

Forsyth Report MSU Nassar Moore Simon

On December 21, 2018, William Forsyth the Independent Special Counsel investigating the MSU Nassar scandal issued his report. The report indicated that his investigation covered a lot of ground. I commend him and his team for their work. **However, I feel that he could have dug much deeper concerning the roles Paulette Granberry Russell and Kristine Moore had in the Nassar scandal.** He began the report by stating that three individuals, former President Simon, former Osteopath Dean Strampel, and former gymnastics coach Kathie Klages have been indicted on various charges. The report would not dwell on the specifics of the three cases because they are pending.

One of the main points that the report made was that “*MSU stonewalls the very investigation it pledged to support.*” Examples are given detailing how MSU impeded the investigation of Nassar prior to when Forsyth was appointed as a special investigator and during the time he was investigating. He was very frustrated with all of the obstacles that were placed in his path to impede the investigation. He was interested in how Nassar could sexually assault so many patients for such a long period of time. He probably did not uncover all of the facts concerning the Nassar scandal.

This article will deal with the part of the report concerning Nassar’s sexual assault of Amanda Thomashow in 2014. Ms. Thomashow reported the sexual assault which initiated a Title IX investigation. The Title IX investigation was reported to former President Simon. She lied to a police officer gathering information from her about the incident which led to her being indicted. Many who have followed the Nassar scandal recall that Simon stated she was unaware that it was Nassar who was being reviewed for an incident in 2014, and did not know the details. I feel that she used the word reviewed instead of investigated to downplay the incident. It turns out that Kristine Moore the Title IX investigator (not reviewer) reported the investigation to her superior Paulette Granberry Russell the Title IX coordinator as soon as the investigation of Thomashow’s complaint commenced. This investigation alarmed Ms. Russell because MSU at the time was being investigated by the federal government for Title IX violations, and Nassar was a MSU employee. Not a good thing to be happening at MSU. Ms. Russell immediately scheduled a meeting with President Simon. Both made written notations concerning the meeting agenda, which are in possession of Mr. Forsyth’s team. This was the evidence presented when Simon was indicted. It has not been revealed what was discussed at the meeting. Simon has made statements that she said to conduct a fair investigation. It has not been revealed how the MSU Office of the General Counsel was informed and what directives they were given. It has not been revealed if the Office of the General Counsel played it straight. We do not know Ms. Russell’s role in the Nassar scandal other than having a meeting to inform former President Simon that Nassar was being investigated for a sexual assault. Paulette Granberry Russell is not mentioned in the Forsyth report.

The Forsyth report goes into a lot of detail in a section titled **MSU’s Title IX Office failed to properly investigate 2014 allegations against Nassar** in explaining why Kristine Moore exonerated Nassar of sexually assaulting Ms. Thomashow. The Forsyth report gives some previously unknown information concerning what Kristine Moore did. However, unless he left out some information that he did not want to disclose due to reasons that he cited, I feel that his investigation was not sufficient concerning Kristine Moore’s improper conduct. The Forsyth report stated, “*There is no evidence that she conducted the investigation in bad faith or*

consciously arrived at a predetermined result.” The report does not state what evidence was evaluated to reach this conclusion. The report does not indicate if Ms. Moore was interviewed by the Forsyth team. It is highly unlikely that Ms. Moore would admit to a conflict of interest or her superiors, such as Ms. Russell, who are attorneys would admit to a conflict of interest. A central theme of the Forsyth report was that MSU would not cooperate with the Forsyth team.

The Forsyth report stated, *“Sadly, the MSU Title IX investigation process, aided in part by mistakes by those tasked with carrying out the investigation, failed Ms. Thomashow. And again, the deficiencies were borne of a deference to authority figures.”*

The Forsyth report states, *“The first significant failure of the Title IX investigation centered on Moore’s failure to consult neutral and objective medical experts with no ties to Nassar or the MSU College of Osteopathic Medicine. ... That leads to the second significant failure of the Title IX investigation: Moore’s failure to accurately convey Ms. Thomashow’s allegation to Drs. Lemmen, DeStefano, and Gilmore.”*

The Forsyth report further states, *“According to Moore’s handwritten notes from her interviews with Drs. Lemmen, DeStefano, and Gilmore, it does not appear that Moore ever recited Ms. Thomashow’s specific allegation regarding his pelvic treatment. Moore’s notes reveal that she conveyed discrete aspects of Ms. Thomashow’s complaint, like the fact that Nassar did not immediately stop when she complained of pain, but there is no evidence she specifically told the doctors that Nassar placed three fingers on top of the patient’s vagina and rubbed in a circular motion.”*

Kristine Moore is an intelligent female. I feel she knew that Nassar sexually assaulted Ms. Thomashow based on Thomashow’s reporting of what happened. That is why she left out crucial pieces of information a number of times during her investigation and in her report. This just happened too many times.

The Forsyth report downplays Moore’s conduct as mistakes and even tries to rationalize a reason for these *mistakes* from Moore’s point of view. I feel that the Forsyth report should state an opinion(s) for the etiology of Moore’s behavior rather than just leaving us with Moore’s explanation. The Forsyth report does give other opinions such as *“deficiencies were borne of a deference to authority figures”* and *“A failure of people, not policy”*, which is the report’s concluding statement.

I feel that Moore’s conduct was the result of either a conflict of interest or incompetence. The Forsyth report states they feel that Moore did not have a conflict of interest, which I feel may not be correct.

Kristine Moore is a bright attorney who graduated high in her law school class and was a member of a well regarded law firm prior to working for MSU. However, she worked mainly in labor and employment law prior to being a Title IX investigator. The Nassar investigation was not the usual type of Title IX investigation. It was about a sexual assault in a medical setting by a physician. One would have to assume that Ms. Moore was not experienced and had no

expertise in this specialized legal area. Her work was definitely incompetent. Besides using biased experts and not conveying the proper allegation about how Nassar touched Ms. Thomashow as stated above, there are other very serious deficiencies in Moore's investigation.

Ms. Moore did not properly interview Ms. Thomashow concerning the correct anatomical names of the sites that Dr. Nassar touched on the breast or the genital area. A competent investigator would have asked if Dr. Nassar touched or fondled the nipple. Touching or massaging the nipple would definitely be considered a sexual assault and not legitimate medical treatment for shoulder pain. There is no mention in Ms. Moore's report of what part of the breast Dr. Nassar touched. Ms. Moore wrote in her notes she took during her interview with Lisa DeStefano, D.O., "you don't need to touch nipple"

Moore's report which appears in the appendix of this article never once mentions Dr. Nassar's medical records concerning his medical session with Ms. Thomashow. Ms. Moore did not go over the medical record with Nassar when she interviewed him. Ms. Moore did not go over the medical record when she questioned any of the three expert physicians. No medical findings or diagnoses are mentioned in Moore's report. Were Nassar's actions medically appropriate based on his medical records concerning Ms. Thomashow? In this case a competent investigator and expert would want the expert to personally evaluate the patient with the medical records and written allegations in hand. At the least the investigating attorney would want the expert to evaluate the written allegations and medical records. A written report should be expected from the expert. None of this was done. Ms. Moore and all her experts fell far short of this standard.

The complaint against Dr. Larry Nassar was unique in that it was against a physician in a clinical setting involving the questionable medical examination and treatment of a patient. The complaint was against an employee of MSU in a MSU medical clinic. This complaint was not the usual type of complaint that the MSU Title IX office handled. Although the complaint was about sexual assault it also implied medical malpractice. Many of the factual and legal elements in the complaint against Dr. Larry Nassar are the same as a medical malpractice case.

Violation of MRPC 1.1(a)

Kristine Moore did not have the experience or expertise to handle the complex legal assignment she was given concerning the complaint against Dr. Larry Nassar. She did not seek the help of a lawyer of established competence in the field in question.

Violation of MRPC 1.1(b)

Michigan Rules of Professional Conduct Rule: 1.1 Competence states as follows:
THOROUGHNESS AND PREPARATION

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

The report that Kristine Moore issued indicates that she fell far short of the standard for THOROUGHNESS AND PREPARATION. Her work did not have the necessary factual and legal elements required for her report to meet the standards of competent practitioners.

It is now well known that Kristine Moore issued two separate reports to Ms. Thomashow and Larry Nassar. This was a violation of the Clery Act. The United States Dept. of Education Dear Colleague Letter of 2011 stated that *“Postsecondary institutions also are subject to additional rules under the Clery Act. This law, which applies to postsecondary institutions that participate in Federal student financial aid programs, requires that “both the accuser and the accused must be informed of the outcome³⁷ of any institutional disciplinary proceeding brought alleging a sex offense.”³⁸ Compliance with this requirement does not constitute a violation of FERPA. Furthermore, the FERPA limitations on redisclosure of information do not apply to information that postsecondary institutions are required to disclose under the Clery Act.³⁹ Accordingly, postsecondary institutions may not require a complainant to abide by a nondisclosure agreement, in writing or otherwise, that would prevent the redisclosure of this information.”*

The Forsyth Report did not mention anything about the two different reports. In an article in the Lansing State Journal dated Dec. 21, 2018, it was stated, *“Forsyth said that he didn't like that there were two endings to the report, but that was his personal opinion.*

“I never see what's gained by doing two documents, which are different,” he said. “All it does is set you up to be criticized for why you did this and why you basically withheld that information from the person who made the complaint.”

The Forsyth Report should have commented on this violation of the Clery Act.

The Forsyth Report does not indicate if Paulette Granberry Russell the Title IX Coordinator at MSU and Kristine Moore's boss was investigated.

The Forsyth Report does not tell us who gave Kristine Moore the job to investigate Larry Nassar. The Forsyth Report does not tell us why Kristine Moore was given the assignment. The Forsyth report does not tell us if anyone in the Title IX office, the Office of the General Counsel, or others aided Ms. Moore besides the *experts* she consulted.

In summary the Forsyth Investigation and Report gives the public more information concerning the Nassar Scandal at MSU. It has resulted in the indictment of three individuals, including the former President of MSU and the former Dean of the School of Osteopathic Medicine.

Ted Golden, M.D.

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



WILLIAM FORSYTH
INDEPENDENT SPECIAL COUNSEL

December 21, 2018

**Status of the Independent Special Counsel's Investigation into
Michigan State University's Handling of the Larry Nassar Matter**

On January 27, 2018, three days after MSU sports medicine physician Dr. Larry Nassar received an effective life sentence for sexually assaulting hundreds of young female patients, the Michigan Department of Attorney General announced that it had opened an investigation into “systemic issues with sexual misconduct at Michigan State University.” Attorney General Schuette appointed independent special counsel William Forsyth to lead the investigation, with assistance from the Michigan State Police (MSP) and members of the Attorney General’s Office.¹

To date, the investigation has uncovered evidence that led to the filing of criminal charges by the Attorney General’s Office against three individuals at MSU: former gymnastics coach Kathie Klages, former Dean of the College of Osteopathic Medicine William Strampel, and former President Lou Anna K. Simon. Because those charges remain pending, the rules of professional conduct require us to exercise considerable caution in disseminating facts that risk affecting the defendants’ rights. Unlike other independent investigations of this nature, such as the Freeh investigation of Penn State, our dual role as both investigator and prosecutor limits what facts we can disclose publicly while criminal charges are pending. As a result, this release is not intended to be a full accounting of our investigation, but rather an overview of our general findings. What follows is a brief summary of the steps we have taken to this point, a synopsis of facts we found, and insight into the culture of indifference and institutional protection that existed at MSU.

¹ It is important to make clear the limited scope of our investigation. We did not investigate USA Gymnastics, Twistars, or any other local gymnastics teams with which Nassar was affiliated. We also did not undertake a systemic review of MSU’s compliance with Title IX of the Education Amendments Act of 1972, the federal law that prohibits public educational institutions from discriminating on the basis of sex. The federal agency that oversees Title IX, the Department of Education, is currently reviewing MSU’s Title IX compliance. Nor did we investigate any allegations of sexual assault involving other MSU sports teams or colleges. Those allegations were referred to the appropriate law enforcement agency.

Larry Nassar pleads guilty to first-degree criminal sexual conduct

In the fall of 2016, Attorney General Schuette charged Nassar with three counts of first-degree criminal sexual conduct (CSC-I) for crimes perpetrated against the daughter of a family friend, Kyle Stephens. In February 2017, Nassar was charged with an additional twenty-two counts of CSC-I for sexual assaults he committed in Ingham and Eaton counties against nine of his patients. On November 22, 2017, Nassar pleaded guilty to seven of those counts in Ingham County, and a week later, he pleaded guilty to three counts in neighboring Eaton County. Nassar's sentencing hearings began on January 16, 2018, with hundreds of survivors giving statements about Nassar's abuse and the profound effect it had on their lives, capturing the nation's attention.

Amid the multitude of stirring accounts of how MSU's premier sports medicine doctor sexually abused scores of young women, the MSU Board of Trustees sent a written request to the Attorney General asking him to investigate "MSU's handling of the Nassar situation." The Board pledged that it stood "ready to fully cooperate with [the Attorney General Office's] review."

MSU stonewalls the very investigation it pledged to support

Unfortunately, the University failed to live up to this pledge by: (1) issuing misleading public statements, (2) drowning investigators in irrelevant documents, (3) waging needless battles over pertinent documents, and (4) asserting attorney-client privilege even when it did not apply. These actions warrant extended discussion because they highlight a common thread we encountered throughout the investigation into how the University handled allegations against Nassar. Both then and now, MSU has fostered a culture of indifference toward sexual assault, motivated by its desire to protect its reputation.

This began even before MSU asked the AG to investigate. Prior to publicly announcing our investigation, the Attorney General's Office asked MSU to turn over the report detailing the internal investigation MSU conducted into its handling of the Nassar matter. MSU had proclaimed publicly that the investigation, led by former United States Attorney Patrick Fitzgerald, would lead to "prompt[and] appropriate action in response to what [they] learn[ed] during the review."² In response to our request, however, MSU revealed that Fitzgerald prepared no written report of any findings. Mr. Fitzgerald, it turned out, was not hired to investigate for the purpose

² We note that while MSU hired Fitzgerald's firm within weeks of firing Nassar in September 2016, MSU's first public statement to the MSU community about Larry Nassar's sexual assaults did not come until months later, on February 3, 2017.

of presenting his findings to the public, as MSU originally implied, but to prepare and protect the institution in forthcoming litigation.

Similarly superficial was MSU's public insistence that all its employees fully cooperate with our investigation. In stark contrast to its public statements, MSU privately insisted that its own attorneys attend interviews with MSU employees. At some of those interviews, MSU's legal team—attorneys hired to represent the interests of *the University*, not the individual witness—prohibited witnesses from answering investigators' questions because it would divulge information they believed was protected by MSU's attorney-client privilege. Investigators perceived this tactic as a veiled attempt by the University to blunt the candor of witnesses and otherwise prevent them from sharing certain details regarding MSU's knowledge and handling of the Nassar matter.

This protectionist tactic continued throughout the investigation. When we requested MSU produce documents relating to Nassar and the University's handling of sexual assault reports, MSU drowned our investigators in irrelevant documents. The University has boasted of producing tens of thousands of pages of electronic documents, but the size of its production should not be confused with its level of cooperation. Unresponsive documents such as the University's Bed Bug Management-Infection Control policy, various restaurant coupons, and the seemingly endless (and duplicative) supply of emails from news-clipping services containing publicly available articles, offered absolutely no assistance in determining who at the University knew of Nassar's abuse and when they knew it.

In addition, the University withheld or redacted thousands of documents under a claim of "attorney-client privilege." Attorney-client privilege generally permits a client, like MSU, to refuse to disclose confidential communications they had with their attorney. But a client can always decide to "waive" the privilege and allow the disclosure of such communications. MSU's decision to invoke this privilege and protect certain documents, while legally permissible, nonetheless reflects a decision to place financial and legal considerations over and above the survivors' and the public's interest in learning how Larry Nassar was able to prey on so many young women at the state's largest public university.

The University's response and the prospect of an investigation based solely on information that it unilaterally and selectively decided to produce was, of course, unacceptable and inconsistent with its public pledge of openness and cooperation. As a result, we requested MSU to provide all information being withheld under the claim of privilege. In response, the University effectively asked us to trust its assertion of privilege while disparaging us for having the audacity to question such assertions, some of which were obviously improper.

Our skepticism of MSU's assertion of privilege was not unfounded. From just the emails that MSU voluntarily disclosed, investigators caught a glimpse into MSU's culture of anti-transparency. For example, Vice President for Communications and Brand Strategy, Heather Swain, directed Trustee Brian Breslin to copy University legal counsel Robert Noto on an email to other Trustees in order to "maintain privilege," despite the fact that the email was not seeking any type of legal advice from Noto.

The protectionist mindset is also evident in an email sent by Secretary of the Board Bill Beekman to President Lou Anna K. Simon. In December 2017, Beekman sent a lengthy email to Simon in which he summarized numerous meetings and conversations from the preceding day. The email ended with Beekman stating, "I will delete this email after sending it." Thus, not only has the University applied a very liberal interpretation of the scope of the privilege to emails that do exist, there is a distinct possibility, if not probability, that relevant, non-privileged emails were destroyed prior to our investigation. Regardless, this reflects a mindset among University leadership that is geared more toward secrecy and protecting its reputation than it is openness and transparency.

As a result of MSU's unwillingness to turn over documents, we had reason to believe were relevant to our investigation, we requested MSU's legal department to reconsider its invocation of privilege. When our request was denied, we next asked the MSU Board of Trustees to waive the privilege to make good on its pledge of cooperation and truth-seeking. The Board, on the advice of counsel, also denied our request. Having failed in our attempts to have MSU waive its privilege, we then asked that MSU turn over the disputed documents to a neutral third-party for review. Once again, we were rebuffed.

Faced with MSU's repeated denials, we obtained a judicially authorized search warrant directing MSU to turn over to a judge all emails, text messages, and documents pertaining to Nassar that MSU previously identified as privileged. In keeping with its ongoing lack of cooperation, MSU objected and asked the judge that they not be required to comply. In documents filed with the court, the University admitted for the first time that it had actually withheld or redacted 7,651 documents. Prior to this admission, attorneys for the University had led us to believe that they had withheld or redacted approximately 1,500 documents.

As we expected, the judge ordered MSU to turn over the contested documents for review. Before doing so, however, MSU "voluntarily" provided the Department with almost a thousand documents it had previously redacted or withheld on the basis of privilege. After review, the judge ordered the University to produce 177 more documents. Unfortunately, MSU continues to challenge the judge's decision, which means that, as of this date, MSU has still not disclosed all information that is potentially relevant to our investigation.

We recount these exchanges to show that, rather than “ready cooperation,” as the Board promised, the University has largely circled the wagons. An institution truly interested in the truth would not have acted as MSU has. MSU’s initial decision to hire a private law firm to conduct its internal investigation, its subsequent refusal to release the results of that investigation and waive attorney-client privilege, along with its insistence on having its attorneys attend witness interviews have made it virtually impossible to know exactly what happened at MSU during the Nassar years. For as long as MSU frustrates the search for the truth, we will never be fully confident that we have it.

Overview of the investigative process

The core mission of our investigation concerned whether anyone at MSU knew or should have known about Nassar’s abuse and could have put a stop to it earlier. Our team performed a comprehensive review of the circumstances surrounding the abuse perpetrated by Nassar, including which MSU employees knew, what they knew, when they knew it, and what did they did—or didn’t do—with that knowledge.

The investigation has spanned nearly a year and involved a substantial amount of time and resources from the Attorney General’s Office and the Michigan State Police. Fifteen law enforcement officers contributed to the investigation, with Michigan State Police assigning eight investigators and the Attorney General’s Office contributing seven.³ Another twelve members of the Attorney General’s Office, from attorneys to support staff, assisted in the investigation.

At the outset of the investigation, we took several immediate steps, including requesting all relevant documents and evidence from MSU, as discussed above. We hosted several informational meetings with survivors in an effort to keep them and the public updated on the status of the investigation. We also set up a tip line for members of the public to provide helpful information in a confidential manner. We received over 100 tips through the tip line, many of which related to the core mission of the investigation. Again, for those tips that related to other alleged criminal wrongdoing at MSU, investigators referred those matters to the appropriate law enforcement agency.

³ The Michigan State Police and the Attorney General Investigators deserve credit for their dedication and professionalism. In particular, Detective-First Lieutenant Ryan Pennell of the Michigan State Police and Special Agent David Dwyre of the Attorney General’s Office coordinated the investigative resources for this large-scale endeavor. Their tireless efforts should give every survivor confidence that our investigation was thorough and relentless.

The bulk of the investigative process involved reviewing documents produced by MSU and interviewing every potentially relevant witness at MSU. In all, we contacted almost 550 people, including interviews of over 280 survivors.⁴ Any information suggesting the survivors had told someone at MSU about concerns with Nassar's treatment led to interviews with the named employee and other relevant personnel at MSU. We interviewed 105 of those individuals, including everyone from secretarial staff, sports trainers, and other physicians in the College of Osteopathic Medicine, to current and former provosts, the entire Board of Trustees, and former university president, Lou Anna K. Simon. For every interview, investigators prepared a written report, which was reviewed by at least three attorneys to determine whether follow-up was appropriate and whether it suggested any criminal activity. In addition, a team of attorneys reviewed approximately 105,000 documents, consisting of almost 500,000 pages.

Dr. Lossing debunks Nassar's false assertion of medical legitimacy

Because Nassar used the guise of "medical treatment" in an attempt to legitimize his abuse, we sought the assistance of a renowned expert in osteopathic manipulative medicine, Dr. Kenneth Lossing. Dr. Lossing, the past president of the American Academy of Osteopathy, provided us with expertise regarding legitimate osteopathic manipulative techniques in the pelvic area, including the "sacrospinous ligament release," which Nassar often used as a cover for his sexual assaults. Nassar's assertion of medical legitimacy was contradicted by Dr. Lossing's analysis. Of note, and contrary to Nassar's practice, Dr. Lossing advised that intravaginal treatment should typically be utilized only if a patient presents with a trauma-induced history of infertility, irregular menstruation, incontinence, or pelvic pain, and only after external treatment is ineffective.

When performing such a sensitive procedure, he said, clear and informed consent is paramount. If the patient is not of legal age, informed consent from the patient's parent or legal guardian is required. And when conducting intravaginal treatment on a patient of the opposite sex, a chaperone is standard procedure. Finally, Dr. Lossing stated that the specific parameters of the treatment, including whether an internal approach was used, should be fully documented in the patient's medical records. The accounts from survivors reveal that Nassar showed no regard for these basic medical protocols.

In light of Dr. Lossing's expert insight and concerns raised by numerous survivors that Nassar's medical colleagues could have or should have noticed his abusive methods from the medical documentation, investigators also reviewed a

⁴ Because a number of the survivors were minors, investigators in some cases interviewed a parent instead of the survivor.

significant number of medical records. Two attorneys at the Attorney General's Office who are also medical doctors confidentially reviewed every medical record that the Department obtained during Nassar's criminal prosecution to look for possible warning signals missed by peer reviewers. They found no evidence that a peer reviewer without the benefit of post-publicity and post-conviction hindsight would have faulted the documentation or questioned the treatments rendered. But in those cases where a survivor had reported abuse to MSU, the survivor's medical records did not correlate with their police statement; specifically, the documentation did not match the police statements as to intensity, duration, and invasiveness of the treatments. A peer reviewer would have or should have questioned the treatments and procedures employed by Nassar if the treatment sessions had been completely documented as to duration and method. In short, it appears that Nassar disguised the "treatments" he performed by not documenting the conduct that would have raised red flags.

Nassar remains defiant and unrepentant

For a variety of reasons, Nassar was among the first people interviewed by our investigators. He offered no helpful information. In fact, it immediately became clear that his statements of remorse in the courtroom were a farce. Among other things, he stated that he did nothing wrong in regard to Amanda Thomashow—the survivor at the center of MSU's 2014 Title IX investigation into Nassar. He also felt that the criminal case against him "should have been handled as a medical malpractice case." Nassar claimed that he only pleaded guilty because he lost support from the medical community and his patients after the police discovered reams of child pornography in his possession. Finally, and contrary to his sworn statement at the time he pleaded guilty, he was adamant that all of his "treatment" was done for a medical purpose, not for his own pleasure.

Investigative interviews reveal eleven MSU employees failed to report Nassar's abuse

A major component of our investigation involved interviewing the survivors to determine whether they told anyone at MSU about the abuse. Of the 280 survivors we interviewed, thirteen stated that they reported Nassar's abuse to an identified MSU employee at or near the time it was happening.⁵ Their reports date as far back as 1997 and as recently as 2015. Those thirteen women and a summary of their allegations are as follows:

⁵ Other survivors stated that they reported to someone at MSU but were unable to recall the person's name and we were unable to independently identify those employees.

1. **Kyle Stephens**, the daughter of a family friend of Nassar, was sexually abused by Nassar beginning in 1998. Her abuse exceeded Nassar's typical sexual abuse under the guise of medical treatment and included being forced to watch Nassar masturbate and Nassar rubbing his penis against her feet. Stephens reported her abuse to MSU professor and psychologist Dr. Gary Stollak, who counselled her, her parents, and Nassar together about the allegation. After Dr. Stollak's counselling, Stephens falsely recanted her story.
- 2 & 3. **Larissa Boyce** and a **second youth gymnast** were digitally penetrated by Nassar during treatment sessions in the late 1990s. We allege that after talking with each other about the treatment both girls raised concerns about it with MSU gymnastics coach, Kathie Klages. We have charged Klages with lying to a police officer for her alleged misrepresentations to police surrounding this incident, and as a result we are unable to provide further details about this incident. We reiterate here that Klages is presumed innocent until proven guilty.
4. **Tiffany Thomas Lopez** reported being digitally penetrated by Nassar during several of her appointments in 1999. She initially told athletic trainer Heena Shah Trivedi, who did not relay Lopez's complaint to the proper authorities but who apparently did inform Nassar. Lopez later reported Nassar's conduct to trainer Lianna Hadden, even demonstrating what he did. In response, Hadden began to cry and later told Lopez she would report the matter to her supervisor, Destiny Teachnor-Hauk. There is no evidence that Hadden informed Teachnor-Hauk. Lopez later raised the issue directly with Teachnor-Hauk, who assured Lopez that Nassar's treatments were legitimate and cautioned her that filing a complaint would place a burden on Tiffany, Tiffany's family, and MSU.
5. **Christie Achenbach** received treatment from Nassar in 1999 for hamstring problems. During one appointment, he digitally penetrated her vagina without warning or gloves. Several days later, Achenbach told assistant MSU track coach, Kelli Bert, who brushed off Christie's concerns, saying that Nassar was a doctor and knew what he was doing.
6. **Jennifer Bedford** was sexually assaulted by Nassar in 2000 or 2001, and after one of her appointments she reported to athletic trainer Lianna Hadden that she was not comfortable with Nassar's treatment. Hadden told her that there was no option of filing a confidential complaint and that the only way to voice her concerns would be to file a report, which could prompt a criminal investigation.

7. **Jill Berg** saw Nassar in 2002 for a sports injury. She was sexually assaulted several times, including once in which Nassar cupped her breast and digitally penetrated her vagina. Berg later had a discussion about the treatments with her teammates, which was overheard by athletic trainer Tony Robles. According to Berg, Robles seemed concerned about the incident, but she assured Robles everything was fine.
8. **Kassie Castle**, a youth gymnast at Twistars, was assaulted by Nassar between 2004 and 2010. Nassar's assaults included penetrating her anus and vagina with his fingers, sometimes when he had an erection. Castle's mother initially confronted Nassar about his treatments, but he assured her it was medically appropriate. Later, in 2007, Castle reported to Dr. Brooke Lemmen that she was uncomfortable with Nassar's treatments because it was causing her to bleed.
9. **Shannon Dunn** was abused by Nassar during one treatment session in 2010 in which he digitally penetrated her vagina. Dunn reported the incident to MSU sports psychiatrist Dr. Lionel Rosen, who expressed no concern, telling Shannon that Nassar was only doing what was best for her.
10. **Catryina Brown** was a paid "simulated patient" for the MSU College of Osteopathic Medicine in 2009 or 2010 when Nassar massaged her clitoris under the auspices of instructing students how to perform a pap smear. Brown reported the incident to her supervisor, Rebecca Cass.
11. **One young girl** received treatment from Nassar in 2012. According to her mother, who was present in the room, Nassar used a "medical technique" that made her and her daughter uncomfortable. After that visit, they switched physicians to Nassar's colleague, Dr. Brooke Lemmen. During her daughter's first visit with Dr. Lemmen, the mother told her that Nassar's treatment made them feel uncomfortable. Dr. Lemmen replied, "[W]e get that a lot."
12. **Amanda Thomashow** received treatment from Nassar in 2014 for hip pain. During the appointment, Nassar massaged her breast and rubbed her vagina despite her protestations that it hurt. Thomashow reported the incident to Dr. Jeffrey Kovan, who called the MSU Title IX Office to report her complaint.
13. **Kelle Sajdak** reported being "groped" by Nassar to her boyfriend and MSU athletic trainer David Jager in 2015. According to Sajdak, Jager responded with indifference, saying that Nassar was "the best in the world." According to Jager, he recalled Sajdak's complaint and told her to make a report if she felt uncomfortable.

A culture of indifference toward the health and safety of MSU students and faculty

After interviewing each of the above survivors, we also interviewed every employee mentioned above. Nearly every employee either claimed that they could not recall receiving a report of abuse or explicitly denied ever being told. Although there is no evidence that these MSU employees consciously conspired with each other or with Nassar to cover up his abuse, the real explanation of why Nassar was able to perpetrate his crimes for so long is little better.

In some sense, the MSU employees around Nassar were misled much like the survivors were. All of Nassar's colleagues stated that they never witnessed Nassar digitally penetrate a patient, though the ones most familiar with Nassar's specialty emphasized that vaginal penetration could be medically appropriate in certain, rare circumstances—an opinion shared by Dr. Lossing. It is evident that Nassar was able to use his associates' familiarity with a legitimate medical technique to conduct treatment that resembled that technique, but which constituted sexual assault, done for his own personal sexual gratification.

Nevertheless, the fact remains that, according to nearly every survivor interviewed above, the MSU employees who allegedly received reports of Nassar's sexual assault or improper medical treatment (with the exception of Dr. Kovan) downplayed its seriousness or affirmatively discouraged the survivors from proceeding with their allegation. That so many survivors independently disclosed to so many different MSU employees over so many years, each time with no success, reveals a problem that cannot be explained as mere isolated, individual failures; it is evidence of a larger cultural problem at the MSU Sports Medicine Clinic and MSU more broadly.

For as varied as the details of the survivors' accounts are, there is a common thread through each: the tendency of MSU employees to give the benefit of the doubt to Nassar, not the young women who came forward. When faced with accusations of digital penetration during routine medical treatments—serious allegations that amount to criminal wrongdoing—the MSU employees discounted the young woman's story and deferred to Nassar, the world-renowned sports medicine doctor.

MSU's Title IX Office failed to properly investigate 2014 allegations against Nassar

One of the lessons the evidence in this matter teaches is that automatic deference to authority creates presumptions that work against those without authority. That deference produced catastrophic results not only for the young women whose reports were ignored, but for every other young woman who was

victimized by Nassar up until the investigation of Amanda Thomashow's 2014 complaint.

Unfortunately, the same is also true for Ms. Thomashow—the one survivor whose complaint was properly reported—as well as the young women who were sexually assaulted by Nassar after the conclusion of the Title IX investigation. In April 2014, Ms. Thomashow reported to Dr. Jeffrey Kovan that Nassar rubbed her breast and vagina during a medical appointment to treat her hip pain. Dr. Kovan relayed the complaint to MSU's Title IX Office, which, in conjunction with the MSU Police Department, investigated Ms. Thomashow's allegation. Sadly, the MSU Title IX investigation process, aided in part by mistakes by those tasked with carrying out the investigation, failed Ms. Thomashow. And again, the deficiencies were borne of a deference to authority figures.

The MSU official charged with investigating Thomashow's complaint was Kristine Moore of MSU's Title IX Office. There is no evidence that she conducted the investigation in bad faith or consciously arrived at a predetermined result. But there were multiple shortcomings in the investigation that, even without the benefit of hindsight, substantially influenced MSU's conclusion that Nassar did not violate its sexual misconduct policy.

The first significant failure of the Title IX investigation centered on Moore's failure to consult neutral and objective medical experts with no ties to Nassar or the MSU College of Osteopathic Medicine. Moore recognized early on that resolving Ms. Thomashow's complaint would turn, in part, on whether Nassar's treatment was medically legitimate, which required consultation with experts in his field. Highlighting the deficiency of this process, the experts she consulted were Nassar's colleagues at the College of Osteopathic Medicine, Drs. Brooke Lemmen, Lisa DeStefano, and Jennifer Gilmore. All three either studied, worked, or taught with Nassar. During her investigation, Moore either downplayed the witnesses' connection with Nassar or failed to consider how their personal opinions of Nassar as a man of character affected their professional judgment.

Dr. Lemmen's bias in favor of Nassar was particularly troubling. Evidence shows that she maintained a close personal relationship with Nassar outside the workplace—so close that she was aware of Thomashow's allegations *before* Moore formally interviewed Thomashow on May 29, 2014.⁶ Three days before that, on May 26, 2014, Nassar emailed Lemmen about the allegations, providing Lemmen background on his treatment technique and how he had previously and without

⁶ Dr. Lemmen's connection with Nassar makes it all the more troubling that her MSU email account was deleted before our investigation began.

objection performed techniques similar to the allegations he claimed Thomashow was making.

In an apparent attempt to taint Lemmen's perception of the case, Nassar misrepresented Thomashow's complaint, writing, "[Thomashow] never said that I was making her uncomfortable, she never said that she [*sic*, I] did not explain what I was doing well enough to her. That is what is killing me. I have been called the 'Body Whisperer'. How could I miss her signals that she was so uncomfortable?"

Nassar also implied that Thomashow was motivated to falsely accuse him:

"What I do know is that Dr. Kovan said that it was after I 'Liked' a picture on Instagram of her sister, who is a gymnast, which made her decide to call Dr. Kovan. The patient was in the picture too. I think she may have felt like I was 'stalking' her at that point or being too invasive into her personal life. That would explain why I did not perceive any of the 'vibes' that one would pick up if the patient was feeling violated. Maybe that is why the patient did not say anything to me and actually told me that the treatment was helping her and she felt better afterward. That would make some sense."

Moore was unaware that Nassar was communicating with Lemmen during the investigation, and she has since acknowledged that interactions like this would prejudice the investigation. But she has also continued to defend her decision to consult only MSU- and Nassar-affiliated experts, contending that their credibility was not an issue because everyone agreed (with Nassar) that the treatment he says he performed was medically legitimate.⁷ That reasoning, however, ignores the very real probability that their conclusion was influenced by their bias in favor of Nassar. It also is predicated on the assumption that Nassar was, in fact, performing the technique that he claimed he was performing, as opposed to the highly irregular actions that Ms. Thomashow described.

That leads to the second significant failure of the Title IX investigation: Moore's failure to accurately convey Ms. Thomashow's allegation to Drs. Lemmen, DeStefano, and Gilmore.

⁷ Detective Val O'Brien, the MSU Police Department investigator assigned to Thomashow's case, also failed to consult additional experts, despite being asked to do so by Ingham County Assistant Prosecutor Debra Rousseau. There is no evidence Detective O'Brien ever consulted an outside expert, or even conducted an independent criminal investigation. Detective O'Brien has not explained her investigative decisions, as she was unwilling to be interviewed by our investigators.

During her interview with Moore, Ms. Thomashow alleged, in part, that Nassar placed three fingers on top of her vagina and rubbed in a circular motion. Following Ms. Thomashow's interview, Moore and Detective O'Brien each interviewed Nassar and confronted him with Ms. Thomashow's allegations. Throughout both interviews, Nassar minimized the seriousness of Ms. Thomashow's allegation in an attempt to bring it in line with the legitimate forms of his medical technique. He also implied that Ms. Thomashow had ulterior motives in making an allegation against him, suggesting that she only came forward because he "Liked" a picture of her on social media. He also claimed that she had a "psych history" and questioned whether she had been sexually abused in the past: "Did I open Pandora's Box for her? What other issues does she have whether it be physical space or mental space[?]" By the end, Nassar had reduced Ms. Thomashow's allegation into a close description of his medical procedure. "Yes I'm there and yes it's medical," Nassar said, adding, "What she described matches what I would do."

Nassar's efforts to manipulate the investigation appears to have had a significant effect. Following her interview with Nassar, Moore focused her attention on the legitimacy of the technique that Nassar claimed he performed. As Moore would write in an email a day later about the state of the investigation: "At this point, there is not much discrepancy in terms of the two stories about what occurred." Unfortunately, Moore failed to pursue whether there was a material disconnect between Ms. Thomashow's specific allegations and proper medical procedure.

According to Moore's handwritten notes from her interviews with Drs. Lemmen, DeStefano, and Gilmore, it does not appear that Moore ever recited Ms. Thomashow's specific allegation regarding his pelvic treatment. Moore's notes reveal that she conveyed discrete aspects of Ms. Thomashow's complaint, like the fact that Nassar did not immediately stop when she complained of pain, but there is no evidence she specifically told the doctors that Nassar placed three fingers on top of the patient's vagina and rubbed in a circular motion.

All three doctors have since confirmed with investigators that they were never told the specifics of Ms. Thomashow's complaint. Rather than present the experts with the facts presented in the complaint, Moore focused her questions on the legitimacy of the technique Nassar claimed he was performing. Naturally, all of the doctors told Moore that it was a legitimate medical procedure. As Dr. DeStefano put it to investigators: "[I]t wasn't a matter of trusting Amanda Thomashow, it was questioning the technique." According to Dr. DeStefano, she thought she knew the technique he was using, and her role was to defend the technique.

After subsequently learning the details of Nassar's misconduct, each doctor has since retreated from her original opinion. For example, Dr. Gilmore told investigators that vaginal penetration is not an accepted part of the technique Nassar claimed he was performing. And Dr. Lemmen stated that Ms. Thomashow's

allegation of rubbing the top of the vagina in a circular motion would have raised red flags for her. Lemmen said, “Knowing what I know now, . . . I think the information from Amanda was filtered in a way that did not give me the ability to understand what had truly happened to her.”

In sum, had Moore consulted experts with no ties to Nassar or the MSU Sports Medicine Clinic, or accurately conveyed Ms. Thomashow’s key allegation, it appears likely that the result of the 2014 investigation would have been different.

Criminal charges we have filed

Other facts we have uncovered are consistent with MSU’s culture of indifference and its efforts to protect its reputation. But because we have initiated criminal charges against three individuals in the MSU hierarchy—the former MSU gymnastics coach, the former Dean of the College of Osteopathic Medicine, and the former President of the University—we are obliged by the Michigan Rules of Professional Conduct to abstain from disseminating facts that might affect a jury’s view of the “character, credibility, [or] reputation” of defendants and witnesses that may appear in court. M.R.P.C. 3.6(a)(1). Moreover, there are facts that may well color a jury’s view of a particular defendant that would be inadmissible at a trial. M.R.P.C. 3.6(a)(5). At this stage, these individuals are only alleged to have committed criminal acts and they are all presumed innocent. Because of our ethical duties, we merely outline the nature of the crimes for which the defendants have been charged.

William Strampel is charged with misconduct in office, fourth-degree criminal sexual conduct, and two counts of willful neglect of duty. The willful-neglect charges involve Strampel’s alleged failure to properly supervise Nassar by allowing him to return to work during the 2014 Title IX Thomashow Investigation and his alleged failure to enforce protocols for examinations and procedures conducted by Nassar that had been put in place after the Title IX investigation was completed. Strampel’s remaining charges pertain to his own personal, unrelated criminal conduct uncovered during our investigation. The facts underlying those charges have been set out in the affidavit in support of criminal charges in Ingham County.

Kathie Klages was charged with two counts of lying to a peace officer. These charges involve allegations that Klages falsely denied to investigators that two survivors reported to her that they were assaulted by Nassar.

Lou Anna K. Simon was charged with four counts of lying to a peace officer, also arising out of statements she gave to police officers regarding material facts of this investigation. Specifically, Simon is alleged to have given false or misleading statements when she (1) denied that she was aware of the nature of the complaint that generated the 2014 Title IX Thomashow Investigation and (2) told investigators that she was aware that there was a “sports medicine doc who was subject to review”

in 2014 even though she allegedly knew that it was Nassar who was the subject of the 2014 Title IX investigation.

In addition to these criminal charges brought by the Department of Attorney General, the Department of Licensing and Regulatory Affairs has taken administrative action against Strampel's and Stollak's professional licenses. The allegations in the administrative proceedings against Strampel arise, in part, from his alleged failure to properly supervise Nassar. In regard to Stollak, he voluntarily surrendered his license after not contesting that he failed to inform authorities of Kyle Stephens' allegations of sexual abuse by Nassar.

Erika Davis' allegations of conspiracy by MSU officials

There is one additional allegation involving MSU's knowledge of Nassar's conduct that warrants discussion: Erika Davis' claim of a cover-up by certain MSU officials after Nassar allegedly drugged her and then filmed himself sexually assaulting her. According to Davis' civil complaint, the assault happened in 1992 when she was 17 years old. She alleges that her field hockey coach, Martha Ludwig, referred her to Nassar because she (Ludwig) knew him through a mutual friend. Based on her coach's recommendation and Nassar's reputation and standing with USA Gymnastics, Davis made an appointment with Nassar. She further alleges that after the alleged assault she told her coach, who confronted Nassar, retrieved the video of the assault, and ultimately took the allegations to the athletic director. She also claims that former athletic director George Perles intervened, confiscated the video and forced the field hockey coach to resign and sign a non-disclosure agreement about the matter. She also alleges that she told her "dorm mom" Cheryl about the assault and that "Cheryl" told her to contact the MSU Police Department. Davis claims that, when she went to the MSU Police Department to report the assault, a sergeant instructed her to drop the complaint and told her to leave the building.

As part of our review of MSU, we investigated Ms. Davis' allegations and found no credible evidence to support them. In fact, we found substantial evidence contradicting her claims concerning the supposed cover-up. We interviewed Ms. Ludwig who told investigators that she did not recall Ms. Davis. Ludwig also told investigators that she had never referred any of her athletes to Nassar and did not know Nassar personally or by reputation. She further stated that the only interactions she ever had with George Perles were in regard to whether the field hockey team could practice on the "turf field" in order to prepare for upcoming games. Ms. Ludwig also stated that her contacts with Perles, which were always about work and sports, were always professional and respectful. Moreover, there is no evidence that Ms. Ludwig was forced to resign or was required to sign a non-disclosure agreement upon leaving MSU. More significantly, we confirmed that in 1992 Nassar was not affiliated with either the MSU Sports Medicine Clinic or USA Gymnastics. In actuality, Nassar was still a medical school student in the spring of 1992. Further,

we could find no “dorm mom” named Cheryl assigned to any of Ms. Davis’ residence halls during her time at MSU. Finally, we found no evidence that Ms. Davis filed a complaint with the MSU Police Department in 1992.

A failure of people, not policy

While MSU’s latest efforts at reforming its sexual misconduct policies and procedures are a step in the right direction, our investigation leads us to conclude that the inability to halt Nassar’s lengthy pattern of abuse and to address the dysfunctional atmosphere at the College of Osteopathic Medicine is attributable not to any deficient policy, but to a series of individual failures; policies are no better than the people tasked with implementing them. Until there is a top-down cultural change at MSU, survivors and the public would be rightly skeptical of the effectiveness of any set of written policies.

EXHIBIT 1

Confidential

Report on Investigation into Allegations of Sexual Harassment

Investigation Conducted By:

Kristine M. Moore, Assistant Director for Institutional Equity
Office for Inclusion and Intercultural Initiatives

7/18/14

Claimant:

Amanda Thomashow

Respondent:

Dr. Larry Nassar

A. BACKGROUND AND ISSUE

Amanda Thomashow brought a concern to the attention of MSU Sports Medicine Clinic, Dr. Jeff Kovan, about possible sexually harassing conduct on the part of Dr. Larry Nassar, a physician in the practice during a medical exam of her on March 24, 2014. She reported her concern to Dr. Kovan on April 18, 2014. Dr. Kovan met with Ms. Thomashow on April 21 and brought the concern to the Office for Inclusion and Intercultural Initiatives (I3) the same day.

Ms. Thomashow is an MSU student now and is an alum of MSU, although she was not an MSU student at the time of the incident. Dr. Nassar works for the MSU Sports Medicine Clinic, which is a part of the College of Osteopathic Medicine.

Based on the information presented to I3, an investigation was conducted.

Confidential

B. DISCUSSION

The summary of our findings is as follows. I3 uses a "preponderance of the evidence" standard, which requires that the evidence supporting an allegation be more convincing than the evidence offered in opposition to it.

Based on all of the interviews conducted¹ and the information reviewed, as described further herein, the evidence establishes that Dr. Nassar did not violate the Sexual Harassment Policy.

1. INTERVIEWS

a. Ms. Thomashow

Ms. Thomashow's allegations are limited to conduct that occurred on March 24, 2014. She made an appointment with Dr. Nassar for that day because she was having hip pain. She had seen him once previously for another medical issue, but it had been years. She knows Dr. Nassar through her mother, a pediatrician, who refers cases to him and her sister who is active in gymnastics and is on the Twistars competitive team (Dr. Nassar is Twistar's team doctor). She states that her appointment with Dr. Nassar was approximately one and a half hour in length and for the majority of the appointment, a female resident was also in the room.

¹ This report contains summaries of portions of the interviews relevant to the analysis. A complete set of notes of each interview are in the file. In each interview, the witness was reminded of the confidentiality and no-retaliation provisions in the Sexual Harassment Policy.

Confidential

She states that Dr. Nassar made her feel slightly uncomfortable when the resident was in the room because she thought he was “goofy” and “too touchy.” In addition, her friend, Deanna Lewycky, had told her earlier in the day that Dr. Nassar was “creepy” and that she should not go see him. Ms. Lewycky had seen Dr. Nassar once before.²

She states that Dr. Nassar touched her legs a few seconds too long a few times. She states that at one point, while the resident was still in the room, he “cupped her butt” over her sweat pants, enough to be “a little too much.” She states he never indicated why he did that, but that she was not too worried because there was a resident in the room and because he was known to her mom, sister and in the community. She thought “that’s just Dr. Nassar.” She states that at some point, he told her that her boyfriend should give her better massages, which she felt was inappropriate.

She states he sent her to get an x-ray and she believed it was weird that he required her to get a “frog leg” x-ray. She states that after looking at the x-ray, he told her that one hip was higher than the other and that her pelvic bone was low and that he would have to readjust her pelvic bone. She states that he had her turn a certain way and asked whether that hurt her hip and she replied that actually, it hurt her shoulder.

At that point, she had been at the appointment for about an hour, she states Dr. Nassar sent the resident out of the room, asking the resident whether she had seen a particular type of injury and when she responded “no,” he told her to go and see it.

At that point, she states she started feeling very uncomfortable. She states he told her to lie down on the table and first worked on her shoulder. He told her to turn on her side and he put pressure on her shoulder and the side of her breast. She states he had one hand on her back and the other under her shirt over her bra. She states it was fine for a while, but then he was

² See Ms. Lewycky’s interview summary, *infra*.

Confidential

massaging her breast, "full-on," from the front and this went on for at least 30-45 seconds. She states the entire thing lasted for one and a half to two minutes. She states that the way he was touching was intimate, "like your boyfriend would while you were making out with him."

Ms. Thomashow states that at some point during the 30-45 seconds, she said things like "oh, you know, this isn't helping anymore" and "you've helped all you can," at least three – four times. He responded "almost done,"

After that, Dr. Nassar told Ms. Thomashow to lie with her stomach down. He got a tub of lotion, put it on his hands, pulled her t-shirt up to her bra and applied pressure with his arm to her back. He pulled her sweat pants down a little to the point her "butt crack" was exposed and started massaging her hip on top of her clothes. He asked how it felt and she responded that it helped a little. She states that he took that as an invitation and then began to massage her buttocks by moving his hands under her sweat pants and underwear, so there was skin-to-skin contact.

She states that he began to massage her with three fingers in a circular motion in her vaginal area. She states she was shocked. She states he was extremely close to inserting a finger into her vaginal opening. She states she could not process in her mind what was happening. She states that she felt it was so inappropriate that she was worried that if he did this to others, they would become automatically sexually aroused because of the physical motion in that area.

She states that it went on for a minute and a half or so before she got the courage to say "stop, you're hurting me." She states he did not stop in response, but instead said "I'm almost done."

She states after he finished, he tried to make another appointment with her on his computer in the exam room, but it froze. She said he got very frustrated with the computer. She

Confidential

said she did not want another appointment, but he was insistent. She said that she told him “no” with respect to approximately five different proposed dates/times before she finally said “yes,” because it appeared he was not giving up. She states that he then said “if you are on your period next time, we can work around that, so don’t worry.”

She states that throughout the visit, there was never a clear description of what Dr. Nassar was doing. He never said “this is what I’m going to do and here is why. . .”

She said she was in shock afterwards. She reacted by pretending like it did not happen afterwards. She told a friend from work that he made her feel uncomfortable, but did not tell her any details. But, the next day, she told her mom on the way home from work and broke down, sobbing. She said her mom’s reaction to the conduct, which was “that is absolutely disgusting,” helped things click and made her realize how inappropriate it was. She called the clinic the next day to cancel her appointment. She told the front desk receptionist to whom she spoke that she was cancelling because she felt violated. She states that the person simply said “O.K.” and that was it.

She states that she also told her manager at work, Chelsea Griffin, her friend Andrea Zaworski, her sister Catherine, her father, her friend Geanina Rahlly and her friend Deanna Lewycky³. She states for a few weeks, she thought about it and still did not want to believe it happened. She states she felt finally that she had to do something. She called Dr. Kovan on April 18 and met with him for about a half hour on a Monday, April 21, she believes. She states that she was worried that Dr. Kovan was just backing up Dr. Nassar and did not believe he was taking her seriously.

³ I did not interview Ms. Thomashow’s sister or father. Nor was I able to reach Ms. Zaworski. None of these individuals were necessary to the investigation since the vast majority of facts are not in dispute.

Confidential

b. Deanna Lewycky

Ms. Lewycky is a friend of Ms. Thomashow's; they are friends through work, but do not "hang out" outside of work. Ms. Lewycky recalls that Ms. Thomashow called her soon after it happened. She said she was very, very upset and was crying. Ms. Thomashow told her that Dr. Nassar touched her inappropriately. She told Ms. Lewycky that he massaged her breasts and then went under her pants in her vaginal area "like he was fingering her," although she does not recall if Ms. Thomashow told her whether he inserted a finger. She states she remembers Ms. Thomashow telling her that she had asked Dr. Nassar to stop, saying "stop, you're hurting me," but cannot recall whether Dr. Nassar stopped in response. Ms. Thomashow told Ms. Lewycky that when she left the appointment, Dr. Nassar said "if you are on your period, we can work around that."

Ms. Lewycky shared with Ms. Thomashow that she saw Dr. Nassar five years ago for a stress fracture in her back and, despite her dad being in the room, she thought Dr. Nassar was very inappropriate, joking about her "butt being athletic" and grabbing her butt. She said she avoided going back. She states she is an athlete – dance and cheer.

c. Suzanne Thomashow

Suzanne Thomashow is Amanda Thomashow's mother, as well as a pediatrician, practicing in Saline, Michigan. She did rotations with Drs. Nassar and Kovan while at the College of Human Medicine as a student at MSU. Her daughter has had back and hip issues and she knew that Dr. Nassar was "really good" so she advised her daughter to see him. She states that he knows manipulative medicine very well.

Confidential

The day after the appointment, her daughter told her about it. She states she was very upset – she was crying and felt horrible and violated. It sounded to Dr. Thomashow that Dr. Nassar touched her daughter inappropriately based on what her daughter said. Dr. Thomashow does not know why Dr. Nassar asked the resident to leave the exam room. Her daughter told her that Dr. Nassar made a comment about her daughter's period, saying "I can work around that," which Dr. Thomashow felt was inappropriate. However, Dr. Thomashow stated that she knows Dr. Nassar is good, so thought that maybe that was the norm. She states she encouraged her daughter not to report to the police, but to go to Dr. Kovan, because she did not want this following her around as something traumatic she has to deal with.

Dr. Thomashow states that it was her daughter's perception that she felt violated. She states that she felt sick to her stomach when her daughter told her.

When we asked Dr. Thomashow what her daughter told her about the appointment, she responded that her daughter told her that he touched her vaginal area and her breasts and massaged them for minutes each.

d. Geanina Rahlly

Ms. Rahlly is a friend of Ms. Thomashow's. She states that Ms. Thomashow told her about the appointment with Dr. Nassar shortly after it occurred. Ms. Thomashow told Ms. Rahlly that she was there for her hip. She told Ms. Rahlly that he put his hand under panties, but sent someone out of the room before he did this. She told her that he made a comment about her period, saying "we can work around this." She told her that Dr. Nassar became very upset because he insisted on making another appointment with her and kept suggesting dates until she finally said "yes."

Confidential

Ms. Rahlly states that based on what Ms. Thomashow said, it sounded extremely inappropriate. Ms. Rahlly states that she knows that Dr. Nassar volunteers at St. Thomas, that she worked there, and that one of the parents there told her that she had been very uncomfortable with what he did with her daughter.

e. Chelsea Griffin

Ms. Griffin is a friend of Ms. Thomashow and Ms. Thomashow's manager at work. Ms. Griffin said that Ms. Thomashow told her that she felt uncomfortable about her appointment with Dr. Nassar, but did not share the details. Ms. Thomashow seemed very upset.

When we asked Ms. Griffin whether she had ever had an experience with Dr. Nassar that made her feel uncomfortable, she said "no." She said she was in high school when she saw him with her mom in the room and nothing made it uncomfortable. Ms. Griffin said that her boyfriend had seen Dr. Nassar and that he thought Dr. Nassar was "creepy and goofy" and was not going to go back.

f. Larry Nassar

Dr. Nassar states that he does not recall the specific appointment, although he recalls the patient, given the patient's mother is someone he knows well and has referred patients to him over the years. He also knows the patient's sister through her involvement in gymnastics.

After we provided Dr. Nassar with the details regarding Ms. Thomashow's allegation that he inappropriate touched her breasts, he responded as follows. Dr. Nassar states that he touched Ms. Thomashow's breasts in his examination of her shoulder, but that it was medically necessary. He states that feeling ribs (which are under the breasts) is how you would examine a shoulder from a osteopathic manipulative medicine perspective. He states he would have used

Confidential

compression, pushing the breast tissue out of the way, feeling for connective tissue related to ribs because ribs and shoulders are inextricably intertwined. He states he would not call it "massaging," he would call it manipulating or palpating. He states that he does this with anyone complaining of shoulder pain – that it is standard operating procedure. He states that he is compressing ribs, asking if it is better or worse as he compresses.

After we provided Dr. Nassar with the allegations related to touching Ms. Thomashow's vaginal area, he responded as follows. He states that everything we described in terms of Ms. Thomashow's description sounds like standard operating procedure. The SacroTuberous Ligament (STL) goes from the pelvis to the tail bone. He states that if someone presented with hip pain, he would have manipulated in the pelvic floor area, including the STL. He states that the ligament is very closely connected to the pelvic floor area, and thus close to the vagina, so that touching in the vaginal area to work on the STL is common. He also states that the pelvic floor can be related to hip pain.

He states he has been doing this procedure in particular (a STL release) it for a long time. He has designed a leotard showing how important he thinks it is to lift in that area. He teaches it to residents and fellows. He provided us with numerous videos of him on-line performing the technique. He states that he teaches patients how to perform it on themselves, telling children that it is like "giving yourself a wedgie."

He states that he is known for this work, but that he knows it is not widely performed and, in fact, he has included in his presentations that the pelvic floor area is ignored by too many physicians. He indicated that he has a slide in a frequently used power point that contains Star Trek images and is entitled "Pelvic floor: Where no man has gone before." He states that the

Confidential

STL release is a very powerful technique, that it drastically increases range of motion, and that gymnasts come to him from all over to have it done.

He states that he does not recall whether Ms. Thomashow said "stop, you're hurting me." However, he states that if she had said that, he would have moved his hand position and not stopped the exam altogether. This is because he is constantly communicating with patients as he examines them to determine if something is hurting as he continues to use manipulative medicine on them. An indication of pain would, in his mind, mean that specific touch was hurting – and would not be an indication to stop the entire exam, but merely to change hand placement.

When asked whether he made the comment about Ms. Thomashow's period, he said "yes," that is something he would say. He states that given where he is manipulating, he does not want the patient to believe that would be problematic. When asked whether he tried to schedule a follow-up exam with Ms. Thomashow five to six times, he states that he does not recall, but it is important generally to schedule an appointment soon otherwise the work lose its effectiveness and he would not want the pain to go back to baseline.

When asked about sending the resident out of the room, he states that he does that frequently, in particular when he is running behind. He states that there is no set protocol for whether to have another person in the room during such an exam.

In terms of communicating with patients about the procedure, he cannot recall the communication with Ms. Thomashow. He states that his standard operating procedure in terms of communicating with patients is to explain as he goes. He usually states "I am going to place my hand here; is that better or worse?" He states that he talks throughout his appointments and if he is not talking, he is thinking about what comes next.

Confidential

Dr. Nassar added that he is very hurt to think that he violated a patient's trust, even though it was inadvertent. He stated he was so sorry, that he never had any inappropriate intent and that it especially hurts because helping people is what he does.

g. Physicians and treating professionals practicing in this area

In order to analyze Ms. Thomashow's claim, it was necessary to consult with medical professionals in the area since Dr. Nassar's defense is that his conduct was medically appropriate.

Sexual harassment is unwelcome behavior of a sexual nature when such behavior is so severe, persistent or pervasive that it would cause a reasonable person's educational experience to be impacted. Sexual assault, a form of sexual harassment, is unwelcome touching "of a sexual nature" without a person's consent. "Touching of a sexual nature" includes touching of a sexual body part.

Ms. Thomashow claims that Dr. Nassar touched her sexual body parts (breast and vagina), that it was unwelcome, severe and that it impacted her greatly (although she could not establish it impacted her educationally at the time⁴).

To determine whether this conduct violated the MSU Sexual Harassment Policy, it is necessary to determine if the touch was sexual in nature. Dr. Nassar states it was medically appropriate and, thus, was not sexual in any way. We consulted with manipulative medicine

⁴ Ms. Thomashow is a graduate of MSU and is currently taking classes at MSU. However, at the time of the incident, she was not a student. MSU, however, has a duty to address any sexual harassment of which it becomes aware even if it is brought to MSU's attention by a third party. Thus, an investigation was appropriate, and necessary, in this case.

Confidential

physicians in the area for other opinions related to the appropriateness of the procedure medically.

1. Dr. Brooke Lemmen

Dr. Lemmen is a DO and is board certified in family and sports medicine. She went to medical school at MSU and started as a fellow at MSU Sports Medicine Clinic and as a full time physician in July 2010. She, like Dr. Nassar, practices osteopathic manipulative therapy (OMT). Dr. Lemmen studied under Dr. Nassar, is currently a colleague, and says they are “very good friends.”

After we described the allegations to Dr. Lemmen, she states that she believes what was alleged to have occurred would be medically appropriate treatment based upon the patient’s complaints.

She states that when treating shoulder pain from an osteopathic perspective, it is necessary to treat the ribs. She states you would examine the ribs and as the ribs run right under the breasts, it is difficult to not palpate the breasts while assessing and treating the underlying rib dysfunctions. She states that she would perform the same technique – a myofascial technique – which involves following the tissue through palpation and examining the tissue texture change (which is a tenant of osteopathic treatment) as she goes. She said the difference is that she would do so over a shirt, not under. However, she states that there is a medical detriment to performing the technique over the shirt. It can be more painful over the shirt on the anterior chest of female patients because you are creating friction with the shirt and skin and that the physician cannot feel the tissue as well. She states she does not touch under the shirt in that technique because she is sensitive to the issue, as a woman.

Confidential

She states she is completely convinced that Dr. Nassar was not touching sexually, but was touching in a way that was medically appropriate because of many years observing his treatment styles and techniques.

In terms of the allegations about touching in the vaginal area, Dr. Lemmen again states that the alleged conduct is consistent with that which is medically appropriate. She states that treating someone for hip pain would include, for a manipulative medicine specialist, manipulating in the pelvic floor area, including areas very close to the vaginal area⁵. She states, again, the difference between she and Dr. Nassar is that she would not use a skin-on-skin method. She would go over clothes. She states that in part it is that she does not want to put on gloves and in part because she is sensitive to what that would mean for a patient.

In terms of communicating with her patients, she states that she explains ahead of time any time she would touch in the area near the vagina.

Dr. Lemmen states that Dr. Nassar's explanation about his reaction to being asked to stop because he was hurting Ms. Thomashow is consistent with what she would do — move hand placement because she would assume that particular touch was hurting her, not the entire procedure. She further explains that many OMT treatments are working in areas that are painful; thus, it is common to have patients complain of pain, or for the clinician to ask about any sensation of pain, in an area and adjust hand placement or treatment technique based upon the position and tissue response.

In terms of sending the resident out of the room, Dr. Lemmen states that does not surprise her at all because Dr. Nassar is consistently running behind since he spends so much time with his patients. She states that she will do the same thing if she knows she is running behind and

⁵ She clarifies that the "vaginal area" is technically inside the body, but the layperson's understanding of the vaginal area could include the "underwear zone." When using the term "vaginal area" here, she is talking about palpation outside of the labia.

Confidential

the next patient is waiting. She states that she seldom sees patients independently (without anyone else in the room). She states at MSU Sports Medicine, they are a teaching facility and have students, residents and fellows shadowing them all the time. It is common for them to start working with the next patient while they finish up with the current patient to try to keep on schedule and limit wait times for the patients.

2. Dr. Lisa DeStafano

Dr. DeStafano is a DO and is board certified in family medicine and neuromusculoskeletal medicine. She went to medical school at MSU and has been practicing in the area since 1997. She is the Chair of the Osteopathic Manipulative Medicine Department in COM. She authored the fourth edition of the textbook entitled Greenman's Principles of Manual Medicine, used nationally and internationally.

She has known Dr. Nassar since 1988 and states that they were classmates together and that she has taught with him. She describes their relationship as that of colleagues. She has had the opportunity to view his work when they co-teach, she has watched his videos many times and she knows that he is very well known for his work on the pelvic floor – it is what he does and he is famous for it.

After we described the allegations to Dr. DeStafano, she states that she believes what was alleged to have occurred would be medically appropriate. She explains why as follows.

In terms of the massaging of the breast, she states that ribs go under the breasts and it would be very appropriate to press and move breast tissue aside to follow the ribs to determine what is causing shoulder pain. She states that there is no scenario where she would examine someone for shoulder pain where she would not touch a patient's rib cage, potentially involving

Confidential

breast tissue in some way. She states that this type of manipulation, which is medically very appropriate, could be confused with massage.

In terms of the STL release, she states that he is very well known for this technique and what we described (the alleged conduct) is medically appropriate. She states that she performs this technique herself. When she does, her fingers are on someone's buttocks and she is trying to access the ischiorectal fossa. She states that their faculty teach this to students. They perform this myofascial technique to achieve a pelvic floor release. This is a common thing to do if someone has hip pain. She states that the hip and tendons related to it blend into the pelvic floor and to treat the pelvic floor for hip pain makes sense.

She states that while she performs the technique generally over clothes, there is a medical benefit to performing skin-to-skin instead because you are trying to feel for soft tissue changes and that is "very difficult to do with clothing." She adds that it depends on the type of clothing. For example, if a gymnast has a leotard on, that's one thing, but if someone has thicker sweat pants on, it can be very difficult. She states they teach their students to perform skin-to-skin exams as much as possible, but leave it up to them to use their judgment as to what makes sense. She states she does it over clothes because as a woman, she is sensitive to the fact that skin-to-skin contact may be uncomfortable for some.

She states that it does not surprise her that Dr. Nassar sent the resident out of the room because he is notoriously slow and sending the resident to start with the next patient is common. She states that the comment he made about the patient's period makes sense given where he is treating.

She states that DO's, as professionals, are very "hands-on" — stating "that's just who we are." She states about Dr. Nassar — he is a very good doctor, with a very strong character. He is

Confidential

very well known and well respected. She states she would never say that he would have any intent in an exam other than purely professional.

3. Dr. Jennifer Gilmore

Dr. Gilmore is a DO. She graduated from COM at MSU and did both her Family Medicine residency and her Osteopathic Manipulative Medicine residency at MSU. She did a sports medicine fellowship at MSU in 2000 and has worked for the Department of Osteopathic Manipulative Medicine in COM ever since.

Dr. Gilmore has known Dr. Nassar since 1995. He was just ahead of her in residency. When she was a sports medicine fellow, he was her attending. She states that they do not work in the same clinic, but she has had the opportunity to see him work; she states they occasionally share patients. She added that he treats her 15 year old daughter.

After we described the allegations to Dr. Gilmore, she states that she believes what was alleged to have occurred would be medically appropriate. She explains why as follows,

She states that ribs go under the breasts and it depends on whether he had an indication to follow the tissue / ribs there. She states that examining ribs is absolutely appropriate for treating shoulder pain.

In terms of the STL release, she states she performs this technique as well when treating hip pain (at least weekly). She states the technique is primarily used for sports medicine related injuries, but can also be used for prostate or ObGyn issues. She states that when performing the technique, she would have a patient on his/her belly and would push her thumb far up under the STL in the pelvic floor area. She states that she uses myofascial release as a form of manipulation. She states MD's will not know this technique, but it is well-known in the osteopathic professional community.

Confidential

She states that her communication with her patients is something to the effect of "I will be right by your butt bone," knowing patients do not know most of the anatomical terms. She explains the STL release procedure before she performs it on a patient for the first time. She states she tends to do it over clothes and does not use skin-to-skin contact. She states it is a personal preference; however, she states that there is a medical benefit to using skin-to-skin contact – that one can feel the tissue more easily.

4. Destiny Technor-Hauk

Ms. Teachnor-Hauk works with Dr. Nassar regularly in the training room with MSU athletes (average of four hours a week over 17 years). She states that she is a certified athletic trainer and has worked at MSU for 17 years. She has her Master's degree in Sports Medicine from MSU.

After I described the allegations to her, she responded that in her view, the conduct was appropriate. It was appropriate to move breast tissue as you are examining shoulder pain / ribs. She states that she has seen Dr. Nassar perform an STL release hundreds of times in the 17 years she has worked with him. She states that he frequently does the release skin-on-skin and that the STL is a broad band that is right by the vaginal area. She states that she has had an STL release performed on her and explained to us that when it is performed the doctor is "right there; very close" to the vagina.

Ms. Teachnor-Hauk states that she has never had a complaint about Dr. Nassar in 17 years and has no concern about him crossing a line between medically appropriate and inappropriate. She states that she believes that he had no inappropriate intent, is very professional, extremely smart and that she really respects him.

Confidential

2. FINDINGS

There are two key issues: (1) what we believe occurred; and (2) whether the conduct we believe occurred constitutes sexually harassing conduct which is prohibited by MSU's Sexual Harassment Policy.

a. Credibility – What Occurred

The vast majority of the conduct is undisputed. Dr. Nassar is at a disadvantage since he does not recall the specific appointment. However, Dr. Nassar responded that almost everything that Ms. Thomashow described would be part of his standard operating procedure.

b. Sexual Harassment – Whether the Conduct Constituted a Violation of the Policy

Conduct prohibited under the University's Sexual Harassment Policy is described as follows:

"Sexual harassment" means unwelcome sexual advances, unwelcome requests for sexual favors, or other unwelcome behavior of a sexual nature when:

1. submission to such behavior is made, explicitly or implicitly, a term or condition of an individual's employment or status in a course, program, or activity; or
2. submission to or rejection of such behavior is used as a basis for a decision affecting an individual's employment or participation in a course, program, or activity; or

Confidential

3. such behavior is so severe, persistent, or pervasive that a reasonable person would find that it:
 - a. alters the terms or conditions of a person's employment or educational experience, or
 - b. unreasonably interferes with an individual's work or performance in a course, program, or activity, thus creating a hostile or abusive working or educational environment.

Sexual harassment involves unwanted sexual attention. However, a person's subjective belief that behavior is offensive does not make that behavior sexual harassment. The behavior must also be objectively unreasonable.

The analysis here is under #3.

- i. **Was the touching of Ms. Thomashow's breasts and vaginal area touching of a sexual nature?**

The behavior was unwelcome and it was touching of a sexual body part. Thus, the question is whether the conduct was medically appropriate (inferring, obviously, non-sexual in nature).

All three of the physicians we interviewed, as well as the certified athletic trainer, concurred that the conduct alleged was medically appropriate. All explained why the procedure was medically appropriate, including the location of the touch. The STL is very close to the

vaginal area. Manipulation or palpation can be interpreted as massage to someone who is not familiar with osteopathic medicine and would not know the nuanced difference between the two.

We considered the credibility of the physicians and the trainer. While Dr. Lemmen and Ms. Technor-Hauk have a relationship in which they have worked for Dr. Nassar, Drs. Gilmore and DeStafano do not. The latter two physicians are in completely different clinics than Dr. Nassar and although Dr. Nassar was Dr. Gilmore's attending for one year when she was a fellow, that was 14 years ago. All medical professionals were very credible, knowledgeable and

Often quoted "nuanced difference between the two" of Moore report is in line to the right.

Confidential

thorough in their medical opinions and have a great deal of experience in the field — 35 years total combined with regard to the physicians and 17 years with respect to Ms. Teachnor-Hauk.

Finally, Dr. Nassar has presented on this nationally and internationally, has videos posted to the web that explain the procedure and is widely known for this work.

We also considered that the other three physicians all performed the procedure over clothes — not one used skin-on-skin technique. However, all three physicians opined that using a skin-on-skin method provided a medical benefit that was lost when performed over clothing — some clothing in particular.

Based on this, we cannot find that the conduct was medically inappropriate and thus, cannot find it was sexual in nature.

ii. Was Dr. Nassar's other conduct inappropriate behavior of a sexual nature?

In terms of the other conduct, there are several issues raised by Ms. Thomashow: (1) the comment about the boyfriend giving better massages, (2) the resident leaving the room, (3) asking Dr. Nassar to stop several times, (4) the period comment, (5) being persistent about setting up another appointment, and (6) not communicating what he was going to do before he did it.

The comment about Ms. Thomashow's boyfriend giving better massages may have been somewhat inappropriate, but would not rise to the level of the type of severe, persistent or pervasive conduct that is prohibited under the Sexual Harassment Policy.

In terms of the comment about the period, being persistent about setting up the appointment and telling the resident to leave the room, Dr. Nassar offered explanations that were confirmed as appropriate by the other medical professionals.

Confidential

Finally, the failure to communicate about what he was doing is, frankly, troubling -- though not a Sexual Harassment Policy violation. Dr. Nassar admits he usually states "I am going to place my hand here; is that better or worse?" Thus, he has already placed his hand on the patient's body prior to communicating what he is going to do. In addition, he states that he talks throughout his appointments and if he is not talking, he is thinking about what comes next. He also admits that he may have been concentrating and not communicating as well as he should.

Although Dr. Nassar cannot recall the specific appointment, his description of his standard operating procedure is not much different from Ms. Thomashow's explanation -- that there was never a clear description of what Dr. Nassar was doing. He never said "this is what I'm going to do and here is why" prior to beginning the procedure. There were no models or diagrams used. There was no explanation of the medical benefit to touching, skin-on-skin, near the vagina to hip pain. There was certainly never any choice presented about the procedure or different ways to perform the procedure. The failure to do this when there is a procedure as invasive and sensitive as the STL procedure is problematic. As is the failure to at least give the patient the option of having someone else in the room during the procedure.

In fact, given the lack of explanation about the manipulation in the breast and vaginal areas, the other factors exacerbated the situation. The resident leaving the room with no explanation or choice given to the patient is problematic, as is the timing of the resident leaving (at the end of the appointment, right before the invasive procedures). The lack of communication in terms of how a patient is able to communicate that they would like the procedure to stop is problematic. Casual (versus professional) comments about one's boyfriend needing to give better massages is problematic.

Confidential

The trauma suffered by Ms. Thomashow is deeply felt and not short term. Without adequate knowledge about this procedure and without choice related to the procedure, a reasonable person could feel shock, shame, embarrassment and violated.

Again, because the touching was medically appropriate, none of these factors create a hostile environment. However, they will need to be considered.

C. CONCLUSION AND RECOMMENDATIONS

We cannot find that the conduct was of a sexual nature. Thus, it did not violate the Sexual Harassment Policy. However, we find the claim helpful in that it brought to light some significant problems that the practice will want to address.

We find that whether medically sound or not, the failure to adequately explain procedures such as these invasive, sensitive procedures, is opening the practice up to liability and is exposing patients to unnecessary trauma based on the possibility of perceived inappropriate sexual misconduct. In addition, we find that the failure to obtain consent from patients prior to the procedure is likewise exposing the practice to liability. If procedures can be performed skin-on-skin or over clothes in the breast or pelvic floor area, it would seem patients should have the choice between the two. Having a resident, nurse or someone in room during a sensitive procedure protects doctors and provides patients with peace of mind. If "touching is what DO's do" and that is not commonly known, perhaps the practice will want to consider a disclaimer or information sheet with that information provided to the patient up front.

Finally, we believe the practice should consider whether its procedure for intake of complaints about physicians' behavior is adequate. Ms. Thomashow claims she tried to file a

Confidential

complaint with the front desk receptionist, telling her that she was cancelling her appointment because she felt “violated.” Whether this triggers a reporting protocol should be examined by the practice.

Confidential

Report on Investigation into Allegations of Sexual Harassment

Investigation Conducted By:
Kristine M. Moore, Assistant Director for Institutional Equity
Office for Inclusion and Intercultural Initiatives

7/18/14

Claimant:

Amanda Thomashow

Respondent:

Dr. Larry Nassar

A. BACKGROUND AND ISSUE

Amanda Thomashow brought a concern to the attention of MSU Sports Medicine Clinic, Dr. Jeff Kovan, about possible sexually harassing conduct on the part of Dr. Larry Nassar, a physician in the practice during a medical exam of her on March 24, 2014. She reported her concern to Dr. Kovan on April 18, 2014. Dr. Kovan met with Ms. Thomashow on April 21 and brought the concern to the Office for Inclusion and Intercultural Initiatives (I3) the same day.

Ms. Thomashow is an MSU student now and is an alum of MSU, although she was not an MSU student at the time of the incident. Dr. Nassar works for the MSU Sports Medicine Clinic, which is a part of the College of Osteopathic Medicine.

Based on the information presented to I3, an investigation was conducted.

Confidential

B. DISCUSSION

The summary of our findings is as follows. I3 uses a "preponderance of the evidence" standard, which requires that the evidence supporting an allegation be more convincing than the evidence offered in opposition to it.

Based on all of the interviews conducted¹ and the information reviewed, as described further herein, the evidence establishes that Dr. Nassar did not violate the Sexual Harassment Policy.

1. INTERVIEWS

a. Ms. Thomashow

Ms. Thomashow's allegations are limited to conduct that occurred on March 24, 2014. She made an appointment with Dr. Nassar for that day because she was having hip pain. She had seen him once previously for another medical issue, but it had been years. She knows Dr. Nassar through her mother, a pediatrician, who refers cases to him and her sister who is active in gymnastics and is on the Twistars competitive team (Dr. Nassar is Twistar's team doctor). She states that her appointment with Dr. Nassar was approximately one and a half hour in length and for the majority of the appointment, a female resident was also in the room.

¹ This report contains summaries of portions of the interviews relevant to the analysis. A complete set of notes of each interview are in the file. In each interview, the witness was reminded of the confidentiality and no-retaliation provisions in the Sexual Harassment Policy.

Confidential

She states that Dr. Nassar made her feel slightly uncomfortable when the resident was in the room because she thought he was “goofy” and “too touchy.” In addition, her friend, Deanna Lewycky, had told her earlier in the day that Dr. Nassar was “creepy” and that she should not go see him. Ms. Lewycky had seen Dr. Nassar once before.²

She states that Dr. Nassar touched her legs a few seconds too long a few times. She states that at one point, while the resident was still in the room, he “cupped her butt” over her sweat pants, enough to be “a little too much.” She states he never indicated why he did that, but that she was not too worried because there was a resident in the room and because he was known to her mom, sister and in the community. She thought “that’s just Dr. Nassar.” She states that at some point, he told her that her boyfriend should give her better massages, which she felt was inappropriate.

She states he sent her to get an x-ray and she believed it was weird that he required her to get a “frog leg” x-ray. She states that after looking at the x-ray, he told her that one hip was higher than the other and that her pelvic bone was low and that he would have to readjust her pelvic bone. She states that he had her turn a certain way and asked whether that hurt her hip and she replied that actually, it hurt her shoulder.

At that point, she had been at the appointment for about an hour, she states Dr. Nassar sent the resident out of the room, asking the resident whether she had seen a particular type of injury and when she responded “no,” he told her to go and see it.

At that point, she states she started feeling very uncomfortable. She states he told her to lie down on the table and first worked on her shoulder. He told her to turn on her side and he put pressure on her shoulder and the side of her breast. She states he had one hand on her back and the other under her shirt over her bra. She states it was fine for a while, but then he was

² See Ms. Lewycky’s interview summary, *infra*.

Confidential

massaging her breast, “full-on,” from the front and this went on for at least 30-45 seconds. She states the entire thing lasted for one and a half to two minutes. She states that the way he was touching was intimate, “like your boyfriend would while you were making out with him.”

Ms. Thomashow states that at some point during the 30-45 seconds, she said things like “oh, you know, this isn’t helping anymore” and “you’ve helped all you can,” at least three – four times. He responded “almost done.”

After that, Dr. Nassar told Ms. Thomashow to lie with her stomach down. He got a tub of lotion, put it on his hands, pulled her t-shirt up to her bra and applied pressure with his arm to her back. He pulled her sweat pants down a little to the point her “butt crack” was exposed and started massaging her hip on top of her clothes. He asked how it felt and she responded that it helped a little. She states that he took that as an invitation and then began to massage her buttocks by moving his hands under her sweat pants and underwear, so there was skin-to-skin contact.

She states that he began to massage her with three fingers in a circular motion in her vaginal area. She states she was shocked. She states he was extremely close to inserting a finger into her vaginal opening. She states she could not process in her mind what was happening. She states that she felt it was so inappropriate that she was worried that if he did this to others, they would become automatically sexually aroused because of the physical motion in that area.

She states that it went on for a minute and a half or so before she got the courage to say “stop, you’re hurting me.” She states he did not stop in response, but instead said “I’m almost done.”

She states after he finished, he tried to make another appointment with her on his computer in the exam room, but it froze. She said he got very frustrated with the computer. She

Confidential

said she did not want another appointment, but he was insistent. She said that she told him “no” with respect to approximately five different proposed dates/times before she finally said “yes,” because it appeared he was not giving up. She states that he then said “if you are on your period next time, we can work around that, so don’t worry.”

She states that throughout the visit, there was never a clear description of what Dr. Nassar was doing. He never said “this is what I’m going to do and here is why. . .”

She said she was in shock afterwards. She reacted by pretending like it did not happen afterwards. She told a friend from work that he made her feel uncomfortable, but did not tell her any details. But, the next day, she told her mom on the way home from work and broke down, sobbing. She said her mom’s reaction to the conduct, which was “that is absolutely disgusting,” helped things click and made her realize how inappropriate it was. She called the clinic the next day to cancel her appointment. She told the front desk receptionist to whom she spoke that she was cancelling because she felt violated. She states that the person simply said “O.K.” and that was it.

She states that she also told her manager at work, Chelsea Griffin, her friend Andrea Zaworski, her sister Catherine, her father, her friend Geanina Rahlly and her friend Deanna Lewycky³. She states for a few weeks, she thought about it and still did not want to believe it happened. She states she felt finally that she had to do something. She called Dr. Kovan on April 18 and met with him for about a half hour on a Monday, April 21, she believes. She states that she was worried that Dr. Kovan was just backing up Dr. Nassar and did not believe he was taking her seriously.

³ I did not interview Ms. Thomashow’s sister or father. Nor was I able to reach Ms. Zaworski. None of these individuals were necessary to the investigation since the vast majority of facts are not in dispute.

Confidential

b. Deanna Lewycky

Ms. Lewycky is a friend of Ms. Thomashow's; they are friends through work, but do not "hang out" outside of work. Ms. Lewycky recalls that Ms. Thomashow called her soon after it happened. She said she was very, very upset and was crying. Ms. Thomashow told her that Dr. Nassar touched her inappropriately. She told Ms. Lewycky that he massaged her breasts and then went under her pants in her vaginal area "like he was fingering her," although she does not recall if Ms. Thomashow told her whether he inserted a finger. She states she remembers Ms. Thomashow telling her that she had asked Dr. Nassar to stop, saying "stop, you're hurting me," but cannot recall whether Dr. Nassar stopped in response. Ms. Thomashow told Ms. Lewycky that when she left the appointment, Dr. Nassar said "if you are on your period, we can work around that."

Ms. Lewycky shared with Ms. Thomashow that she saw Dr. Nassar five years ago for a stress fracture in her back and, despite her dad being in the room, she thought Dr. Nassar was very inappropriate, joking about her "butt being athletic" and grabbing her butt. She said she avoided going back. She states she is an athlete — dance and cheer.

c. Suzanne Thomashow

Suzanne Thomashow is Amanda Thomashow's mother, as well as a pediatrician, practicing in Saline, Michigan. She did rotations with Drs. Nassar and Kovan while at the College of Human Medicine as a student at MSU. Her daughter has had back and hip issues and she knew that Dr. Nassar was "really good" so she advised her daughter to see him. She states that he knows manipulative medicine very well.

Confidential

The day after the appointment, her daughter told her about it. She states she was very upset – she was crying and felt horrible and violated. It sounded to Dr. Thomashow that Dr. Nassar touched her daughter inappropriately based on what her daughter said. Dr. Thomashow does not know why Dr. Nassar asked the resident to leave the exam room. Her daughter told her that Dr. Nassar made a comment about her daughter's period, saying "I can work around that," which Dr. Thomashow felt was inappropriate. However, Dr. Thomashow stated that she knows Dr. Nassar is good, so thought that maybe that was the norm. She states she encouraged her daughter not to report to the police, but to go to Dr. Kovan, because she did not want this following her around as something traumatic she has to deal with.

Dr. Thomashow states that it was her daughter's perception that she felt violated. She states that she felt sick to her stomach when her daughter told her.

When we asked Dr. Thomashow what her daughter told her about the appointment, she responded that her daughter told her that he touched her vaginal area and her breasts and massaged them for minutes each.

d. Geanina Rahlly

Ms. Rahlly is a friend of Ms. Thomashow's. She states that Ms. Thomashow told her about the appointment with Dr. Nassar shortly after it occurred. Ms. Thomashow told Ms. Rahlly that she was there for her hip. She told Ms. Rahlly that he put his hand under panties, but sent someone out of the room before he did this. She told her that he made a comment about her period, saying "we can work around this." She told her that Dr. Nassar became very upset because he insisted on making another appointment with her and kept suggesting dates until she finally said "yes."

Confidential

Ms. Rahlly states that based on what Ms. Thomashow said, it sounded extremely inappropriate. Ms. Rahlly states that she knows that Dr. Nassar volunteers at St. Thomas, that she worked there, and that one of the parents there told her that she had been very uncomfortable with what he did with her daughter.

e. Chelsea Griffin

Ms. Griffin is a friend of Ms. Thomashow and Ms. Thomashow's manager at work. Ms. Griffin said that Ms. Thomashow told her that she felt uncomfortable about her appointment with Dr. Nassar, but did not share the details. Ms. Thomashow seemed very upset.

When we asked Ms. Griffin whether she had ever had an experience with Dr. Nassar that made her feel uncomfortable, she said "no." She said she was in high school when she saw him with her mom in the room and nothing made it uncomfortable. Ms. Griffin said that her boyfriend had seen Dr. Nassar and that he thought Dr. Nassar was "creepy and goofy" and was not going to go back.

f. Larry Nassar

Dr. Nassar states that he does not recall the specific appointment, although he recalls the patient, given the patient's mother is someone he knows well and has referred patients to him over the years. He also knows the patient's sister through her involvement in gymnastics.

After we provided Dr. Nassar with the details regarding Ms. Thomashow's allegation that he inappropriate touched her breasts, he responded as follows. Dr. Nassar states that he touched Ms. Thomashow's breasts in his examination of her shoulder, but that it was medically necessary. He states that feeling ribs (which are under the breasts) is how you would examine a shoulder from a osteopathic manipulative medicine perspective. He states he would have used

Confidential

compression, pushing the breast tissue out of the way, feeling for connective tissue related to ribs because ribs and shoulders are inextricably intertwined. He states he would not call it “massaging,” he would call it manipulating or palpating. He states that he does this with anyone complaining of shoulder pain – that it is standard operating procedure. He states that he is compressing ribs, asking if it is better or worse as he compresses.

After we provided Dr. Nassar with the allegations related to touching Ms. Thomashow’s vaginal area, he responded as follows. He states that everything we described in terms of Ms. Thomashow’s description sounds like standard operating procedure. The SacroTuberous Ligament (STL) goes from the pelvis to the tail bone. He states that if someone presented with hip pain, he would have manipulated in the pelvic floor area, including the STL. He states that the ligament is very closely connected to the pelvic floor area, and thus close to the vagina, so that touching in the vaginal area to work on the STL is common. He also states that the pelvic floor can be related to hip pain.

He states he has been doing this procedure in particular (a STL release) it for a long time. He has designed a leotard showing how important he thinks it is to lift in that area. He teaches it to residents and fellows. He provided us with numerous videos of him on-line performing the technique. He states that he teaches patients how to perform it on themselves, telling children that it is like “giving yourself a wedgie.”

He states that he is known for this work, but that he knows it is not widely performed and, in fact, he has included in his presentations that the pelvic floor area is ignored by too many physicians. He indicated that he has a slide in a frequently used power point that contains Star Trek images and is entitled “Pelvic floor: Where no man has gone before.” He states that the

Confidential

STL release is a very powerful technique, that it drastically increases range of motion, and that gymnasts come to him from all over to have it done.

He states that he does not recall whether Ms. Thomashow said “stop, you’re hurting me.” However, he states that if she had said that, he would have moved his hand position and not stopped the exam altogether. This is because he is constantly communicating with patients as he examines them to determine if something is hurting as he continues to use manipulative medicine on them. An indication of pain would, in his mind, mean that specific touch was hurting – and would not be an indication to stop the entire exam, but merely to change hand placement.

When asked whether he made the comment about Ms. Thomashow’s period, he said “yes,” that is something he would say. He states that given where he is manipulating, he does not want the patient to believe that would be problematic. When asked whether he tried to schedule a follow-up exam with Ms. Thomashow five to six times, he states that he does not recall, but it is important generally to schedule an appointment soon otherwise the work lose its effectiveness and he would not want the pain to go back to baseline.

When asked about sending the resident out of the room, he states that he does that frequently, in particular when he is running behind. He states that there is no set protocol for whether to have another person in the room during such an exam.

In terms of communicating with patients about the procedure, he cannot recall the communication with Ms. Thomashow. He states that his standard operating procedure in terms of communicating with patients is to explain as he goes. He usually states “I am going to place my hand here; is that better or worse?” He states that he talks throughout his appointments and if he is not talking, he is thinking about what comes next.

Confidential

Dr. Nassar added that he is very hurt to think that he violated a patient's trust, even though it was inadvertent. He stated he was so sorry, that he never had any inappropriate intent and that it especially hurts because helping people is what he does.

g. Physicians and treating professionals practicing in this area

In order to analyze Ms. Thomashow's claim, it was necessary to consult with medical professionals in the area since Dr. Nassar's defense is that his conduct was medically appropriate.

Sexual harassment is unwelcome behavior of a sexual nature when such behavior is so severe, persistent or pervasive that it would cause a reasonable person's educational experience to be impacted. Sexual assault, a form of sexual harassment, is unwelcome touching "of a sexual nature" without a person's consent. "Touching of a sexual nature" includes touching of a sexual body part.

Ms. Thomashow claims that Dr. Nassar touched her sexual body parts (breast and vagina), that it was unwelcome, severe and that it impacted her greatly (although she could not establish it impacted her educationally at the time⁴).

To determine whether this conduct violated the MSU Sexual Harassment Policy, it is necessary to determine if the touch was sexual in nature. Dr. Nassar states it was medically appropriate and, thus, was not sexual in any way. We consulted with manipulative medicine

⁴ Ms. Thomashow is a graduate of MSU and is currently taking classes at MSU. However, at the time of the incident, she was not a student. MSU, however, has a duty to address any sexual harassment of which it becomes aware even if it is brought to MSU's attention by a third party. Thus, an investigation was appropriate, and necessary, in this case.

Confidential

physicians in the area for other opinions related to the appropriateness of the procedure medically.

1. Dr. Brooke Lemmen

Dr. Lemmen is a DO and is board certified in family and sports medicine. She went to medical school at MSU and started as a fellow at MSU Sports Medicine Clinic and as a full time physician in July 2010. She, like Dr. Nassar, practices osteopathic manipulative therapy (OMT). Dr. Lemmen studied under Dr. Nassar, is currently a colleague, and says they are “very good friends.”

After we described the allegations to Dr. Lemmen, she states that she believes what was alleged to have occurred would be medically appropriate treatment based upon the patient’s complaints.

She states that when treating shoulder pain from an osteopathic perspective, it is necessary to treat the ribs. She states you would examine the ribs and as the ribs run right under the breasts, it is difficult to not palpate the breasts while assessing and treating the underlying rib dysfunctions. She states that she would perform the same technique – a myofascial technique – which involves following the tissue through palpation and examining the tissue texture change (which is a tenant of osteopathic treatment) as she goes. She said the difference is that she would do so over a shirt, not under. However, she states that there is a medical detriment to performing the technique over the shirt. It can be more painful over the shirt on the anterior chest of female patients because you are creating friction with the shirt and skin and that the physician cannot feel the tissue as well. She states she does not touch under the shirt in that technique because she is sensitive to the issue, as a woman.

Confidential

She states she is completely convinced that Dr. Nassar was not touching sexually, but was touching in a way that was medically appropriate because of many years observing his treatment styles and techniques.

In terms of the allegations about touching in the vaginal area, Dr. Lemmen again states that the alleged conduct is consistent with that which is medically appropriate. She states that treating someone for hip pain would include, for a manipulative medicine specialist, manipulating in the pelvic floor area, including areas very close to the vaginal area⁵. She states, again, the difference between she and Dr. Nassar is that she would not use a skin-on-skin method. She would go over clothes. She states that in part it is that she does not want to put on gloves and in part because she is sensitive to what that would mean for a patient.

In terms of communicating with her patients, she states that she explains ahead of time any time she would touch in the area near the vagina.

Dr. Lemmen states that Dr. Nassar's explanation about his reaction to being asked to stop because he was hurting Ms. Thomashow is consistent with what she would do – move hand placement because she would assume that particular touch was hurting her, not the entire procedure. She further explains that many OMT treatments are working in areas that are painful; thus, it is common to have patients complain of pain, or for the clinician to ask about any sensation of pain, in an area and adjust hand placement or treatment technique based upon the position and tissue response.

In terms of sending the resident out of the room, Dr. Lemmen states that does not surprise her at all because Dr. Nassar is consistently running behind since he spends so much time with his patients. She states that she will do the same thing if she knows she is running behind and

⁵ She clarifies that the "vaginal area" is technically inside the body, but the layperson's understanding of the vaginal area could include the "underwear zone." When using the term "vaginal area" here, she is talking about palpation outside of the labia.

Confidential

the next patient is waiting. She states that she seldom sees patients independently (without anyone else in the room). She states at MSU Sports Medicine, they are a teaching facility and have students, residents and fellows shadowing them all the time. It is common for them to start working with the next patient while they finish up with the current patient to try to keep on schedule and limit wait times for the patients.

2. Dr. Lisa DeStafano

Dr. DeStafano is a DO and is board certified in family medicine and neuro-musculoskeletal medicine. She went to medical school at MSU and has been practicing in the area since 1997. She is the Chair of the Osteopathic Manipulative Medicine Department in COM. She authored the fourth edition of the textbook entitled Greenman's Principles of Manual Medicine, used nationally and internationally.

She has known Dr. Nassar since 1988 and states that they were classmates together and that she has taught with him. She describes their relationship as that of colleagues. She has had the opportunity to view his work when they co-teach, she has watched his videos many times and she knows that he is very well known for his work on the pelvic floor — it is what he does and he is famous for it.

After we described the allegations to Dr. DeStafano, she states that she believes what was alleged to have occurred would be medically appropriate. She explains why as follows.

In terms of the massaging of the breast, she states that ribs go under the breasts and it would be very appropriate to press and move breast tissue aside to follow the ribs to determine what is causing shoulder pain. She states that there is no scenario where she would examine someone for shoulder pain where she would not touch a patient's rib cage, potentially involving

Confidential

breast tissue in some way. She states that this type of manipulation, which is medically very appropriate, could be confused with massage.

In terms of the STL release, she states that he is very well known for this technique and what we described (the alleged conduct) is medically appropriate. She states that she performs this technique herself. When she does, her fingers are on someone's buttocks and she is trying to access the ischiorectal fossa. She states that their faculty teach this to students. They perform this myofascial technique to achieve a pelvic floor release. This is a common thing to do if someone has hip pain. She states that the hip and tendons related to it blend into the pelvic floor and to treat the pelvic floor for hip pain makes sense.

She states that while she performs the technique generally over clothes, there is a medical benefit to performing skin-to-skin instead because you are trying to feel for soft tissue changes and that is "very difficult to do with clothing." She adds that it depends on the type of clothing. For example, if a gymnast has a leotard on, that's one thing, but if someone has thicker sweat pants on, it can be very difficult. She states they teach their students to perform skin-to-skin exams as much as possible, but leave it up to them to use their judgment as to what makes sense. She states she does it over clothes because as a woman, she is sensitive to the fact that skin-to-skin contact may be uncomfortable for some.

She states that it does not surprise her that Dr. Nassar sent the resident out of the room because he is notoriously slow and sending the resident to start with the next patient is common. She states that the comment he made about the patient's period makes sense given where he is treating.

She states that DO's, as professionals, are very "hands-on" — stating "that's just who we are." She states about Dr. Nassar — he is a very good doctor, with a very strong character. He is

Confidential

very well known and well respected. She states she would never say that he would have any intent in an exam other than purely professional.

3. Dr. Jennifer Gilmore

Dr. Gilmore is a DO. She graduated from COM at MSU and did both her Family Medicine residency and her Osteopathic Manipulative Medicine residency at MSU. She did a sports medicine fellowship at MSU in 2000 and has worked for the Department of Osteopathic Manipulative Medicine in COM ever since.

Dr. Gilmore has known Dr. Nassar since 1995. He was just ahead of her in residency. When she was a sports medicine fellow, he was her attending. She states that they do not work in the same clinic, but she has had the opportunity to see him work; she states they occasionally share patients. She added that he treats her 15 year old daughter.

After we described the allegations to Dr. Gilmore, she states that she believes what was alleged to have occurred would be medically appropriate. She explains why as follows.

She states that ribs go under the breasts and it depends on whether he had an indication to follow the tissue / ribs there. She states that examining ribs is absolutely appropriate for treating shoulder pain.

In terms of the STL release, she states she performs this technique as well when treating hip pain (at least weekly). She states the technique is primarily used for sports medicine related injuries, but can also be used for prostate or ObGyn issues. She states that when performing the technique, she would have a patient on his/her belly and would push her thumb far up under the STL in the pelvic floor area. She states that she uses myofascial release as a form of manipulation. She states MD's will not know this technique, but it is well-known in the osteopathic professional community.

Confidential

She states that her communication with her patients is something to the effect of “I will be right by your butt bone,” knowing patients do not know most of the anatomical terms. She explains the STL release procedure before she performs it on a patient for the first time. She states she tends to do it over clothes and does not use skin-to-skin contact. She states it is a personal preference; however, she states that there is a medical benefit to using skin-to-skin contact – that one can feel the tissue more easily.

4. Destiny Technor-Hauk

Ms. Teachnor-Hauk works with Dr. Nassar regularly in the training room with MSU athletes (average of four hours a week over 17 years). She states that she is a certified athletic trainer and has worked at MSU for 17 years. She has her Master’s degree in Sports Medicine from MSU.

After I described the allegations to her, she responded that in her view, the conduct was appropriate. It was appropriate to move breast tissue as you are examining shoulder pain / ribs. She states that she has seen Dr. Nassar perform an STL release hundreds of times in the 17 years she has worked with him. She states that he frequently does the release skin-on-skin and that the STL is a broad band that is right by the vaginal area. She states that she has had an STL release performed on her and explained to us that when it is performed the doctor is “right there; very close” to the vagina.

Ms. Teachnor-Hauk states that she has never had a complaint about Dr. Nassar in 17 years and has no concern about him crossing a line between medically appropriate and inappropriate. She states that she believes that he had no inappropriate intent, is very professional, extremely smart and that she really respects him.

Confidential

2. FINDINGS

There are two key issues: (1) what we believe occurred; and (2) whether the conduct we believe occurred constitutes sexually harassing conduct which is prohibited by MSU's Sexual Harassment Policy.

a. Credibility – What Occurred

The vast majority of the conduct is undisputed. Dr. Nassar is at a disadvantage since he does not recall the specific appointment. However, Dr. Nassar responded that almost everything that Ms. Thomashow described would be part of his standard operating procedure.

b. Sexual Harassment – Whether the Conduct Constituted a Violation of the Policy

Conduct prohibited under the University's Sexual Harassment Policy is described as follows:

"Sexual harassment" means unwelcome sexual advances, unwelcome requests for sexual favors, or other unwelcome behavior of a sexual nature when:

1. submission to such behavior is made, explicitly or implicitly, a term or condition of an individual's employment or status in a course, program, or activity; or
2. submission to or rejection of such behavior is used as a basis for a decision affecting an individual's employment or participation in a course, program, or activity; or

Confidential

3. such behavior is so severe, persistent, or pervasive that a reasonable person would find that it:
 - a. alters the terms or conditions of a person's employment or educational experience, or
 - b. unreasonably interferes with an individual's work or performance in a course, program, or activity, thus creating a hostile or abusive working or educational environment.

Sexual harassment involves unwanted sexual attention. However, a person's subjective belief that behavior is offensive does not make that behavior sexual harassment. The behavior must also be objectively unreasonable.

The analysis here is under #3.

- i. **Was the touching of Ms. Thomashow's breasts and vaginal area touching of a sexual nature?**

The behavior was unwelcome and it was touching of a sexual body part. Thus, the question is whether the conduct was medically appropriate (inferring, obviously, non-sexual in nature).

All three of the physicians we interviewed, as well as the certified athletic trainer, concurred that the conduct alleged was medically appropriate. All explained why the procedure was medically appropriate, including the location of the touch. The STL is very close to the vaginal area. Manipulation or palpation can be interpreted as massage to someone who is not familiar with osteopathic medicine and would not know the nuanced difference between the two.

We considered the credibility of the physicians and the trainer. While Dr. Lemmen and Ms. Technor-Hauk have a relationship in which they have worked for Dr. Nassar, Drs. Gilmore and DeStafano do not. The latter two physicians are in completely different clinics than Dr. Nassar and although Dr. Nassar was Dr. Gilmore's attending for one year when she was a fellow, that was 14 years ago. All medical professionals were very credible, knowledgeable and

Confidential

thorough in their medical opinions and have a great deal of experience in the field – 35 years total combined with regard to the physicians and 17 years with respect to Ms. Teachnor-Hauk.

Finally, Dr. Nassar has presented on this nationally and internationally, has videos posted to the web that explain the procedure and is widely known for this work.

We also considered that the other three physicians all performed the procedure over clothes – not one used skin-on-skin technique. However, all three physicians opined that using a skin-on-skin method provided a medical benefit that was lost when performed over clothing – some clothing in particular.

Based on this, we cannot find that the conduct was medically inappropriate and thus, cannot find it was sexual in nature.

ii. Was Dr. Nassar's other conduct inappropriate behavior of a sexual nature?

In terms of the other conduct, there are several issues raised by Ms. Thomashow: (1) the comment about the boyfriend giving better massages, (2) the resident leaving the room, (3) asking Dr. Nassar to stop several times, (4) the period comment, (5) being persistent about setting up another appointment, and (6) not communicating what he was going to do before he did it.

The comment about Ms. Thomashow's boyfriend giving better massages may have been somewhat inappropriate, but would not rise to the level of the type of severe, persistent or pervasive conduct that is prohibited under the Sexual Harassment Policy.

In terms of the comment about the period, being persistent about setting up the appointment and telling the resident to leave the room, Dr. Nassar offered explanations that were confirmed as appropriate by the other medical professionals.

Confidential

Finally, the failure to communicate about what he was doing is, frankly, troubling — though not a Sexual Harassment Policy violation. Dr. Nassar admits he usually states “I am going to place my hand here; is that better or worse?” Thus, he has already placed his hand on the patient’s body prior to communicating what he is going to do. In addition, he states that he talks throughout his appointments and if he is not talking, he is thinking about what comes next. He also admits that he may have been concentrating and not communicating as well as he should.

Although Dr. Nassar cannot recall the specific appointment, his description of his standard operating procedure is not much different from Ms. Thomashow’s explanation — that there was never a clear description of what Dr. Nassar was doing. He never said “this is what I’m going to do and here is why” prior to beginning the procedure. There were no models or diagrams used. There was no explanation of the medical benefit to touching, skin-on-skin, near the vagina to hip pain. There was certainly never any choice presented about the procedure or different ways to perform the procedure. The failure to do this when there is a procedure as invasive and sensitive as the STL procedure is problematic. As is the failure to at least give the patient the option of having someone else in the room during the procedure.

In fact, given the lack of explanation about the manipulation in the breast and vaginal areas, the other factors exacerbated the situation. The resident leaving the room with no explanation or choice given to the patient is problematic, as is the timing of the resident leaving (at the end of the appointment, right before the invasive procedures). The lack of communication in terms of how a patient is able to communicate that they would like the procedure to stop is problematic. Casual (versus professional) comments about one’s boyfriend needing to give better massages is problematic.

Confidential

The trauma suffered by Ms. Thomashow is deeply felt and not short term. Without adequate knowledge about this procedure and without choice related to the procedure, a reasonable person could feel shock, shame, embarrassment and violated.

Again, because the touching was medically appropriate, none of these factors create a hostile environment. However, they will need to be considered.

C. CONCLUSION AND RECOMMENDATIONS

We cannot find that the conduct was of a sexual nature. Thus, it did not violate the Sexual Harassment Policy. However, we find the claim helpful in that it allows us to examine certain practices at the MSU Sports Medicine Clinic.

Archived Information



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

April 4, 2011

Dear Colleague:

Education has long been recognized as the great equalizer in America. The U.S. Department of Education and its Office for Civil Rights (OCR) believe that providing all students with an educational environment free from discrimination is extremely important. The sexual harassment of students, including sexual violence, interferes with students' right to receive an education free from discrimination and, in the case of sexual violence, is a crime.

Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 *et seq.*, and its implementing regulations, 34 C.F.R. Part 106, prohibit discrimination on the basis of sex in education programs or activities operated by recipients of Federal financial assistance. Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX. In order to assist recipients, which include school districts, colleges, and universities (hereinafter "schools" or "recipients") in meeting these obligations, this letter¹ explains that the requirements of Title IX pertaining to sexual harassment also cover sexual violence, and lays out the specific Title IX requirements applicable to sexual violence.² Sexual violence, as that term is used in this letter, refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability. A number of different acts fall into the category of sexual violence, including rape,

¹ The Department has determined that this Dear Colleague Letter is a "significant guidance document" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), available at:

http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/012507_good_guidance.pdf.

OCR issues this and other policy guidance to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that we enforce. OCR's legal authority is based on those laws and regulations. This letter does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations. If you are interested in commenting on this guidance, please send an e-mail with your comments to OCR@ed.gov, or write to us at the following address: Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, DC 20202.

² Use of the term "sexual harassment" throughout this document includes sexual violence unless otherwise noted. Sexual harassment also may violate Title IV of the Civil Rights Act of 1964 (42 U.S.C. § 2000c), which prohibits public school districts and colleges from discriminating against students on the basis of sex, among other bases. The U.S. Department of Justice enforces Title IV.

sexual assault, sexual battery, and sexual coercion. All such acts of sexual violence are forms of sexual harassment covered under Title IX.

The statistics on sexual violence are both deeply troubling and a call to action for the nation. A report prepared for the National Institute of Justice found that about 1 in 5 women are victims of completed or attempted sexual assault while in college.³ The report also found that approximately 6.1 percent of males were victims of completed or attempted sexual assault during college.⁴ According to data collected under the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act (Clery Act), 20 U.S.C. § 1092(f), in 2009, college campuses reported nearly 3,300 forcible sex offenses as defined by the Clery Act.⁵ This problem is not limited to college. During the 2007-2008 school year, there were 800 reported incidents of rape and attempted rape and 3,800 reported incidents of other sexual batteries at public high schools.⁶ Additionally, the likelihood that a woman with intellectual disabilities will be sexually assaulted is estimated to be significantly higher than the general population.⁷ The Department is deeply concerned about this problem and is committed to ensuring that all students feel safe in their school, so that they have the opportunity to benefit fully from the school's programs and activities.

This letter begins with a discussion of Title IX's requirements related to student-on-student sexual harassment, including sexual violence, and explains schools' responsibility to take immediate and effective steps to end sexual harassment and sexual violence. These requirements are discussed in detail in OCR's *Revised Sexual Harassment Guidance* issued in 2001 (*2001 Guidance*).⁸ This letter supplements the *2001 Guidance* by providing additional guidance and practical examples regarding the Title IX requirements as they relate to sexual violence. This letter concludes by discussing the proactive efforts schools can take to prevent sexual harassment and violence, and by providing examples of remedies that schools and OCR may use to end such conduct, prevent its recurrence, and address its effects. Although some examples contained in this letter are applicable only in the postsecondary context, sexual

³ CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT STUDY: FINAL REPORT xiii (Nat'l Criminal Justice Reference Serv., Oct. 2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>. This study also found that the majority of campus sexual assaults occur when women are incapacitated, primarily by alcohol. *Id.* at xviii.

⁴ *Id.* at 5-5.

⁵ U.S. Department of Education, Office of Postsecondary Education, Summary Crime Statistics (data compiled from reports submitted in compliance with the Clery Act), available at <http://www2.ed.gov/admins/lead/safety/criminal2007-09.pdf>. Under the Clery Act, forcible sex offenses are defined as any sexual act directed against another person, forcibly and/or against that person's will, or not forcibly or against the person's will where the victim is incapable of giving consent. Forcible sex offenses include forcible rape, forcible sodomy, sexual assault with an object, and forcible fondling. 34 C.F.R. Part 668, Subpt. D, App. A.

⁶ SIMONE ROBERS ET AL., INDICATORS OF SCHOOL CRIME AND SAFETY: 2010 at 104 (U.S. Dep't of Educ. & U.S. Dep't of Justice, Nov. 2010), available at <http://nces.ed.gov/pubs2011/2011002.pdf>.

⁷ ERIKA HARRELL & MICHAEL R. RAND, CRIME AGAINST PEOPLE WITH DISABILITIES, 2008 (Bureau of Justice Statistics, U.S. Dep't of Justice, Dec. 2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/capd08.pdf>.

⁸ The *2001 Guidance* is available on the Department's Web site at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>. This letter focuses on peer sexual harassment and violence. Schools' obligations and the appropriate response to sexual harassment and violence committed by employees may be different from those described in this letter. Recipients should refer to the *2001 Guidance* for further information about employee harassment of students.

harassment and violence also are concerns for school districts. The Title IX obligations discussed in this letter apply equally to school districts unless otherwise noted.

Title IX Requirements Related to Sexual Harassment and Sexual Violence

Schools' Obligations to Respond to Sexual Harassment and Sexual Violence

Sexual harassment is unwelcome conduct of a sexual nature. It includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual violence is a form of sexual harassment prohibited by Title IX.⁹

As explained in OCR's *2001 Guidance*, when a student sexually harasses another student, the harassing conduct creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the harassment is physical. Indeed, a single or isolated incident of sexual harassment may create a hostile environment if the incident is sufficiently severe. For instance, a single instance of rape is sufficiently severe to create a hostile environment.¹⁰

Title IX protects students from sexual harassment in a school's education programs and activities. This means that Title IX protects students in connection with all the academic, educational, extracurricular, athletic, and other programs of the school, whether those programs take place in a school's facilities, on a school bus, at a class or training program

⁹ Title IX also prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, even if those acts do not involve conduct of a sexual nature. The Title IX obligations discussed in this letter also apply to gender-based harassment. Gender-based harassment is discussed in more detail in the *2001 Guidance*, and in the 2010 Dear Colleague letter on Harassment and Bullying, which is available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

¹⁰ See, e.g., *Jennings v. Univ. of N.C.*, 444 F.3d 255, 268, 274 n.12 (4th Cir. 2006) (acknowledging that while not an issue in this case, a single incident of sexual assault or rape could be sufficient to raise a jury question about whether a hostile environment exists, and noting that courts look to Title VII cases for guidance in analyzing Title IX sexual harassment claims); *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 259 n.4 (6th Cir. 2000) ("[w]ithin the context of Title IX, a student's claim of hostile environment can arise from a single incident" (quoting *Doe v. Sch. Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 62 (D. Me. 1999))); *Soper v. Hoben*, 195 F.3d 845, 855 (6th Cir. 1999) (explaining that rape and sexual abuse "obviously qualify[ed] as...severe, pervasive, and objectively offensive sexual harassment"); see also *Berry v. Chi. Transit Auth.*, 618 F.3d 688, 692 (7th Cir. 2010) (in the Title VII context, "a single act can create a hostile environment if it is severe enough, and instances of uninvited physical contact with intimate parts of the body are among the most severe types of sexual harassment"); *Turner v. Saloon, Ltd.*, 595 F.3d 679, 686 (7th Cir. 2010) (noting that "[o]ne instance of conduct that is sufficiently severe may be enough," which is "especially true when the touching is of an intimate body part" (quoting *Jackson v. Cnty. of Racine*, 474 F.3d 493, 499 (7th Cir. 2007))); *McKinnis v. Crescent Guardian, Inc.*, 189 F. App'x 307, 310 (5th Cir. 2006) (holding that "the deliberate and unwanted touching of [a plaintiff's] intimate body parts can constitute severe sexual harassment" in Title VII cases (quoting *Harvill v. Westward Commc'ns, L.L.C.*, 433 F.3d 428, 436 (5th Cir. 2005))).

sponsored by the school at another location, or elsewhere. For example, Title IX protects a student who is sexually assaulted by a fellow student during a school-sponsored field trip.¹¹

If a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.¹² Schools also are required to publish a notice of nondiscrimination and to adopt and publish grievance procedures. Because of these requirements, which are discussed in greater detail in the following section, schools need to ensure that their employees are trained so that they know to report harassment to appropriate school officials, and so that employees with the authority to address harassment know how to respond properly. Training for employees should include practical information about how to identify and report sexual harassment and violence. OCR recommends that this training be provided to any employees likely to witness or receive reports of sexual harassment and violence, including teachers, school law enforcement unit employees, school administrators, school counselors, general counsels, health personnel, and resident advisors.

Schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school's education program or activity. If a student files a complaint with the school, regardless of where the conduct occurred, the school must process the complaint in accordance with its established procedures. Because students often experience the continuing effects of off-campus sexual harassment in the educational setting, schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus. For example, if a student alleges that he or she was sexually assaulted by another student off school grounds, and that upon returning to school he or she was taunted and harassed by other students who are the alleged perpetrator's friends, the school should take the earlier sexual assault into account in determining whether there is a sexually hostile environment. The school also should take steps to protect a student who was assaulted off campus from further sexual harassment or retaliation from the perpetrator and his or her associates.

Regardless of whether a harassed student, his or her parent, or a third party files a complaint under the school's grievance procedures or otherwise requests action on the student's behalf, a school that knows, or reasonably should know, about possible harassment must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation. As discussed later in this letter, the school's Title IX investigation is different from any law enforcement investigation, and a law enforcement investigation does not relieve the school of its independent Title IX obligation to investigate the conduct. The specific steps in a school's

¹¹ Title IX also protects third parties from sexual harassment or violence in a school's education programs and activities. For example, Title IX protects a high school student participating in a college's recruitment program, a visiting student athlete, and a visitor in a school's on-campus residence hall. Title IX also protects employees of a recipient from sexual harassment. For further information about harassment of employees, see *2001 Guidance* at n.1.

¹² This is the standard for administrative enforcement of Title IX and in court cases where plaintiffs are seeking injunctive relief. See *2001 Guidance* at ii-v, 12-13. The standard in private lawsuits for monetary damages is actual knowledge and deliberate indifference. See *Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629, 643, 648 (1999).

investigation will vary depending upon the nature of the allegations, the age of the student or students involved (particularly in elementary and secondary schools), the size and administrative structure of the school, and other factors. Yet as discussed in more detail below, the school's inquiry must in all cases be prompt, thorough, and impartial. In cases involving potential criminal conduct, school personnel must determine, consistent with State and local law, whether appropriate law enforcement or other authorities should be notified.¹³

Schools also should inform and obtain consent from the complainant (or the complainant's parents if the complainant is under 18 and does not attend a postsecondary institution) before beginning an investigation. If the complainant requests confidentiality or asks that the complaint not be pursued, the school should take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation. If a complainant insists that his or her name or other identifiable information not be disclosed to the alleged perpetrator, the school should inform the complainant that its ability to respond may be limited.¹⁴ The school also should tell the complainant that Title IX prohibits retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs.

As discussed in the *2001 Guidance*, if the complainant continues to ask that his or her name or other identifiable information not be revealed, the school should evaluate that request in the context of its responsibility to provide a safe and nondiscriminatory environment for all students. Thus, the school may weigh the request for confidentiality against the following factors: the seriousness of the alleged harassment; the complainant's age; whether there have been other harassment complaints about the same individual; and the alleged harasser's rights to receive information about the allegations if the information is maintained by the school as an "education record" under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 C.F.R. Part 99.¹⁵ The school should inform the complainant if it cannot ensure confidentiality. Even if the school cannot take disciplinary action against the alleged harasser because the complainant insists on confidentiality, it should pursue other steps to limit the effects of the alleged harassment and prevent its recurrence. Examples of such steps are discussed later in this letter.

Compliance with Title IX, such as publishing a notice of nondiscrimination, designating an employee to coordinate Title IX compliance, and adopting and publishing grievance procedures, can serve as preventive measures against harassment. Combined with education and training programs, these measures can help ensure that all students and employees recognize the

¹³ In states with mandatory reporting laws, schools may be required to report certain incidents to local law enforcement or child protection agencies.

¹⁴ Schools should refer to the *2001 Guidance* for additional information on confidentiality and the alleged perpetrator's due process rights.

¹⁵ For example, the alleged harasser may have a right under FERPA to inspect and review portions of the complaint that directly relate to him or her. In that case, the school must redact the complainant's name and other identifying information before allowing the alleged harasser to inspect and review the sections of the complaint that relate to him or her. In some cases, such as those where the school is required to report the incident to local law enforcement or other officials, the school may not be able to maintain the complainant's confidentiality.

nature of sexual harassment and violence, and understand that the school will not tolerate such conduct. Indeed, these measures may bring potentially problematic conduct to the school's attention before it becomes serious enough to create a hostile environment. Training for administrators, teachers, staff, and students also can help ensure that they understand what types of conduct constitute sexual harassment or violence, can identify warning signals that may need attention, and know how to respond. More detailed information and examples of education and other preventive measures are provided later in this letter.

Procedural Requirements Pertaining to Sexual Harassment and Sexual Violence

Recipients of Federal financial assistance must comply with the procedural requirements outlined in the Title IX implementing regulations. Specifically, a recipient must:

- (A) Disseminate a notice of nondiscrimination;¹⁶
- (B) Designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX;¹⁷ and
- (C) Adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints.¹⁸

These requirements apply to all forms of sexual harassment, including sexual violence, and are important for preventing and effectively responding to sex discrimination. They are discussed in greater detail below. OCR advises recipients to examine their current policies and procedures on sexual harassment and sexual violence to determine whether those policies comply with the requirements articulated in this letter and the *2001 Guidance*. Recipients should then implement changes as needed.

(A) Notice of Nondiscrimination

The Title IX regulations require that each recipient publish a notice of nondiscrimination stating that the recipient does not discriminate on the basis of sex in its education programs and activities, and that Title IX requires it not to discriminate in such a manner.¹⁹ The notice must state that inquiries concerning the application of Title IX may be referred to the recipient's Title IX coordinator or to OCR. It should include the name or title, office address, telephone number, and e-mail address for the recipient's designated Title IX coordinator.

The notice must be widely distributed to all students, parents of elementary and secondary students, employees, applicants for admission and employment, and other relevant persons. OCR recommends that the notice be prominently posted on school Web sites and at various

¹⁶ 34 C.F.R. § 106.9.

¹⁷ *Id.* § 106.8(a).

¹⁸ *Id.* § 106.8(b).

¹⁹ *Id.* § 106.9(a).

locations throughout the school or campus and published in electronic and printed publications of general distribution that provide information to students and employees about the school's services and policies. The notice should be available and easily accessible on an ongoing basis.

Title IX does not require a recipient to adopt a policy specifically prohibiting sexual harassment or sexual violence. As noted in the *2001 Guidance*, however, a recipient's general policy prohibiting sex discrimination will not be considered effective and would violate Title IX if, because of the lack of a specific policy, students are unaware of what kind of conduct constitutes sexual harassment, including sexual violence, or that such conduct is prohibited sex discrimination. OCR therefore recommends that a recipient's nondiscrimination policy state that prohibited sex discrimination covers sexual harassment, including sexual violence, and that the policy include examples of the types of conduct that it covers.

(B) Title IX Coordinator

The Title IX regulations require a recipient to notify all students and employees of the name or title and contact information of the person designated to coordinate the recipient's compliance with Title IX.²⁰ The coordinator's responsibilities include overseeing all Title IX complaints and identifying and addressing any patterns or systemic problems that arise during the review of such complaints. The Title IX coordinator or designee should be available to meet with students as needed. If a recipient designates more than one Title IX coordinator, the notice should describe each coordinator's responsibilities (*e.g.*, who will handle complaints by students, faculty, and other employees). The recipient should designate one coordinator as having ultimate oversight responsibility, and the other coordinators should have titles clearly showing that they are in a deputy or supporting role to the senior coordinator. The Title IX coordinators should not have other job responsibilities that may create a conflict of interest. For example, serving as the Title IX coordinator and a disciplinary hearing board member or general counsel may create a conflict of interest.

Recipients must ensure that employees designated to serve as Title IX coordinators have adequate training on what constitutes sexual harassment, including sexual violence, and that they understand how the recipient's grievance procedures operate. Because sexual violence complaints often are filed with the school's law enforcement unit, all school law enforcement unit employees should receive training on the school's Title IX grievance procedures and any other procedures used for investigating reports of sexual violence. In addition, these employees should receive copies of the school's Title IX policies. Schools should instruct law enforcement unit employees both to notify complainants of their right to file a Title IX sex discrimination complaint with the school in addition to filing a criminal complaint, and to report incidents of sexual violence to the Title IX coordinator if the complainant consents. The school's Title IX coordinator or designee should be available to provide assistance to school law enforcement unit employees regarding how to respond appropriately to reports of sexual violence. The Title IX coordinator also should be given access to school law enforcement unit investigation notes

²⁰ *Id.* § 106.8(a).

and findings as necessary for the Title IX investigation, so long as it does not compromise the criminal investigation.

(C) Grievance Procedures

The Title IX regulations require all recipients to adopt and publish grievance procedures providing for the prompt and equitable resolution of sex discrimination complaints.²¹ The grievance procedures must apply to sex discrimination complaints filed by students against school employees, other students, or third parties.

Title IX does not require a recipient to provide separate grievance procedures for sexual harassment and sexual violence complaints. Therefore, a recipient may use student disciplinary procedures or other separate procedures to resolve such complaints. Any procedures used to adjudicate complaints of sexual harassment or sexual violence, including disciplinary procedures, however, must meet the Title IX requirement of affording a complainant a prompt and equitable resolution.²² These requirements are discussed in greater detail below. If the recipient relies on disciplinary procedures for Title IX compliance, the Title IX coordinator should review the recipient's disciplinary procedures to ensure that the procedures comply with the prompt and equitable requirements of Title IX.²³

Grievance procedures generally may include voluntary informal mechanisms (*e.g.*, mediation) for resolving some types of sexual harassment complaints. OCR has frequently advised recipients, however, that it is improper for a student who complains of harassment to be required to work out the problem directly with the alleged perpetrator, and certainly not without appropriate involvement by the school (*e.g.*, participation by a trained counselor, a trained mediator, or, if appropriate, a teacher or administrator). In addition, as stated in the *2001 Guidance*, the complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process. Moreover, in cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis. OCR recommends that recipients clarify in their grievance procedures that mediation will not be used to resolve sexual assault complaints.

²¹ *Id.* § 106.8(b). Title IX also requires recipients to adopt and publish grievance procedures for employee complaints of sex discrimination.

²² These procedures must apply to all students, including athletes. If a complaint of sexual violence involves a student athlete, the school must follow its standard procedures for resolving sexual violence complaints. Such complaints must not be addressed solely by athletics department procedures. Additionally, if an alleged perpetrator is an elementary or secondary student with a disability, schools must follow the procedural safeguards in the Individuals with Disabilities Education Act (at 20 U.S.C. § 1415 and 34 C.F.R. §§ 300.500-300.519, 300.530-300.537) as well as the requirements of Section 504 of the Rehabilitation Act of 1973 (at 34 C.F.R. §§ 104.35-104.36) when conducting the investigation and hearing.

²³ A school may not absolve itself of its Title IX obligations to investigate and resolve complaints of sexual harassment or violence by delegating, whether through express contractual agreement or other less formal arrangement, the responsibility to administer school discipline to school resource officers or "contract" law enforcement officers. See 34 C.F.R. § 106.4.

Prompt and Equitable Requirements

As stated in the *2001 Guidance*, OCR has identified a number of elements in evaluating whether a school's grievance procedures provide for prompt and equitable resolution of sexual harassment complaints. These elements also apply to sexual violence complaints because, as explained above, sexual violence is a form of sexual harassment. OCR will review all aspects of a school's grievance procedures, including the following elements that are critical to achieve compliance with Title IX:

- Notice to students, parents of elementary and secondary students, and employees of the grievance procedures, including where complaints may be filed;
- Application of the procedures to complaints alleging harassment carried out by employees, other students, or third parties;
- Adequate, reliable, and impartial investigation of complaints, including the opportunity for both parties to present witnesses and other evidence;
- Designated and reasonably prompt time frames for the major stages of the complaint process;
- Notice to parties of the outcome of the complaint;²⁴ and
- An assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

As noted in the *2001 Guidance*, procedures adopted by schools will vary in detail, specificity, and components, reflecting differences in the age of students, school sizes and administrative structures, State or local legal requirements, and past experiences. Although OCR examines whether all applicable elements are addressed when investigating sexual harassment complaints, this letter focuses on those elements where our work indicates that more clarification and explanation are needed, including:

(A) *Notice of the grievance procedures*

The procedures for resolving complaints of sex discrimination, including sexual harassment, should be written in language appropriate to the age of the school's students, easily understood, easily located, and widely distributed. OCR recommends that the grievance procedures be prominently posted on school Web sites; sent electronically to all members of the school community; available at various locations throughout the school or campus; and summarized in or attached to major publications issued by the school, such as handbooks, codes of conduct, and catalogs for students, parents of elementary and secondary students, faculty, and staff.

(B) *Adequate, Reliable, and Impartial Investigation of Complaints*

OCR's work indicates that a number of issues related to an adequate, reliable, and impartial investigation arise in sexual harassment and violence complaints. In some cases, the conduct

²⁴ "Outcome" does not refer to information about disciplinary sanctions unless otherwise noted. Notice of the outcome is discussed in greater detail in Section D below.

may constitute both sexual harassment under Title IX and criminal activity. Police investigations may be useful for fact-gathering; but because the standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX. Conduct may constitute unlawful sexual harassment under Title IX even if the police do not have sufficient evidence of a criminal violation. In addition, a criminal investigation into allegations of sexual violence does not relieve the school of its duty under Title IX to resolve complaints promptly and equitably.

A school should notify a complainant of the right to file a criminal complaint, and should not dissuade a victim from doing so either during or after the school's internal Title IX investigation. For instance, if a complainant wants to file a police report, the school should not tell the complainant that it is working toward a solution and instruct, or ask, the complainant to wait to file the report.

Schools should not wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation and, if needed, must take immediate steps to protect the student in the educational setting. For example, a school should not delay conducting its own investigation or taking steps to protect the complainant because it wants to see whether the alleged perpetrator will be found guilty of a crime. Any agreement or Memorandum of Understanding (MOU) with a local police department must allow the school to meet its Title IX obligation to resolve complaints promptly and equitably. Although a school may need to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence, once notified that the police department has completed its gathering of evidence (not the ultimate outcome of the investigation or the filing of any charges), the school must promptly resume and complete its fact-finding for the Title IX investigation.²⁵ Moreover, nothing in an MOU or the criminal investigation itself should prevent a school from notifying complainants of their Title IX rights and the school's grievance procedures, or from taking interim steps to ensure the safety and well-being of the complainant and the school community while the law enforcement agency's fact-gathering is in progress. OCR also recommends that a school's MOU include clear policies on when a school will refer a matter to local law enforcement.

As noted above, the Title IX regulation requires schools to provide equitable grievance procedures. As part of these procedures, schools generally conduct investigations and hearings to determine whether sexual harassment or violence occurred. In addressing complaints filed with OCR under Title IX, OCR reviews a school's procedures to determine whether the school is using a preponderance of the evidence standard to evaluate complaints. The Supreme Court has applied a preponderance of the evidence standard in civil litigation involving discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.* Like Title IX,

²⁵ In one recent OCR sexual violence case, the prosecutor's office informed OCR that the police department's evidence gathering stage typically takes three to ten calendar days, although the delay in the school's investigation may be longer in certain instances.

Title VII prohibits discrimination on the basis of sex.²⁶ OCR also uses a preponderance of the evidence standard when it resolves complaints against recipients. For instance, OCR's Case Processing Manual requires that a noncompliance determination be supported by the preponderance of the evidence when resolving allegations of discrimination under all the statutes enforced by OCR, including Title IX.²⁷ OCR also uses a preponderance of the evidence standard in its fund termination administrative hearings.²⁸ Thus, in order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (*i.e.*, it is more likely than not that sexual harassment or violence occurred). The "clear and convincing" standard (*i.e.*, it is highly probable or reasonably certain that the sexual harassment or violence occurred), currently used by some schools, is a higher standard of proof. Grievance procedures that use this higher standard are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX. Therefore, preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence.

Throughout a school's Title IX investigation, including at any hearing, the parties must have an equal opportunity to present relevant witnesses and other evidence. The complainant and the alleged perpetrator must be afforded similar and timely access to any information that will be used at the hearing.²⁹ For example, a school should not conduct a pre-hearing meeting during which only the alleged perpetrator is present and given an opportunity to present his or her side of the story, unless a similar meeting takes place with the complainant; a hearing officer or disciplinary board should not allow only the alleged perpetrator to present character witnesses at a hearing; and a school should not allow the alleged perpetrator to review the complainant's

²⁶ See, *e.g.*, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003) (noting that under the "conventional rule of civil litigation," the preponderance of the evidence standard generally applies in cases under Title VII); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-55 (1989) (approving preponderance standard in Title VII sex discrimination case) (plurality opinion); *id.* at 260 (White, J., concurring in the judgment); *id.* at 261 (O'Connor, J., concurring in the judgment). The 2001 *Guidance* noted (on page vi) that "[w]hile *Gebser* and *Davis* made clear that Title VII agency principles do not apply in determining liability for money damages under Title IX, the *Davis* Court also indicated, through its specific references to Title VII caselaw, that Title VII remains relevant in determining what constitutes hostile environment sexual harassment under Title IX." See also *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) ("We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.").

²⁷ OCR's Case Processing Manual is available on the Department's Web site, at <http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.html>.

²⁸ The Title IX regulations adopt the procedural provisions applicable to Title VI of the Civil Rights Act of 1964. See 34 C.F.R. § 106.71 ("The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference."). The Title VI regulations apply the Administrative Procedure Act to administrative hearings required prior to termination of Federal financial assistance and require that termination decisions be "supported by and in accordance with the reliable, probative and substantial evidence." 5 U.S.C. § 556(d). The Supreme Court has interpreted "reliable, probative and substantial evidence" as a direction to use the preponderance standard. See *Steadman v. SEC*, 450 U.S. 91, 98-102 (1981).

²⁹ Access to this information must be provided consistent with FERPA. For example, if a school introduces an alleged perpetrator's prior disciplinary records to support a tougher disciplinary penalty, the complainant would not be allowed access to those records. Additionally, access should not be given to privileged or confidential information. For example, the alleged perpetrator should not be given access to communications between the complainant and a counselor or information regarding the complainant's sexual history.

statement without also allowing the complainant to review the alleged perpetrator's statement.

While OCR does not require schools to permit parties to have lawyers at any stage of the proceedings, if a school chooses to allow the parties to have their lawyers participate in the proceedings, it must do so equally for both parties. Additionally, any school-imposed restrictions on the ability of lawyers to speak or otherwise participate in the proceedings should apply equally. OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing. Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment. OCR also recommends that schools provide an appeals process. If a school provides for appeal of the findings or remedy, it must do so for both parties. Schools must maintain documentation of all proceedings, which may include written findings of facts, transcripts, or audio recordings.

All persons involved in implementing a recipient's grievance procedures (*e.g.*, Title IX coordinators, investigators, and adjudicators) must have training or experience in handling complaints of sexual harassment and sexual violence, and in the recipient's grievance procedures. The training also should include applicable confidentiality requirements. In sexual violence cases, the fact-finder and decision-maker also should have adequate training or knowledge regarding sexual violence.³⁰ Additionally, a school's investigation and hearing processes cannot be equitable unless they are impartial. Therefore, any real or perceived conflicts of interest between the fact-finder or decision-maker and the parties should be disclosed.

Public and state-supported schools must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant.

(C) *Designated and Reasonably Prompt Time Frames*

OCR will evaluate whether a school's grievance procedures specify the time frames for all major stages of the procedures, as well as the process for extending timelines. Grievance procedures should specify the time frame within which: (1) the school will conduct a full investigation of the complaint; (2) both parties receive a response regarding the outcome of the complaint; and (3) the parties may file an appeal, if applicable. Both parties should be given periodic status updates. Based on OCR experience, a typical investigation takes approximately 60 calendar days following receipt of the complaint. Whether OCR considers complaint resolutions to be timely, however, will vary depending on the complexity of the investigation and the severity and extent of the harassment. For example, the resolution of a complaint involving multiple incidents with multiple complainants likely would take longer than one involving a single incident that

³⁰ For instance, if an investigation or hearing involves forensic evidence, that evidence should be reviewed by a trained forensic examiner.

occurred in a classroom during school hours with a single complainant.

(D) Notice of Outcome

Both parties must be notified, in writing, about the outcome of both the complaint and any appeal,³¹ *i.e.*, whether harassment was found to have occurred. OCR recommends that schools provide the written determination of the final outcome to the complainant and the alleged perpetrator concurrently. Title IX does not require the school to notify the alleged perpetrator of the outcome before it notifies the complainant.

Due to the intersection of Title IX and FERPA requirements, OCR recognizes that there may be confusion regarding what information a school may disclose to the complainant.³² FERPA generally prohibits the nonconsensual disclosure of personally identifiable information from a student's "education record." However, as stated in the *2001 Guidance*, FERPA permits a school to disclose to the harassed student information about the sanction imposed upon a student who was found to have engaged in harassment when the sanction directly relates to the harassed student. This includes an order that the harasser stay away from the harassed student, or that the harasser is prohibited from attending school for a period of time, or transferred to other classes or another residence hall.³³ Disclosure of other information in the student's "education record," including information about sanctions that do not relate to the harassed student, may result in a violation of FERPA.

Further, when the conduct involves a crime of violence or a non-forcible sex offense,³⁴ FERPA permits a postsecondary institution to disclose to the alleged victim the final results of a

³¹ As noted previously, "outcome" does not refer to information about disciplinary sanctions unless otherwise noted.

³² In 1994, Congress amended the General Education Provisions Act (GEPA), of which FERPA is a part, to state that nothing in GEPA "shall be construed to affect the applicability of title VI of the Civil Rights Act of 1964, title IX of Education Amendments of 1972, title V of the Rehabilitation Act of 1973, the Age Discrimination Act, or other statutes prohibiting discrimination, to any applicable program." 20 U.S.C. § 1221(d). The Department interprets this provision to mean that FERPA continues to apply in the context of Title IX enforcement, but if there is a direct conflict between the requirements of FERPA and the requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions. *See 2001 Guidance* at vii.

³³ This information directly relates to the complainant and is particularly important in sexual harassment cases because it affects whether a hostile environment has been eliminated. Because seeing the perpetrator may be traumatic, a complainant in a sexual harassment case may continue to be subject to a hostile environment if he or she does not know when the perpetrator will return to school or whether he or she will continue to share classes or a residence hall with the perpetrator. This information also directly affects a complainant's decision regarding how to work with the school to eliminate the hostile environment and prevent its recurrence. For instance, if a complainant knows that the perpetrator will not be at school or will be transferred to other classes or another residence hall for the rest of the year, the complainant may be less likely to want to transfer to another school or change classes, but if the perpetrator will be returning to school after a few days or weeks, or remaining in the complainant's classes or residence hall, the complainant may want to transfer schools or change classes to avoid contact. Thus, the complainant cannot make an informed decision about how best to respond without this information.

³⁴ Under the FERPA regulations, crimes of violence include arson; assault offenses (aggravated assault, simple assault, intimidation); burglary; criminal homicide (manslaughter by negligence); criminal homicide (murder and

disciplinary proceeding against the alleged perpetrator, regardless of whether the institution concluded that a violation was committed.³⁵ Additionally, a postsecondary institution may disclose to anyone—not just the alleged victim—the final results of a disciplinary proceeding if it determines that the student is an alleged perpetrator of a crime of violence or a non-forcible sex offense, and, with respect to the allegation made, the student has committed a violation of the institution’s rules or policies.³⁶

Postsecondary institutions also are subject to additional rules under the Clery Act. This law, which applies to postsecondary institutions that participate in Federal student financial aid programs, requires that “both the accuser and the accused must be informed of the outcome³⁷ of any institutional disciplinary proceeding brought alleging a sex offense.”³⁸ Compliance with this requirement does not constitute a violation of FERPA. Furthermore, the FERPA limitations on redisclosure of information do not apply to information that postsecondary institutions are required to disclose under the Clery Act.³⁹ Accordingly, postsecondary institutions may not require a complainant to abide by a nondisclosure agreement, in writing or otherwise, that would prevent the redisclosure of this information.

Steps to Prevent Sexual Harassment and Sexual Violence and Correct its Discriminatory Effects on the Complainant and Others

Education and Prevention

In addition to ensuring full compliance with Title IX, schools should take proactive measures to prevent sexual harassment and violence. OCR recommends that all schools implement preventive education programs and make victim resources, including comprehensive victim services, available. Schools may want to include these education programs in their (1) orientation programs for new students, faculty, staff, and employees; (2) training for students who serve as advisors in residence halls; (3) training for student athletes and coaches; and (4) school assemblies and “back to school nights.” These programs should include a

non-negligent manslaughter); destruction, damage or vandalism of property; kidnapping/abduction; robbery; and forcible sex offenses. Forcible sex offenses are defined as any sexual act directed against another person forcibly or against that person’s will, or not forcibly or against the person’s will where the victim is incapable of giving consent. Forcible sex offenses include rape, sodomy, sexual assault with an object, and forcible fondling. Non-forcible sex offenses are incest and statutory rape. 34 C.F.R. Part 99, App. A.

³⁵ 34 C.F.R. § 99.31(a)(13). For purposes of 34 C.F.R. §§ 99.31(a)(13)-(14), disclosure of “final results” is limited to the name of the alleged perpetrator, any violation found to have been committed, and any sanction imposed against the perpetrator by the school. 34 C.F.R. § 99.39.

³⁶ 34 C.F.R. § 99.31(a)(14).

³⁷ For purposes of the Clery Act, “outcome” means the institution’s final determination with respect to the alleged sex offense and any sanctions imposed against the accused. 34 C.F.R. § 668.46(b)(11)(vi)(B).

³⁸ 34 C.F.R. § 668.46(b)(11)(vi)(B). Under the Clery Act, forcible sex offenses are defined as any sexual act directed against another person forcibly or against that person’s will, or not forcibly or against the person’s will where the person is incapable of giving consent. Forcible sex offenses include forcible rape, forcible sodomy, sexual assault with an object, and forcible fondling. Non-forcible sex offenses include incest and statutory rape. 34 C.F.R. Part 668, Subpt. D, App. A.

³⁹ 34 C.F.R. § 99.33(c).

discussion of what constitutes sexual harassment and sexual violence, the school's policies and disciplinary procedures, and the consequences of violating these policies.

The education programs also should include information aimed at encouraging students to report incidents of sexual violence to the appropriate school and law enforcement authorities. Schools should be aware that victims or third parties may be deterred from reporting incidents if alcohol, drugs, or other violations of school or campus rules were involved.⁴⁰ As a result, schools should consider whether their disciplinary policies have a chilling effect on victims' or other students' reporting of sexual violence offenses. For example, OCR recommends that schools inform students that the schools' primary concern is student safety, that any other rules violations will be addressed separately from the sexual violence allegation, and that use of alcohol or drugs never makes the victim at fault for sexual violence.

OCR also recommends that schools develop specific sexual violence materials that include the schools' policies, rules, and resources for students, faculty, coaches, and administrators. Schools also should include such information in their employee handbook and any handbooks that student athletes and members of student activity groups receive. These materials should include where and to whom students should go if they are victims of sexual violence. These materials also should tell students and school employees what to do if they learn of an incident of sexual violence. Schools also should assess student activities regularly to ensure that the practices and behavior of students do not violate the schools' policies against sexual harassment and sexual violence.

Remedies and Enforcement

As discussed above, if a school determines that sexual harassment that creates a hostile environment has occurred, it must take immediate action to eliminate the hostile environment, prevent its recurrence, and address its effects. In addition to counseling or taking disciplinary action against the harasser, effective corrective action may require remedies for the complainant, as well as changes to the school's overall services or policies. Examples of these actions are discussed in greater detail below.

Title IX requires a school to take steps to protect the complainant as necessary, including taking interim steps before the final outcome of the investigation. The school should undertake these steps promptly once it has notice of a sexual harassment or violence allegation. The school should notify the complainant of his or her options to avoid contact with the alleged perpetrator and allow students to change academic or living situations as appropriate. For instance, the school may prohibit the alleged perpetrator from having any contact with the complainant pending the results of the school's investigation. When taking steps to separate the complainant and alleged perpetrator, a school should minimize the burden on the

⁴⁰ The Department's Higher Education Center for Alcohol, Drug Abuse, and Violence Prevention (HEC) helps campuses and communities address problems of alcohol, other drugs, and violence by identifying effective strategies and programs based upon the best prevention science. Information on HEC resources and technical assistance can be found at www.higheredcenter.org.

complainant, and thus should not, as a matter of course, remove complainants from classes or housing while allowing alleged perpetrators to remain. In addition, schools should ensure that complainants are aware of their Title IX rights and any available resources, such as counseling, health, and mental health services, and their right to file a complaint with local law enforcement.⁴¹

Schools should be aware that complaints of sexual harassment or violence may be followed by retaliation by the alleged perpetrator or his or her associates. For instance, friends of the alleged perpetrator may subject the complainant to name-calling and taunting. As part of their Title IX obligations, schools must have policies and procedures in place to protect against retaliatory harassment. At a minimum, schools must ensure that complainants and their parents, if appropriate, know how to report any subsequent problems, and should follow-up with complainants to determine whether any retaliation or new incidents of harassment have occurred.

When OCR finds that a school has not taken prompt and effective steps to respond to sexual harassment or violence, OCR will seek appropriate remedies for both the complainant and the broader student population. When conducting Title IX enforcement activities, OCR seeks to obtain voluntary compliance from recipients. When a recipient does not come into compliance voluntarily, OCR may initiate proceedings to withdraw Federal funding by the Department or refer the case to the U.S. Department of Justice for litigation.

Schools should proactively consider the following remedies when determining how to respond to sexual harassment or violence. These are the same types of remedies that OCR would seek in its cases.

Depending on the specific nature of the problem, remedies for the complainant might include, but are not limited to:⁴²

- providing an escort to ensure that the complainant can move safely between classes and activities;
- ensuring that the complainant and alleged perpetrator do not attend the same classes;
- moving the complainant or alleged perpetrator to a different residence hall or, in the case of an elementary or secondary school student, to another school within the district;
- providing counseling services;
- providing medical services;
- providing academic support services, such as tutoring;

⁴¹ The Clery Act requires postsecondary institutions to develop and distribute a statement of policy that informs students of their options to notify proper law enforcement authorities, including campus and local police, and the option to be assisted by campus personnel in notifying such authorities. The policy also must notify students of existing counseling, mental health, or other student services for victims of sexual assault, both on campus and in the community. 20 U.S.C. §§ 1092(f)(8)(B)(v)-(vi).

⁴² Some of these remedies also can be used as interim measures before the school's investigation is complete.

- arranging for the complainant to re-take a course or withdraw from a class without penalty, including ensuring that any changes do not adversely affect the complainant's academic record; and
- reviewing any disciplinary actions taken against the complainant to see if there is a causal connection between the harassment and the misconduct that may have resulted in the complainant being disciplined.⁴³

Remedies for the broader student population might include, but are not limited to:

Counseling and Training

- offering counseling, health, mental health, or other holistic and comprehensive victim services to all students affected by sexual harassment or sexual violence, and notifying students of campus and community counseling, health, mental health, and other student services;
- designating an individual from the school's counseling center to be "on call" to assist victims of sexual harassment or violence whenever needed;
- training the Title IX coordinator and any other employees who are involved in processing, investigating, or resolving complaints of sexual harassment or sexual violence, including providing training on:
 - the school's Title IX responsibilities to address allegations of sexual harassment or violence
 - how to conduct Title IX investigations
 - information on the link between alcohol and drug abuse and sexual harassment or violence and best practices to address that link;
- training all school law enforcement unit personnel on the school's Title IX responsibilities and handling of sexual harassment or violence complaints;
- training all employees who interact with students regularly on recognizing and appropriately addressing allegations of sexual harassment or violence under Title IX; and
- informing students of their options to notify proper law enforcement authorities, including school and local police, and the option to be assisted by school employees in notifying those authorities.

Development of Materials and Implementation of Policies and Procedures

- developing materials on sexual harassment and violence, which should be distributed to students during orientation and upon receipt of complaints, as well as widely posted throughout school buildings and residence halls, and which should include:
 - what constitutes sexual harassment or violence
 - what to do if a student has been the victim of sexual harassment or violence
 - contact information for counseling and victim services on and off school grounds
 - how to file a complaint with the school
 - how to contact the school's Title IX coordinator

⁴³ For example, if the complainant was disciplined for skipping a class in which the harasser was enrolled, the school should review the incident to determine if the complainant skipped the class to avoid contact with the harasser.

- what the school will do to respond to allegations of sexual harassment or violence, including the interim measures that can be taken
- requiring the Title IX coordinator to communicate regularly with the school's law enforcement unit investigating cases and to provide information to law enforcement unit personnel regarding Title IX requirements;⁴⁴
- requiring the Title IX coordinator to review all evidence in a sexual harassment or sexual violence case brought before the school's disciplinary committee to determine whether the complainant is entitled to a remedy under Title IX that was not available through the disciplinary committee;⁴⁵
- requiring the school to create a committee of students and school officials to identify strategies for ensuring that students:
 - know the school's prohibition against sex discrimination, including sexual harassment and violence
 - recognize sex discrimination, sexual harassment, and sexual violence when they occur
 - understand how and to whom to report any incidents
 - know the connection between alcohol and drug abuse and sexual harassment or violence
 - feel comfortable that school officials will respond promptly and equitably to reports of sexual harassment or violence;
- issuing new policy statements or other steps that clearly communicate that the school does not tolerate sexual harassment and violence and will respond to any incidents and to any student who reports such incidents; and
- revising grievance procedures used to handle sexual harassment and violence complaints to ensure that they are prompt and equitable, as required by Title IX.

School Investigations and Reports to OCR

- conducting periodic assessments of student activities to ensure that the practices and behavior of students do not violate the school's policies against sexual harassment and violence;
- investigating whether any other students also may have been subjected to sexual harassment or violence;
- investigating whether school employees with knowledge of allegations of sexual harassment or violence failed to carry out their duties in responding to those allegations;
- conducting, in conjunction with student leaders, a school or campus "climate check" to assess the effectiveness of efforts to ensure that the school is free from sexual harassment and violence, and using the resulting information to inform future proactive steps that will be taken by the school; and

⁴⁴ Any personally identifiable information from a student's education record that the Title IX coordinator provides to the school's law enforcement unit is subject to FERPA's nondisclosure requirements.

⁴⁵ For example, the disciplinary committee may lack the power to implement changes to the complainant's class schedule or living situation so that he or she does not come in contact with the alleged perpetrator.

- submitting to OCR copies of all grievances filed by students alleging sexual harassment or violence, and providing OCR with documentation related to the investigation of each complaint, such as witness interviews, investigator notes, evidence submitted by the parties, investigative reports and summaries, any final disposition letters, disciplinary records, and documentation regarding any appeals.

Conclusion

The Department is committed to ensuring that all students feel safe and have the opportunity to benefit fully from their schools' education programs and activities. As part of this commitment, OCR provides technical assistance to assist recipients in achieving voluntary compliance with Title IX.

If you need additional information about Title IX, have questions regarding OCR's policies, or seek technical assistance, please contact the OCR enforcement office that serves your state or territory. The list of offices is available at <http://wdcroboelp01.ed.gov/CFAPPS/OCR/contactus.cfm>. Additional information about addressing sexual violence, including victim resources and information for schools, is available from the U.S. Department of Justice's Office on Violence Against Women (OVW) at <http://www.ovw.usdoj.gov/>.⁴⁶

Thank you for your prompt attention to this matter. I look forward to continuing our work together to ensure that all students have an equal opportunity to learn in a safe and respectful school climate.

Sincerely,

/s/

Russlynn Ali
Assistant Secretary for Civil Rights

⁴⁶ OVW also administers the Grants to Reduce Domestic Violence, Dating Violence, Sexual Assault, and Stalking on Campus Program. This Federal funding is designed to encourage institutions of higher education to adopt comprehensive, coordinated responses to domestic violence, dating violence, sexual assault, and stalking. Under this competitive grant program, campuses, in partnership with community-based nonprofit victim advocacy organizations and local criminal justice or civil legal agencies, must adopt protocols and policies to treat these crimes as serious offenses and develop victim service programs and campus policies that ensure victim safety, offender accountability, and the prevention of such crimes. OVW recently released the first solicitation for the Services, Training, Education, and Policies to Reduce Domestic Violence, Dating Violence, Sexual Assault and Stalking in Secondary Schools Grant Program. This innovative grant program will support a broad range of activities, including training for school administrators, faculty, and staff; development of policies and procedures for responding to these crimes; holistic and appropriate victim services; development of effective prevention strategies; and collaborations with mentoring organizations to support middle and high school student victims.