitly provide information about individuals' right to an advisor under each process.

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

- ▶ It appears that Student Rule 26.2.6 is intended to cover this compliance standard. This rule states as follows: "The complainant shall have the right to not have her/his past behavioral history discussed during the student conduct conference. Questions of relevancy shall be determined by the chairperson." We have recommendations related to this language, and, also, generally recommend that TAMU address this point in the other Title IX-related policies.
- ▶ While the withdrawn 2014 Q&A Guidance¹⁶ strongly advised against questioning on prior sexual history, our view is that there are times when discussing the complainant's past sexual history with others may be relevant. In these instances, there is a competing concern about depriving the respondent of relevant information. As a reference point, Federal Rules of Evidence 412 acknowledges that there are times when allowing

discussion of a victim's past sexual history is permissible. For example, it may be appropriate to do so when sexual history is put into dispute by the complainant's own allegations.

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

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

- ▶ The University's Title IX-related policies state that extensions of investigation timelines may be required, but they do not address periodic communications to the parties. While we recognize that in practice the University may be providing periodic updates to all parties—students, faculty and staff—we recommend that the University revise its policies to clearly indicate its expectation that the parties will be apprised of the progress of the investigation. At a minimum, the University should include such a statement in System Regulation 08.01.01, and Student Rules 26 and 47.

Schools must maintain documentation of all proceedings.¹⁷

- ▶ We recommend revisions to System Rule 08.01.01 to explicitly identify the University's practices related to document retention in sexual misconduct investigations, or alternatively require that member's develop and communicate their practices regarding documentation of sexual misconduct proceedings. Student Rule 26 discusses the record created during a Student Conduct Panel, but the other applicable policies do not include references to documentation of the investigations. And, specifically, as a best practice point, the University should assess the Title IX Coordinator's maintenance of sexual misconduct reporting, investigation and resolution University-wide.
- ▶ Notably, Student Rule 28 provides that the University will destroy student conduct files if the University finds that no violation occurred. The University should be maintaining files of all sexual misconduct investigations—regardless of the outcome of an investigation. The University should have a record of the investigation it conducted for purposes of review by the Title IX Coordinator as she reviews case processing for overall compliance, patterns of allegations, and to demonstrate compliance to OCR. In addition, the University should maintain records of

¹⁵ 2017 Q&A Guidance, discussion on real and perceived conflicts, p. 4 and p. 5.

¹⁶ 2014 Q&A Guidance, p. 31, F-7.

¹⁷ 2015 Resource Guide, discussion on maintaining grievance and compliance records and files, p. 5.

such investigations to demonstrate prompt and equitable resolution of complaints, compliance with its own policies and Guidance from the Department. Likewise, the University should also maintain documentation of proceedings involving faculty and staff and clearly state this requirement in the applicable policies.

Institutions may use voluntary informal resolution methods, including mediation, to address complaints of sexual misconduct.¹⁸

- ▶ Student Rule 47 contemplates the use of informal resolution, but we recommend revisions to clarify TAMU's practice.
- ▶ First, we recommend clarifying that informal resolution will only be used after the parties have received a full disclosure of the allegations and their options for formal resolution.
- ▶ Second, an appropriate administrator should determine if informal resolution is appropriate and assist the parties in reaching a voluntary resolution. Student Rule 47.7.2 provides the following: "Staff is available to assist individuals with the informal complaint process." It is not entirely clear what is meant by this language or if it was drafted to cover this compliance standard. If it was, it is insufficient, as an appropriate administrator must be involved in the facilitation of informal resolution (instead of merely being available to do so).
- ▶ Third, we recommend a revision to clarify that either party is entitled to end the informal process at any time and use the formal process.
- ▶ Finally, the University should include language in System Regulation 08.01.01 and accompanying System Administrative Procedures about the use of informal resolution.

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

- ▶ The 2017 Q&A Guidance contemplates that schools may utilize appeal procedures, and specifies that if a school chooses to allow appeals, the appeal may be available to (1) only respondents or (2) both parties, in which case any appeal must be equally available.

BENCHMARKING NOTE: Although the 2017 Q&A Guidance permits institutions to limit appeals to respondents, this approach may inadvertently undermine the institution's practice of treating the parties fairly and equitably. Further, it is not consistent with common practice. Indeed, of the 14 institutions evaluated, 13 have policies that clearly afford appeal rights to both parties. Only one institution is unclear as to whether an appeal right extends to both complainants and respondents.

- ▶ System Regulation 08.01.01 includes an appeal section and states that complainants and respondents can appeal decisions and sanction on specific bases. There is some inconsistency in other policies, however; for example, 08.01.01.M1.02 limits complainant appeal basis to appropriateness and severity of the sanctions. TAMU should revise its Title IX-related policies to ensure that appeals are provided on an equal basis regardless of the applicable policy depending on the status of the respondent.

CASE LAW TRENDS

Since OCR issued its 2011 DCL, there have been dozens of judicial decisions from various federal courts resolving civil claims brought by one or more of the parties involved in institutional sexual misconduct investigations and proceedings. Relevant to public institutions like TAMU, these claims can generally be divided into three categories:

- ▶ Claims brought by victims of sexual misconduct who allege a "deliberate indifference" theory of Title IX liability premised on the implied cause of action recognized in *Davis v. Monroe County Board of Education*¹⁹;
- ▶ Claims brought by respondents who allege institutional policies and procedures are biased against one sex (typically) male and result in an erroneous outcome;
- ▶ Claims brought by respondents that the institution failed to provide minimum due process as required by the Constitution.

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

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

¹⁸ 2017 Q&A Guidance.

¹⁹ 526 U.S. 629 (1999).

Because all lawsuits are fact specific, the University should work with its litigation counsel to carefully analyze the facts of any given dispute and the likely outcome of a lawsuit arising from such facts.

Deliberate Indifference

In *Davis*, the Supreme Court recognized a narrow implied cause of action arising from student-on-student sexual misconduct. While an institution is not vicariously liable under Title IX for a student's harassment or assault of another student, an institution can be liable for its own misconduct that results in sex discrimination. Such discriminatory conduct can take the form of deliberate indifference, that is, where an institution has: (1) actual knowledge of sexual harassment; (2) is deliberately indifferent to the sexual harassment; and (3) where that deliberate indifference "cause[s] [students] to undergo harassment or make[s] them liable or vulnerable to it."⁵⁰

While, there is a great deal of case law discussing each element of a deliberate indifference claim, and further nuances to liability, courts have often summarized the *Davis* standard as resulting in institutional liability only "where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances."⁵¹

In *Sanches v. Carrollton-Farmers Branch Independent School Dist.*, the Fifth Circuit described the deliberate indifference standard as a "high bar" not to be confused with a "mere reasonableness standard."⁵² The court noted that "[s]chools are not required to remedy the harassment or accede to a parent's remedial demands" and that courts should avoid "second-guessing the disciplinary decisions made by school administrators."⁵³

As discussed above, TAMU's Policy requires the institution to respond to each report of sexual misconduct in a prompt and equitable manner, which includes an immediate assessment of any risk of harm to individuals or the campus community. Following the risk assessment, the institution will determine further response after considering a variety of factors, including the complainant's wish to pursue formal or informal resolution procedure, the risk posed, and the nature of the allegation. Regardless of the resolution procedure, the institution will provide, among other things: (i) resources such as counseling, health, mental health, advocacy, legal and other services to TAMU students; (ii) protection of the complainant, alleged offender, and others, including interim measures, as needed; (iii) student conduct proceedings where further investigation or a conduct conference is warranted, and (iv) if sexual misconduct is found, imposing discipline for the

perpetrator, and follow up with the victim, intended to verify that the conduct has ceased. This process, if followed, should not result in a deliberate indifference finding.

Indeed, in *K.S. v. Northwest Independent School District*, the Fifth Circuit affirmed a grant of summary judgment in favor of the institution where there was evidence the plaintiff's reports of sexual harassment were promptly and thoroughly investigated and discipline of some sort was imposed against students found to have committed harassment.⁵⁴

Similarly, in the recent case *M.D. v. Bowling Green Independent School District*, the Sixth Circuit held that a school was not deliberately indifferent where the school responded to a female student's report of sexual assault by another student by promptly investigating the matter, and transferring the perpetrator to an alternative school for a period of time.⁵⁵ Although the female student was upset when the perpetrator was allowed to return to campus and subsequent interaction between the two made the female student uncomfortable, the court held there was no deliberate indifference as a matter of law.⁵⁶ The court noted that courts must "refrain from second-guessing the disciplinary decisions made by school administrators," and that schools are "not required to engage in any particular disciplinary actions in response to reported harassment."⁵⁷

While abiding by the policy should mean the school is not deliberately indifferent under Title IX, the converse is not true. The failure on TAMU's part to follow its policy (or a failure to comply with relevant OCR Title IX guidance for that matter), does not, *in and of itself*, establish deliberate indifference.⁵⁸ Rather, liability for deliberate indifference requires objectively unreasonable actions, such as discouraging victims from reporting assaults, failing to adequately investigate each assault, and failing to ensure that victims will not be subjected to continuing assault and harassment.⁵⁹

Biased Process

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

⁵⁰ *Id.* at 645.

⁵¹ *Fennell v. Marion Independent School Dist.*, 801 F.3d 398, 410 (5th Cir. 2015); *Williams ex rel. Hart v. Paint Valley Local Sch. Dist.*, 400 F.3d 360, 367 (6th Cir. 2005).

⁵² 647 F.3d 156, 167-68 (5th Cir. 2011).

⁵³ *Id.*

⁵⁴ 689 Fed.Appx. 780, 784-85 (5th Cir. 2017).

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

⁵⁶ *Id.*

⁵⁷ *Id.* at 777 (internal quotations omitted).

⁵⁸ See *K.S. v. Northwest Independent School District*, 689 Fed.Appx. 780, 786 (5th Cir. 2017) ("The Court has never held that the implied private right of action under Title IX allows recover in damages for violation of those sorts of administrative requirements.") (internal quotations omitted).

⁵⁹ *Doe 1 v. Baylor University*, 210 F.Supp.3d 646, 660-61 (W.D. Tex. 2017).

erroneous outcome resulting from gender bias.⁶⁰ However, courts within the Fifth Circuit have yet to apply the erroneous outcome standard in Title IX.⁶¹

Policy and practice bias could be demonstrated through explicitly biased policy provisions, through selective enforcement, or through the employment of archaic and discriminatory stereotypes.⁶² Deviation from policy, procedural abnormalities, and a party's disagreement with the outcome are not sufficient bases to state a claim under any of these theories; rather, a plaintiff must be able to identify and ultimately prove that the procedural issues complained of, or the alleged erroneous outcome, were motivated by gender bias—that is, an intent to favor one sex over the other.⁶³

As a general matter, TAMU's Policy is drafted in a gender-neutral manner. There is no language or provisions that explicitly favor one sex over the other, and we note that courts have held that bias in favor of claimant, or against a respondent, is not inherent sex discrimination.⁶⁴

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

Due Process

In recent years, there has been a rise in the number of cases filed by respondents alleging that institutions failed to provide the respondent with minimal due process during the course of a sexual misconduct investigation and adjudication. These claims are premised on the Due Process clause of the Fourteenth Amendment to the U.S. Constitution⁶⁵ and are uniquely asserted against public institutions because private institutions are not subject to constitutional constraints.⁶⁶

The Supreme Court of Texas has held that public institutions must provide respondents with minimum due process protection in disciplinary proceedings.⁶⁷ What minimal process is due varies from case to case, depending on “(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”⁶⁸

At a minimum, a student facing a serious sanction such as a suspension or expulsion is entitled to the “oral or written notice of the charges against the student and, if the student denies them, an explanation of the evidence the authorities have and an opportunity to present his or her side of the story.”⁶⁹ Additionally, the Fifth Circuit has long held that “due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct.”⁷⁰

As a general proposition, TAMU's Formal Resolution Procedures set forth a process that includes provisions requiring written notice, an equal opportunity for the parties to present their account to the investigator in an investigative hearing, and the right to appeal. In our view, these provisions, if followed, should satisfy the minimal due process standards expected by the Fifth Circuit.

While there are myriad due process cases with varying claims and theories, one recent decision from the Sixth Circuit merits further comment and examination: In the *Doe v. University of Cincinnati* case decided in September 2017, the Sixth Circuit held that, “in the most serious of cases” an accused student “must have the right to cross-examine adverse witnesses.”⁷¹ Applying that rule, the court held that, where a female student accused a male student of sexual assault, and the institution's determination of responsibility rested solely⁷² on finding the claimant's account more credible than the respondent's, due process likely required⁷³ the institution to provide some form of cross-examination to test

60. See, e.g., *Doe v. Case Western Reserve Univ.*, 2017 WL 3310118, at *1 (N.D. Ohio 2017) (articulating different theories of Title IX liability); *Yousif v. Vassar College*, 35 E3d 709 (2nd Cir. 1991).

61. See *Plummer v. University of Houston*, 2015 WL 12731039, at *15 (S.D. Tex. 2015) (“However, there is no binding precedent applying the erroneous outcome standard in Title IX cases in the current jurisdiction.”); *Pacheco v. St. Mary's University* 2017 WL 2670758 (W.D. Tex. 2017) (“because [the student] has presented no evidence casting doubt on the outcome of his disciplinary proceedings and no evidence that gender was a motivating factor in any erroneous outcome here, there is no genuine issue of material fact as to the theory of erroneous outcome under Title IX”).

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

63. See, e.g., *Plummer v. Univ. of Houston*, 860 F.3d 767 (5th Cir. 2017) (rejecting Title IX discrimination claims as insufficient because plaintiff did not adequately plead facts that would plausibly support the inference that gender bias motivated the complained-of actions).

64. See *Doe v. Purdue Univ.*, 201 F. Supp. 3d 754, 777 (N.D. Ind. 2017) citing *Sahn v. Miami Univ.*, 110 F. Supp.3d 771, 778 (S.D. Ohio 2015) (“Demonstrating that a university official is biased in favor of the alleged victims of sexual assault claims, and against the alleged perpetrators, is not the equivalent of demonstrating bias against male students.”).

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

66. See *Plummer v. Univ. of Houston*, 360 E3d 767 (5th Cir. 2017), as revised (June 26, 2017). A private institution may, however, face an analogous claim for breach of contract if it has promised its students certain process rights as a matter of contract. See *David v. Neumann Univ.*, 177 F. Supp. 3d 920, 925 (E.D. Pa. 2016). See also *Heinke v. Santa Clara University*, 2017 WL 3368155 (N.D. Cal. 2018); *Doe v. University of Denver*, 2018 WL 1304530 (D. Colo. 2018) (appeal filed to the 10th Cir.).

67. *University of Texas Medical School at Houston v. Than*, 901 S.W.2d 926, 931 (Tex. 1995) (disciplinary proceedings were instituted for academic dishonesty).

68. *Id.* at 930.

69. *Id.* at 931.

70. *Dixon v. Ala. State Bd. Of Educ.*, 291 F.2d 150, 158 (5th Cir. 1961).

71. 872 E.3d 393, 401 (6th Cir. 2017).

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

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

the claimant's credibility.⁷⁴ Consistent with its prior ruling in *Doe v. Cummins*, the court held that a circumscribed form of cross-examination, where a respondent supplied cross-examination questions to a panel, which then posed them to the claimant, is acceptable in a case where the claimant actually appears at the hearing.⁷⁵ Importantly, the Fifth Circuit has not yet been required to “determine whether confrontation and cross-examination would ever be constitutionally required in student disciplinary proceedings.”⁷⁶

TAMU's policy does not provide a right of direct cross-examination, nor does it explain how effective cross-examination is effectuated. We understand that in practice each party is advised of the substance of the other's testimony such that he or she is able to formulate questions to be posed, but an effective form of cross-examination that satisfies the instructive holdings in *Doe* and *Cummins*, should be stated in TAMU's policies and procedures.

CONSENSUAL RELATIONSHIP POLICIES

In an effort to meet the University's goal of developing a model Title IX program, the University has also asked us to consider a related policy matter involving romantic and sexual relationships between employees and students. Although such relationships may involve consenting adults who are both the age of majority, there are a number of factors and complexities that can sometimes make the dynamic of these relationships problematic in workplace and academic settings. For instance, romantic relationships may raise concerns in academic and business units about unfair or favorable treatment of one individual over others. Alternatively, a power differential between individuals involved in a relationship can raise questions of whether there is undue pressure on one party. The issue of a power differential also becomes relevant in circumstances where the nature or circumstances of a personal relationship give rise to reports of sexual misconduct.

For these reasons, it is becoming a more common practice for institutions of higher education—as well as employers in other industries—to set policies governing whether romantic relationships may exist, and if allowed, imposing limitations to mitigate potential conflicts, both perceived and actual. Indeed, it is important to recognize that healthy, productive relationships in academia, like most work places, are not uncommon, or *per se* criminal. Indeed, there are a number of factors, including the culture and expectations of a campus community, geography and broader community values that should be taken into consideration.

Many educational institutions that have adopted consensual relationship policies explain in their policies that there is an inherent potential for conflicts or misconduct when individuals from different levels in the educational or employment hierarchy are engaged in a relationship. These policies vary in terms of the institutions' dictates. For example, some policies impose an outright prohibition on relationships between any employee and any undergraduate student, while others modify this restriction to students that employees are responsible for evaluating or supervising. Others simply outline the risk for potential misconduct and advise against such relationships and encourage precautionary measures.

The institutional policies used as benchmarks for this review followed a similar trend. One policy imposes an outright ban on romantic or sexual relationship with undergraduate students; most prohibit romantic and sexual relationships when an individual has control over the terms and conditions over another individual's education or employment. Three policies strongly discourage romantic or sexual relationships in cases of power differentials and require reporting when such relationships exist.

TAMU's current “Improper Consensual Relationships” policy most closely aligns with this last identified benchmarked policy. TAMU's policy acknowledges that certain relationships, although apparently consensual, create actual or perceived ethical, discriminatory or harassing situations. The regulation requires an individual with educational or employment authority engaging in an improper consensual relationship to notify his or her immediate supervisor and engage in discussions about alternative arrangements.

While not explicitly stating as much, it appears the intent of this policy is to remove the opportunity for negative educational or employment impact—through alternative arrangements—that can exist due to a power differential, thereby reducing the risk of conflicts and misconduct. We recommend that TAMU consider alternative language that more explicitly states that an employee cannot have supervisory or evaluative authority over a person with whom the employee is in a romantic or sexual relationship, and that in such circumstance, the supervisory or evaluative authority must be modified. Additionally, the current policy seems to be tailored more towards University employees, and does not specifically address the applicability to undergraduate and graduate students.

TAMU should consider modifying its policy to more explicitly address employee-student relationships, including where parties are married or have entered in a domestic partnership. TAMU should decide what is appropriate for its University community. While this may not be an outright ban on employee-student relationships, being more direct about what the University expects of its employees in cases of these types of relationships can reduce the chance of misconduct and complaints.

⁷⁴ *Doe v. University of Cincinnati*, 872 E.3d, at 401.

⁷⁵ *Id.*, at 401 (citing *Doe v. Cummins*, 662 F.Appx. 437, 118 (6th Cir. 2016)).

⁷⁶ *Plummer v. University of Houston*, 800 E.3d 767, 775 (5th Cir. 2017).

CONCLUSION

We appreciate that our recommendations for improvements to TAMU's Title IX-related policies are extensive, and include both substantive changes, as well as what may appear to be some pedantic suggestions. Together, both sets of recommendations will provide meaningful change in practice and help the University demonstrate its compliance with applicable guidance and legal requirements.

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

- › Overhauling the structure of TAMU's Title IX-related policies by consolidating all relevant provisions in an omnibus policy in effort to improve clarity and ease of access for faculty, staff and students;
- › Streamlining reporting obligations for responsible employees;
- › Redefining the role of the Title IX Coordinator and clarifying the resources and authority available to ensure compliance and execution of the critical functions of the role; and
- › Establishing an ongoing and collaborative process for evaluating policy improvements on a regular basis.

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



HUSCH BLACKWELL

HIGHER EDUCATION GROUP