IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SARA WECKHORST, Plaintiff, v. KANSAS STATE UNIVERSITY, an agency of the State of Kansas, Defendant.	)	Case No. 2:16-cv-02255-JAR-GEB

REPLY BRIEF IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Date: July 25, 2016

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I. INTRODUCTION/NATURE OF THE MATTER

Title IX prohibits colleges and universities that receive federal funds from engaging in sex discrimination in their education programs and activities. Contrary to Ms. Weckhorst's arguments, Title IX does not obligate institutions to disregard traditional notions of control and jurisdiction, not to mention constitutional rights, and conduct wide ranging investigations of alleged misconduct committed by students in off-campus, private settings. To hold otherwise would transform Title IX from an anti-discrimination law into a remedial, quasi-criminal statute and force colleges and universities to become worldwide law enforcement agencies. To the contrary, under Title IX, an institution is only obliged to respond to sexual harassment where it has "substantial control" over the harasser and the "context" of the harassment, and even then, an institution can only be liable if its deliberate indifference *causes* further harassment. Ms. Weckhorst's allegations come nowhere close to meeting these key elements.

Here, Ms. Weckhorst seeks money damages from K-State by alleging it was deliberately indifferent to her report that J.F. and J.G. raped her at a private party at Pillsbury Crossing, in a private car somewhere between Pillsbury Crossing and Manhattan, and in a private bedroom at a privately owned off-campus fraternity house, which K-State cannot enter without permission or a warrant.[1] While every report of rape is serious and every rape is a tragedy, universities should not, and cannot, be responsible for guaranteeing their students' safety at off-campus, private functions and in off-campus, private places. This is the business of police and prosecutors.

The allegations in Ms. Weckhorst's own Complaint make clear K-State did not have substantial control over J.F. and J.G. *in the context that the alleged rapes occurred* and that K-State's response did not cause Ms. Weckhorst to suffer further harassment. Thus, her Title IX

[1] Ms. Weckhorst has abandoned her claim that K-State was deliberately indifferent to alleged sexual assaults that occurred prior to her alleged rapes by J.F. and J.G. *See* Opposition at 2, n.1.

claim fails under *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).

In her Opposition, Ms. Weckhorst argues K-State had substantial control over J.F. and J.G.'s actions because it could discipline them *ex post* and because it has a process for granting institutional recognition to fraternities as student organizations. But the ability to discipline a student *ex post* is not the same as "substantial control" over harassers and the "context" of the harassment. Further, simply because an institution recognizes fraternities as student organizations does not mean the institution has substantial control over the acts of individual fraternity members off-campus and in private locations. To the contrary, analogous cases hold precisely the opposite. And any statements to the contrary in recent Department of Education ("ED") "Question and Answers" lack the force of law, are inconsistent with Title IX's language, and are entitled to no deference. And the law is clear that violating ED's guidance is *not* equivalent to deliberate indifference. So, while Ms. Weckhorst wants to make this case turn on whether K-State complied with ED's recent edicts, this is irrelevant.

In addition, Ms. Weckhorst argues that she does not need to show that K-State caused J.F. and J.G. to commit further harassment because her subjective fear that she might encounter them on campus was sufficient. But *Davis* itself makes clear that an institution can be liable under Title IX only if its own actions cause further harassment, and fear of a future encounter with a prior harasser is not further harassment. Indeed, numerous cases within and outside the Tenth Circuit hold that Title IX does not impose a duty on the part of institutions to remedy the effects of off-campus criminal conduct. This is not to say that institutions should not, for moral or ethical reasons, provide support services to alleged victims and, indeed, K-State provided such services to Ms. Weckhorst. But an alleged victim cannot recover money damages from a school simply because the school does not provide the particular form of remediation she seeks or

because it does not discipline the alleged perpetrator as she wishes. Yet that is exactly what Ms. Weckhorst claims the law requires, and her claims necessarily fail as a result.

Although Ms. Weckhorst attempts to defend the adequacy of her secondary Kansas Consumer Protection Act ("KCPA") claim, the defense is half-hearted and unsupported. Ms. Weckhorst concedes her KCPA claim must be pled with particularity. But her Opposition fails to identify where she has pled the critical who, what, when, where, and how of K-State's alleged false misrepresentations about fraternities. She also fails to plead the causation necessary to establish she was "aggrieved" by any misrepresentation. Thus, her KCPA claim fails.

Similarly, Ms. Weckhorst's cursory attempt to defend her secondary common law negligence claim is unsuccessful. The claim is barred because a university does not have a general duty to protect its students from third-party criminal acts. Further, her claim is barred by sovereign immunity under the "discretionary function" exception to liability in the Kansas Tort Claims Act ("KTCA"), and her argument to the contrary is based on her misreading of a dated Kansas case that has been clarified extensively. Because there is no law mandating how K-State should respond to student-on-student violence, K-State's response is discretionary, and sovereign immunity applies. Thus, Ms. Weckhorst's negligence claims fails.

In sum, because each of Ms. Weckhorst's claims is deficiently pled and fails as a matter of law, the Court should grant K-State's motion in its entirety.

II. CLARIFICATION OF K-STATE'S *POLICY* AND MS. WECKHORST'S ALLEGATIONS REGARDING K-STATE'S RESPONSE TO HER REPORTS

K-State described Ms. Weckhorst's Complaint and certain operative facts pertinent to its motion in its opening brief. However, Ms. Weckhorst's Opposition falsely states that K-State has an "'off-campus, not our problem' position," Opposition at 1, and suggests K-State did nothing to respond to Ms. Weckhort's report of rapes when, in fact, her own Complaint

establishes that K-State did a great deal. Accordingly, it is necessary for K-State to clarify the record, both with respect to its *Policy* and Ms. Weckhorst's allegations regarding its response.

K-State's Policy Prohibiting Discrimination, Harassment, Sexual Violence, and Stalking, and Procedure for Reviewing Complaints (the "*Policy*")[2] prohibits sex discrimination and establishes the process by which K-State currently evaluates and process reports. Ex. A, *Policy*, http://www.k-state.edu/policies/ppm/3000/3010.html. Pertinent to this motion, the *Policy* states that K-State "will maintain academic, housing, and work environments that are free of discrimination, harassment (including sexual harassment and sexual violence), retaliation, and stalking." *Id.* The *Policy* covers "employees, students, applicants for employment or admission, contractors, vendors, visitors, guests, and participants in University-sponsored programs or activities." *Id.* With respect to jurisdiction, the *Policy* recognizes that:

> [I]n some situations, this policy may apply to allegations of discrimination, harassment or retaliation for behavior that occurs off campus or during after-hours functions sponsored by the University. Off campus occurrences that are not related to University-sponsored programs or activities are investigated under this policy only if those occurrences relate to discrimination, harassment, or retaliation alleged on campus.

Id.

Contrary to Ms. Weckhorst's allegation that K-State ignores reports off-campus rape, K-State evaluates every report of sexual harassment. The *Policy* provides a multi-step process for doing so. Among others, the steps include a review and evaluation of the complaint by the Office of Institutional Equity ("OIE") to determine whether the complaint falls within the *Policy*'s jurisdiction; if jurisdiction is found, or if more information is needed to determine jurisdiction, a review and, if necessary, investigation of the complaint by an Administrative Review Team ("ART"), which issues a written determination as to whether or not the evidence

[2] The Court may consider documents, such as the Policy, referred to in the Complaint and central to the plaintiff's claims. *MacArthur v. San Juan County*, 309 F.3d 1216, 1221 (10th Cir. 2002).

supports the existence of a *Policy* violation using a preponderance standard; and, only in the event a *Policy* violation has been found, a disciplinary process by which the ART recommends sanctions to an administrator who imposes sanctions, subject to appeal. *See* Ex. A, *Policy*.

As the *Policy* makes clear, persons who come forward with complaints of sexual violence are encouraged to report the conduct to local police. *Id.* Further, the *Policy* specifies that the Center for Advocacy, Response and Education ("CARE") office will provide support and advocacy services to a complainant, regardless of whether his or her complaint proceeds to a formal investigation by the ART. *Id.* Thus, K-State provides support and assistance to any student who comes forward with a report of sexual violence, even if K-State does not have jurisdiction to discipline the alleged perpetrator. This is a far cry from Ms. Weckhorst's characterization that K-State has an "off-campus, not our problem" position.

Ms. Weckhorst's Opposition repeatedly claims K-State did nothing in response to her own reports of rape.[3] To the contrary, Ms. Weckhorst's own Complaint makes clear that K-State responded to her report in numerous ways, including: (1) K-State's student health center treated Ms. Weckhorst the day after the alleged rapes, providing her with emergency contraception; (2) K-State's women's center assisted Ms. Weckhorst in drafting a complaint against J.F. and J.G. for evaluation by K-State's "affirmative action office"[4]; (3) K-State's investigator met with Ms. Weckhorst and evaluated her complaint but concluded it was beyond K-State's jurisdiction because Ms. Weckhorst did not allege that the rapes occurred in K-State's education programs and activities, and she did not allege that any sexual harassment occurred on campus; (4) despite

[3] Ms. Weckhorst states that "K-State does not dispute" that it had actual knowledge and was deliberately indifferent. Opposition at 1. While K-State has not moved on these elements based on the standard of review that applies at this stage, K-State has never suggested it "does not dispute them." To the contrary, if necessary, K-State is fully prepared to demonstrate, with evidence, that it responded to Ms. Weckhorst's reports in a reasonable way.

[4] This is the term the Complaint uses, but, in reality, the office was the OIE.

the lack of jurisdiction to conduct a full investigation, K-State offered to provide Ms. Weckhorst with resources such as student escorts on campus and a ride service for weekends; and (5) numerous administrators met with Ms. Weckhorst and filed a complaint with the Interfraternity Council ("IFC"), which regulates Greek organizations. Complaint ¶¶ 19, 21, 22, 37, 48.[5]

III. ARGUMENT

A. Ms. Weckhorst Fails To State A Claim For Violation Of Title IX

Under the *Davis* standard, Ms. Weckhorst must plead facts that show, among other things, that K-State was deliberately indifferent to severe sexual harassment within its substantial control and that K-State's deliberate indifference caused further harassment. 526 U.S. at 643. Here, Ms. Weckhorst alleges that she was raped off-campus, by third-parties, and in private settings. These allegations show K-State had no substantial control over the alleged rapists or the circumstances of the rapes. And she fails to plead that she suffered any further unwelcome conduct of a sexual nature *after* the alleged rapes. Therefore, her Complaint fails to plead essential elements of her claim.

1. Ms. Weckhorst cannot predicate Title IX liability on K-State's alleged violation of ED's guidance; she must satisfy *Davis*.

Despite Ms. Weckhorst's claims that K-State's alleged practices are contrary to ED's sub-regulatory "guidance" in "Questions and Answers" and "Dear Colleague Letters," Title IX civil liability cannot be predicated on violation of such guidance. Indeed, the Supreme Court has held that Title IX civil liability cannot even be predicated on the violation of actual *regulations*, adopted pursuant to notice and comment rulemaking. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291-92 (1998) ("We have never held, however, that the implied private right

[5] K-State did a great deal more in response to Ms. Weckhorst's report but recognizes that the merits of its current motion must be assessed in light of the allegations in the Complaint.

of action under Title IX allows recovery in damages for violation of those sorts of administrative requirements.").[6] Instead, Title IX civil liability can only be established within the narrow framework of *Davis*. And a careful review of *Davis* makes clear that Ms. Weckhorst's Complaint fails to plead two necessary elements of her claim—namely, that the alleged rapes occurred within K-State's substantial control and that K-State caused *further* harassment.

In *Davis*, a fifth grade student, LaShonda, sued a K-12 school district under Title IX, claiming that she had been the victim of a "prolonged pattern" of sexual harassment committed by fellow student G.F. 526 U.S. at 633. LaShonda alleged that the sexual harassment—vulgar comments and unwelcome groping—was reported to school officials, along with similar complaints from other female students, but the school declined to take disciplinary action against G.F. *Id.* LaShonda alleged that, after the school declined to take disciplinary action, the sexual harassment continued in the form of sexually suggestive gestures and an incident where G.F. rubbed his body against LaShonda without her permission. *Id.* Unlike here, where J.F. and J.G. have not even been arrested for the alleged rapes, G.F. was eventually arrested, charged, and pled guilty to sexual battery. *Id.* The Supreme Court found that an implied civil cause of action for money damages exists under Title IX only where a school is "deliberate[ly] indifferen[t] to known acts of harassment *in its programs and activities*," and only where the harassment is "so severe, pervasive and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Id.* (emphasis added).

As the Court explained, Title IX applies only to institutions that accept federal funds and only as a condition of receiving such funds. *Id.* This means that an institution can be liable for

[6] *See also Roe v. St. Louis Univ.*, 746 F.3d 874, 883 (8th Cir. 2014) ("[An] alleged failure to comply with the Title IX regulations does not establish actual notice and deliberate indifference."); *Doe v. Bibb County Sch. Dist.*, 126 F. Supp. 3d 1366, 1378 (M.D. Ga. 2015) ("Clearly, a funding recipient cannot be held liable simply because it did not conduct an appropriate investigation (even if such conduct could expose it to potential administrative action . . .).").

only its *own* discriminatory conduct. *Davis*, 526 U.S. at 641. In other words, the "recipient *itself* must exclude persons from participation in, deny persons the benefits of, or subject persons to discrimination under its programs and activities." *Id.* (internal quotations and ellipses omitted). Thus, while LaShonda sought a broad ruling that Title IX "bar[s] recipients from *permitting* [peer-on-peer] harassment in programs and activities," *id.* at 639 (emphasis added), the Supreme Court rejected this notion, holding instead that an institution is not vicariously liable under Title IX simply because one student commits sexual violence against another. *Id.* at 672.

Unlike Ms. Weckhorst, LaShonda claimed that the school district's alleged deliberate indifference to reported sexual harassment *caused* further harassment. *Id.* at 643. Specifically, she claimed she was harassed *again* after the district did nothing in response to her and other girls' initial reports. Only because of this allegation could LaShonda attempt to "hold the Board liable for its *own decision to remain idle* in the face of known student-on-student harassment." *Id.* at 641 (emphasis added). Indeed, the Tenth Circuit and other courts have interpreted *Davis* to require a plaintiff to prove that a school's deliberate indifference *caused* further harassment. *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1123 (10th Cir. 2008); *Escue v. N. Okla. Coll.*, 450 F.3d 1146, 1155-56 (10th Cir. 2006).[7]

Moreover, because Title IX only prohibits sex discrimination in "education programs and activities," which the statute defines as the "operations" of the institution, *Davis* stressed that harassment "must take place in a *context* subject to the school district's control"—that is, where the institution exercises "substantial control over both the harasser and the context in which the harassment occurs." *Davis*, 526 U.S. at 645. "Only then can the recipient be said to 'expose' its

[7] As Ms. Weckhorst notes, the "further harassment" requirement may not be required where, as in a case like *Simpson v. University of Colorado*, 500 F.3d 1170 (10th Cir. 2007), an institution has an *affirmative* policy that encourages sexual harassment. However, as Ms. Weckhorst concedes, her Complaint does not state a claim based on *Simpson*-type liability. *See* Opposition at 25, n. 10.

students to harassment or 'cause' them to undergo it 'under' the recipient's programs." *Id.*

Thus, while some courts have commented that Title IX provides a "broad prohibition on sex discrimination" in a *regulatory* sense, Opposition at 5,[8] the circumstances in which institutional *civil* liability can result from failure to respond to student-on-student sexual harassment are decidedly "limited." *Davis*, 526 U.S. at 643.

2. Ms. Weckhorst abandoned any claim of alleged deliberate indifference to earlier "rapes."

Ms. Weckhorst makes an important concession in footnote 1 of her Opposition, where she states: "Sara *does not* bring a claim for *pre-assault* Title IX liability and, as such, the Court need not address K-State's arguments regarding actual knowledge or deliberate indifference, which they have only raised in that context." Opposition at 2, n.1 (emphasis in original). This concession is extraordinarily consequential because, as discussed below, Ms. Weckhorst does not allege that J.F. and J.G. took any adverse action against her *after* the alleged rapes. In fact, she does not allege she even encountered J.F. and J.G. after the alleged rapes. Thus, her claim is different than LaShonda's. Here, Ms. Weckhorst seeks to hold K-State liable only because K-State failed to *remediate* the later *effects* of the alleged rapes. This theory is clearly unsupported.

3. Ms. Weckhorst fails to plead K-State had substantial control.

Ms. Weckhorst claims she was raped by J.F. at a party held in rural Riley County, at "Pillsbury Crossing" some 10 miles from campus, later by J.F. in his car, and lastly by J.G. in a private room at an off-campus, privately-owned fraternity house. She does not allege that K-State knew about, let alone supervised, the party at Pillsbury Crossing. She does not allege that K-State's agents were in the car with her and J.F. Nor does she allege that K-State owned the

[8] Notably, the case Ms. Weckhorst cites for this proposition is one where the Secretary of ED was a party and the claims involved were regulatory in nature—not the implied civil cause of action in *Davis*. *See N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982). Moreover, the quote Ms. Weckhorst uses only supports the notion that Title IX be interpreted to the full extent of its statutory language. *Id.* at 521. There is no support for Ms. Weckhorst's desire to expand Title IX well beyond its plain language.

fraternity house or had access to the house, let alone the bedroom where J.G. allegedly raped her.

Unable to show that K-State had contemporaneous control over J.F., J.G. and the context in which the alleged rapes occurred, Ms. Weckhorst argues that K-State could have disciplined J.F. and J.G. *ex post*; that K-State has allegedly "used its disciplinary authority" to address "incidents of off-campus rape" by a "basketball player"; that K-State "promotes" fraternities and sororities; and that K-State provides oversight and support to fraternities. Opposition at 13-14.

As the analogous cases *Roe v. St. Louis University*, 746 F.3d 874 (8th Cir. 2014), *Ostrander v. Duggan*, 341 F.3d 745 (8th Cir. 2003), and *Samuelson v. Oregon State University*, 2016 WL 727162 (D. Or. 2016) show, where, as here, a plaintiff alleges deliberate indifference only to an incident of sexual harassment that she reported, a university does not have "substantial control" even if it could discipline the alleged perpetrator *ex post*. Such a notion would make an institution vicariously liable for sexual harassment unless it *remediated* the effects of harassment; this is inconsistent with *Davis*' teaching that an institution can only be liable for its own acts that *cause* discrimination. *Davis*, 526 U.S. at 648 ("The dissent consistently mischaracterizes this standard to require funding recipients to "remedy" peer harassment and to "ensure that . . . students conform their conduct to" certain rules. Title IX imposes no such requirements."). *Davis*, 526 U.S. at 648 (internal citations omitted).

Even if K-State did investigate and discipline a basketball player for off-campus sexual misconduct, this is immaterial. K-State has never contended that all off-campus conduct is beyond the reach of an institution's Title IX obligations. Indeed, K-State's *Policy* specifically addresses when and under what circumstances off-campus conduct is subject to a full investigation and, if necessary, disciplinary proceedings.

Similarly, whether or not K-State promotes fraternities as an integral part of campus life

is irrelevant. Colleges and universities promote a range of student organizations, but that does not mean that an institution has "substantial control" over what the organizations' members do in off-campus, private settings. "Promotion" is not the test. "Substantial control" is.

Finally, Ms. Weckhorst argues that K-State had substantial control over her alleged rapes because it has "authority and ability to regulate fraternity houses," and has an office of Greek Affairs that provides "substantial support and oversight services," to fraternities. Opposition at 14. Even if true, these allegations do not show "substantial control." Even if an institution has "authority and ability to regulate fraternity *houses*", this is not at all the same as the ability to regulate the conduct *of its individual members* at Pillsbury Crossing, in a private car, and in private bedrooms behind closed doors.

In any event, the supposed "control" that K-State could exercise over the situations at issue in this case would, of course, have to be realistic to be "substantial," which is what *Davis* requires. *See* www.dictionary.com (July 22, 2016) (defining "substantial" as, among others, "of real worth, value, or effect" and "tangible; real"). It is unreasonable and unrealistic to suggest that K-State can monitor, let alone regulate, unsanctioned activities that occur at every party spot in rural Riley County, Panama City Beach, or Cancun. Universities do not have worldwide jurisdiction for every sexual assault. And K-State clearly cannot monitor and regulate what students do in private cars, wherever they might be.

Further, K-State cannot simply enter private fraternity houses to monitor activity. While Fourth Amendment standards permit a university considerable leeway in entering into on-campus dorm rooms, *see Medlock v. Tr. of Indiana Univ.*, 738, F.3d 867, 872-73 (7th Cir. 2013), private fraternity houses are entitled to the same Fourth Amendment protections as any private home. *See Reardon v. Wroan*, 811 F.2d 1025, 1028 & n.2 (7th Cir. 1987) (holding that fraternity

houses are afforded the same Fourth Amendment protections as a private residence). And a public entity cannot conduct even administrative searches of a private home without permission, a warrant, or an exception to the warrant requirement. *See Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 534 (1967) (holding warrantless, administrative searches of private residences violate the Fourth Amendment); *see also Yeasin v. Univ. of Kan.*, 360 P.3d 423, 430 (Kan. Ct. App. 2015) ("It seems obvious the only environment the University can control is on campus or at University sponsored or supervised events."). Put simply, an educational institution cannot have substantial control over a situation if such control is illegal.

a. The Tenth Circuit has not eliminated or replaced the "substantial control" requirement.

Unable to satisfy the *Davis* "substantial control" requirement, Ms. Weckhorst attempts to discard *Davis* entirely by claiming an institution must investigate all reported sexual assaults or it necessarily violates Title IX. Specifically, Ms. Weckhorst claims the Tenth Circuit "specifically finds a school deliberately indifferent when, as here, it refuses to investigate reports of student-on-student sexual assault." Opposition at 6. But the primary case she cites, *Murrell v. School District No. 1*, 186 F.3d 1238 (10th Cir. 1999), says nothing of the sort. In *Murrell*, the plaintiff, a student with learning disabilities, alleged that she received sexually harassing phone calls from another student, that her mother reported the calls to the school, that the school did nothing, and that the plaintiff was *then* sexually assaulted by the perpetrator in the *physical school building* while a janitor watched. *Id.* at 1243-44. Clearly there could be no dispute that sexual harassment occurred within the school's control. *Id.* The case does not stand for the notion that an institution must investigate every reported sexual assault, regardless of its location.[9]

[9] Ms. Weckhorst also relies on *Bryant v. Independent School District No. I-38*, 334 F.3d 928 (10th Cir. 2003). Yet, *Bryant* involved allegations that African Americans were subject to racial harassment *at school* in the form of racial slurs, epithets, swastikas, and the letters "KKK" inscribed in "school furniture" and racially harassing notes placed

Ms. Weckhorst next attacks a strawman by mischaracterizing K-State's argument as that it has *no* duty to investigate *any* sexual assaults that occur off campus. Opposition at 7-10. But this is not what K-State has argued at any point in this case, nor is this position reflected in K-State's *Policy*, which specifically notes K-State may investigate "allegations of discrimination, harassment or retaliation for behavior that occurs off campus and during after-hours functions sponsored by the University," or off-campus misconduct that is "relate[d] to discrimination, harassment, or retaliation alleged on campus." Ex. A, *Policy*. Instead, K-State's position, consistent with the language in Title IX, is that its obligation is to respond to sexual misconduct that occurs within its education programs and activities. Some of those activities clearly may extend off campus—such as when a sports team travels for a game or when a department hosts a BBQ at a local park. But conduct that simply occurs between two students, off-campus, at a private event is not part of K-State's "operations" and, therefore, not part of its "education programs and activities." *See* 20 U.S.C. §§ 1681(a) & 1687; 34 C.F.R. § 106.31(a).

K-State agrees that, in *Rost*, the Tenth Circuit used the term "nexus" to identify that sort of off-campus activity that is nonetheless part of an institution's education programs and activities. *See Rost*, 511 F.3d at 1121, n.1. But as *Rost* itself demonstrates, that "nexus" requires something far more than the occurrence of sexual harassment between current students.

Indeed, *Rost* involved allegations that a female middle school student with learning disabilities was "coerced" by four middle school boys, "in a variety of private locations and social settings," including on the "school bus," to perform sex acts *Id.* at 1117. The plaintiff alleged she shared classes with the boys and was afraid to attend a particular math class with one of the perpetrators because of the off-campus sexual misconduct. *Id.* at 1118. She also alleged

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in lockers. *Id.* at 931. Thus, once again, there was no question the harassment occurred within the school's substantial control.

the boys had threatened to show classmates "naked pictures of her and spread rumors about her." *Id.* at 1117. After reporting the matter to a counselor, the plaintiff suffered an "acute psychotic episode," was hospitalized, and received private tutoring for the remainder of the school year. *Id.* When it learned of the allegations, the school referred the matter to police for a criminal investigation, but it did not conduct its own, internal investigation. *Id.* at 1118.

Just like Ms. Weckhorst, the *Rost* plaintiff brought a Title IX claim premised on the school district's alleged deliberate indifference to *her* reported sexual harassment. *Id.* at 1119. The Tenth Circuit found the school was *not* deliberately indifferent, and in so doing stated:

> The district reasonably could believe it did not have responsibility or control over the incidents, and merely because the principal thought the school could discipline students for conduct occurring outside the school grounds says nothing about whether it was appropriate given what occurred here.[1] This is not a situation where a school district learned of a problem and did nothing. . . . Rather, given a complicated situation involving the rights of many parties, including the alleged perpetrators, the school district deferred to law enforcement.

*Id.*at 1121 (internal citations omitted). Footnote one of this block quote, which contains the "nexus" language Ms. Weckhorst refers to, states, in pertinent part:

> *Davis* suggests there must be some nexus between out-of-school conduct and the school. We did not find a sufficient nexus here, where the only link to the school was an oblique and general reference to harassment or teasing on the school bus or in the halls of the school. Moreover the fact that the boys threatened to post pictures of K.C. at school does not cause the harassment to 'take place in a context subject to the school district's control' either.

Id. at 1121, n.1. Thus, whatever the Tenth Circuit meant by the term "nexus," the facts and holding of *Rost* demonstrate clearly that the nexus test is not implicated by Ms. Weckhorst's allegations, which allege *no* adverse action by J.F. and J.G. on campus and state only that she *feared* encountering them. In short, *Rost* is fatal to Ms. Weckhorst's claims.

Ms. Weckhorst argues that *Rost*'s "nexus" standard is "reinforced and supported" by ED's "guidance," which "for nearly 20 years has recognized Title IX extends to off-campus

harassment." Opposition at 8. But this statement just begs the question of whether sexual harassment occurring between students, at a *private* location off-campus, is an "education programs and activit[y]" *Rost* and the authorities discussed above hold it is not. And ED's guidance has not, and cannot, dispense with the operative language of Title IX. Because this is a private cause of action for money damages, the standards set forth in *Davis* govern the analysis.

But even if this Court were to consider ED's guidance, the same conclusion follows. Indeed, ED's most recent relevant guidance issued pursuant to notice and comment rulemaking states only that "Title IX protects students in connection with all of the academic, education, extra-curricular, athletic, and other *programs* of the school, whether they take place in facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere." 2001 Revised Sexual Harassment Guidance, at 3, available at http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf (emphasis added).

After that guidance was issued in 2004, ED investigated Oklahoma State University based on a complaint from a female student that the university was deliberately indifferent to her report that she was sexually assaulted by football players at one of the players' off-campus apartment. *See* Ex. B, Oklahoma State Findings Letter. In rejecting the complainant's allegations, ED stated, in pertinent part:

> A university does not have a duty under Title IX to address an incident of alleged harassment where the incident occurs off-campus and does not involve a program or activity of the recipient. OCR's investigation . . . substantiated that the alleged assault . . . took place off-campus in a private residence. Therefore, OSU did not have an obligation to take *any* action under Title IX.

Id. at 2 (emphasis added). Thus, as ED's own analysis of a Big XII peer institution shows, a university has no duty to investigate off-campus sexual assaults that occur outside its education programs and activities. Yet, that is precisely the duty Ms. Weckhorst seeks to impose here.

b. ED's guidance is non-binding and highly unpersuasive.

As noted throughout K-State's briefing, this is a civil case governed by *Davis*. Thus, whether K-State complied with the *regulatory* framework of Title IX is irrelevant to this case, and it is unnecessary for this Court to even consider ED's guidance on Title IX regulations. *Gebser*, 524 U.S. at 291-92; *Roe*, 746 F.3d at 883; *Doe*, 126 F. Supp. 3d at 1378. But to the extent the Court finds any guidance documents to be relevant, ED's guidance should be rejected.

While, as Ms. Weckhorst notes, ED has recently claimed in sub-regulatory "Questions and Answers on Title IX and Sexual Violence," that "activities that take place at houses of fraternities or sororities recognized by the school," are "education programs and activities," the "Questions and Answers" do not cite a single statute, regulation, or case supporting the proposition that activities at *private* fraternity houses are part of an institution's "education programs and activities." 2014 Questions and Answers on Title IX and Sexual Violence, at 29, *available at* http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf. Notably, this guidance also does not claim that fraternity members' acts occurring *outside* fraternity houses—e.g., Pillsbury Crossing—are part of an institution's "education programs and activities."

In any event, this Court can and should reject ED's overbroad conclusion for at least six reasons. *First*, the Questions and Answers were not promulgated pursuant to notice and comment rulemaking and thus are merely "guidance documents," that have no legal force in and of themselves—a fact that ED's own Assistant Secretary for Civil Rights has openly admitted. Ex. C, Lhamon Letter, at 2 ("The Department does not view such guidance to have the force and effect of law."). As a result, they are not entitled to *Chevron* deference under Tenth Circuit precedent. *See Mission Group Kan., Inc. v. Riley*, 146 F.3d 775, 781 (10th Cir. 1998); *Headrick v. Rockwell Intern.*, 24 F.3d 1272, 1282 (10th Cir. 1994).

Second, ED's recent proclamation is not even an interpretation of Title IX or its

implementing regulations, but instead an *application* of Title IX's definition of "operations" to the factual scenario of activities at fraternity houses; thus no deference is owed. *See Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 376 (1998) (no deference to agency determinations of fact made in light of regulatory interpretation); *see also People for the Ethical Treatment of Animals, Inc. v. U.S. Dep't of Agriculture*, 2016 WL 2772284, at *6 (D. Colo. 2016) ("The *Chevron* test applies to legal interpretations, not factual determinations.").[10]

Third, deference of any kind is inappropriate where the underlying statute or regulation is unambiguous or has already been definitively construed. Title IX unambiguously defines "education programs and activities," to include all the "operations," of the institution. 20 U.S.C. §§ 1681(a) & 1687; 34 C.F.R. § 106.31(a). *Davis* definitively construed the plain language of the term "operations" to include only those activities where the institution has "substantial control over both the harasser and the context in which the harassment occurs." *Davis*, 526 U.S. at 645; *see Lamb v. Thompson*, 265 F.3d 1038, 1052 (10th Cir. 2001) (holding that *Chevron* deference is unavailable when the plain language of the statute is unambiguous). ED's interpretation, which would classify all activities at fraternities as part of an institution's "operations," irrespective of a "substantial control" analysis, is clearly foreclosed.[11]

Fourth, the Questions and Answers are inconsistent with ED's previous determinations in like situations. *See Indep. Training and Apprentiship Program v. Cal. Dep't of Indus. Relations*, 730 F.3d 1024, 1035 (9th Cir. 2013) ("We decline to afford controlling deference where an

[10] If ED had made an *adjudicatory* decision that K-State has "substantial control" over its fraternities, such a finding could enjoy "substantial evidence" review in a subsequent action under the Administrative Procedures Act. *See* 5 U.S.C. § 706 (2)(E). Here, however, ED has made no such finding.

[11] Ms. Weckhorst notes that a divided panel of the Fourth Circuit in *G.G. ex rel. Grimm v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016), deferred to one of ED's "Dear Colleague Letters." But *Gloucester* concerned whether Title IX's prohibition on "sex" discrimination includes gender identity discrimination—a question the Supreme Court has never addressed. *Id.* at 720. The *Gloucester* majority determined the term "sex" in Title IX's implementing regulations was ambiguous. *Id.* at 720-21. The case has no relevance to the question presented here.

agency pulls the rug out from under litigants that have relied on a long-established, prior interpretation of a regulation . . . ."). Specifically, in 2008, ED investigated a complaint that the University of Wisconsin violated Title IX by failing to adequately investigate an alleged sexual assault. *See* Ex. D, University of Wisconsin Findings Letter. The complainant stated she went to a fraternity party where she became intoxicated and met two members of the men's crew team. *Id.* at 1-2. She alleged the males took her to another off-campus apartment where she alleged the males had sex with her while she was incapacitated. *Id.* at 2. The off-campus apartment was owned by a university employee—the boatmaster—and leased exclusively to crew team members. *Id.* ED concluded "the alleged assault did not occur in the context of an educational program or activity operated by the University." *Id.* at 13. ED's analysis in the University of Wisconsin case simply cannot be squared with its position in the "Questions and Answers." *Cf. Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (holding that when an agency changes its position without providing any justification for doing so, the regulation is arbitrary and capricious, and is not entitled to *Chevron* deference).

Fifth, even if ED's claim that activities at private fraternity residences are "operations" is an interpretation that would otherwise be accorded deference in a lawsuit premised on regulatory enforcement, agency interpretations are not afforded deference in private lawsuits premised on an implied private right of action. *See Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 42 n.27 (1977) ("Indeed, in our prior cases relating to implied causes of action [under the securities laws], the Court has understandably not invoked the 'administrative deference' rule, even when the SEC supported the result reached in a particular case."); *see also Doe*, 126 F. Supp. 3d at 1377 ("[I]t is obvious the guidance in the [Dear Colleague Letter] is broader than the scope of liability for private causes of action for money damages."). Given that Ms. Weckhorst's claim

here is based on an implied cause of action, the Court should give ED no deference.

Sixth, ED's proclamation is facially unpersuasive because it carelessly rests on the unsupported assumption that a college or university's mere "recognition" of a fraternity gives it "substantial control" over what happens at a fraternity "house." Whether or not this is true necessarily depends on factors specific to the institution. For example, some institutions—often private ones like Stanford and Dartmouth[12]—allow fraternities to reside in institution-owned buildings and thus have a degree of control over what occurs in the fraternity residence. Other institutions, like K-State, simply recognize fraternities as student organizations, but fraternity members, to the extent they choose to live communally, do so of their own accord and live at an off-campus house that the institution does not own, does not have access to, and does not control.[13] Where an institution's relationship with fraternities is like K-State's, the Eighth Circuit's closely analogous decisions in *Roe* and *Ostrander* correctly explain why there is no "substantial control." *See Roe*, 746 F.3d at 883; *Ostrander*, 341 F.3d at 750-51.

In the end, Ms. Weckhorst's Complaint simply pleads no facts demonstrating K-State "exercise[d] substantial control over both the harasser and the context" in which the harassment occurred. *Davis*, 526 U.S. at 645. She cannot cure this deficiency by mischaracterizing the *Policy*, attacking strawmen, and relying on flawed proclamations from ED that lack the force of law and that are contrary to the plain language of Title IX itself.

4. Ms. Weckhorst fails to plead facts establishing K-State's alleged deliberate indifference caused her to suffer further harassment.

In light of *Davis*' explicit holding that an institution can only be liable under Title IX

[12] *See* https://rde.stanford.edu/studenthousing/greek-houses and http://www.dartmouth.edu/stulife/greek-soc/cfs/fraternities.html.

[13] *See* http://www.k-state.edu/fsl/parents_families/faq.html. ("Chapter houses are all privately owned and are not owned or controlled by the University.").

when its own conduct causes discrimination, the Tenth Circuit has held that a plaintiff alleging deliberate indifference to reports of harassment must show that an institution's deliberate indifference in failing to respond caused *further* harassment. *Rost*, 511 F.3d at 1124-25; *Escue v.* 450 F.3d at 1155. Despite Ms. Weckhorst's protestations to the contrary, this is the law, and her allegations fail to show she suffered further harassment.

a. Ms. Weckhorst must plead the existence of further harassment.

Essentially ignoring the actual holding of *Rost*, Ms. Weckhorst hones in on a single clause from the opinion where the court stated "deliberate indifference must, at minimum, cause students to undergo harassment or make them liable or vulnerable to it." Opposition at 21. From this single clause, taken out of context, Ms. Weckhorst divines a new rule that *Davis* liability can be predicated on an institution's failure to respond to sexual harassment if the failure causes a student to be *vulnerable* to further harassment that never, in fact, actually occurs.

Such a rule cannot be squared with *Davis*' requirement that an institution's action actually cause discrimination. Indeed, the language from *Rost* merely acknowledges that an institution's deliberate indifference can "cause" further harassment in two ways—directly, such as in *Simpson v. University of Colorado*, 500 F.3d 1170 (10th Cir. 2007), where a university's policy of having football players show recruits a "good time" "natural[ly]" resulted in sexual harassment, or indirectly, as where the school district's failure to respond to LaShonda's reports of harassment emboldened G.F. and permitted him to commit additional harassment.

To be sure, *Davis* insists that a plaintiff show that actual sexual harassment occurred within the institution's "substantial control" and that the institution's deliberate indifference cause discrimination—not there possibility of discrimination. 526 U.S. at 645. This requirement is reflected in *Rost*'s rejection of the plaintiff's claim: even though she was sexually coerced by fellow students multiple times, the institution elected not to engage in an internal investigation or

discipline, the plaintiff could not perform academically and had to leave school, the court still concluded the institution was not liable. *Id.* at 1124. Indeed, Judge McConnell's dissent in *Rost* specifically criticizes the majority's holding on this basis. *See Rost*, 511 F.3d at 1131 (McConnell, J., dissenting). But of course, the majority decision in *Rost* controls, not the dissent.

Rost and *Escue*, controlling in the Tenth Circuit, are not aberrations. There are multiple examples of federal courts dismissing plaintiffs' Title IX claims for the failure to plead facts supporting "further harassment." *See, e.g.*, *Yoona Ha v. Nw. Univ.*, 2014 WL 5893292, at *2 (N.D. Ill. 2014) ("The complainant does not allege any subsequent *acts* of harassment on [the assailant's] part so there was no further action required to be taken by [the school] to avoid Title IX liability.") (emphasis added); *Thomas v. Meharry Med. Coll.*, 1 F. Supp. 3d 816, 827 (M.D. Tenn. 2014) ("[B]ecause plaintiff did not continue to experience sexual harassment once he put defendant on notice of [his harasser's] conduct, there is no basis" for liability.).

While Ms. Weckhorst cites several cases for the supposed proposition a "single sexual assault may constitute sufficiently severe sexual harassment for Title IX liability," Opposition at 22, the question of whether a discrete act of sexual harassment is sufficiently severe to create a hostile environment is an entirely separate question from whether an institution's deliberate indifference *caused* the hostile environment. In most of the cases Ms. Weckhorst cites, the plaintiff alleged she suffered *further* harassment after reporting to school officials. *Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 257 (6th Cir. 2000) (detailing plaintiff's allegations that she suffered repeated sexual harassment starting in 6th grade and continuing into high school despite her repeated reports to school officials); *Fitzgerald v. Barnstable Sch. Committee*, 504 F.3d 165, 169-70 (1st Cir. 2007) (elementary student who suffered sexual harassment on bus alleged further harassment occurred after she first reported to officials, including a forced

"unsettling" interaction between her and the perpetrator in gym class).

While *Kinsman v. Florida State University*, No. 15cv235-MW/CAS, Slip Op. (N.D. Fla. Aug. 12, 2015) (Doc. 27-2), did not allege further harassment, the district court there was bound by the Eleventh Circuit's decision in *Williams v. Board of Regents of the University System of Georgia*, 477 F.3d 1282 (11th Cir. 2007), which specifically rejected the causation requirement fundamental to *Rost* and *Escue*. *See Rost*, 511 F.3d at 1123 (distinguishing *Williams*). Thus, Tenth Circuit precedent is contrary to *Kinsman*'s holding.[14] Moreover, in *Kinsman*, the plaintiff alleged she actually encountered her alleged rapist, after the rape, by sharing a class with him—something Ms. Weckhorst does not allege. *Kinsman*, Slip. Op. at 10.

Ms. Weckhorst also cites an unpublished decision in *Spencer v. University of New Mexico Board of Regents*, Slip Op., No. 15-CV-141 MCA/SCY (Doc. 27-2) (D.N.M. Jan 11, 2016) (unpublished). But in *Spencer*, the plaintiff alleged she was subject to a "gang rape" by football players "on and near campus," after she was drugged by them in a dorm room on campus. Slip Op. at 1-3. She alleged the school then conducted a sham investigation that purposefully exonerated the football players, despite that they lied during the investigation, a video showed her in a drugged state shortly before the rape, the players' DNA was found on her, and a SANE examination found injuries consistent with rape. *Id.* at 12-13. The court held an inference could be drawn from these facts that the school's own actions contributed to the plaintiff's exclusion from its programs and activities. *Id.* Here, Ms. Weckhorst does not make any similar allegations. Her description of *Spencer* as a comparable case strains credulity.

b. Ms. Weckhorst fails to plead that K-State caused any harassing or discriminatory conduct in K-State's education programs and activities.

Failing to overcome the Tenth Circuit's and the majority view that a plaintiff must show

[14] *Kinsman* was also decided before ED admitted its "guidance" is not binding. *See* Ex. C, Lhamon Letter at 2.

the institution's alleged deliberate indifference caused further harassment, Ms. Weckhorst argues the further harassment requirement can be met "due to the hostile environment created by the continued presence of the harasser on campus." Opposition at 22. In *Rost*, there was evidence the plaintiff could not participate in a math class because she shared it with one of the boys who sexually coerced her and that she eventually had to transfer schools. *Rost*, 511 F.3d at 1117. Yet the majority held the school did not "cause K.C. to undergo harassment or make her liable or vulnerable to it" because there was no "further harassment." *Rost*, 511 F.3d at 1123.

Indeed, if a plaintiff is raped off campus and fears encountering her assailants on campus, that environment of subjective fear arises solely from the effect of the rape itself and thus from the acts of the rapists—not from any intentional conduct on the part of the institution.[15] As to her hostile environment claim, Ms. Weckhorst alleges only that she feared she "would encounter" J.F. and J.G. on campus. Complaint ¶ 36. These allegations fail to establish an objectively hostile environment in any anti-discrimination sense, and certainly not one that was *caused* by K-State's conduct, as opposed to J.F. and J.G.'s. In sum, her argument boils down to a claim that K-State violated Title IX simply because it did not discipline J.F. and J.G. as she would have wished. Complaint at ¶ 89 (alleging K-State was deliberately indifferent because it failed to "investigate or take any disciplinary measures"). As one court observed, this "flies in the face of the Supreme Court precedent established in *Davis*." *Ha*, 2014 WL 5893292, at *2.

To the extent Ms. Weckhorst argues K-State's affirmative conduct caused her to suffer further harassment, her Complaint lends no support. The only affirmative conduct on K-State's part that she complains of after reporting the alleged rapes is the alleged decision to notify J.F. and J.G. that they were accused of rape and to refer the matter to the IFC. Complaint ¶¶ 33 &

[15] There are circumstances where deliberate indifference to prior rapes could be potentially causally related to subsequent rapes, but Ms. Weckhorst has abandoned this theory of deliberate indifference. Opposition at 2, n.1.

48. But the disclosure of allegations does not constitute unwelcome conduct of a sexual nature and so cannot constitute sexual harassment as a matter of law. *Seamons v. Snow*, 84 F.3d 1226, 1232 (10th Cir. 1996) (affirming dismissal of Title IX claim where facts failed to show unwelcome conduct of a "sexual" nature). Ms. Weckhorst should not be allowed to masquerade a claim for disclosure of allegedly "private" information as a Title IX claim.[16]

In any event, J.F. and J.G. had a right to access such information because any documents describing Ms. Weckhorst's allegations against them are joint education records under the Family Educational Rights and Privacy Act ("FERPA"). *See* 34 C.F.R. §§ 99.3, 99.10(a), and 99.12(a). It cannot constitute deliberate indifference to orally provide information to students who have a right to the same information in written form. Further, J.F. and J.G. had a right to the information as a matter of basic due process. *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (irreducible minimum of due process is to "be given notice of the case against him and an opportunity to meet it"). In addition, disclosure to the IFC was specifically authorized by FERPA's exception for health and safety emergencies. 34 C.F.R. § 99.31(a)(10). K-State cannot have acted improperly by complying with FERPA and the Constitution.

B. Ms. Weckhorst Fails To State A Claim under the KCPA

1. Ms. Weckhorst fails to plead her KCPA claim with particularity.

Ms. Weckhorst does not dispute that she is required to plead her KCPA claim with particularity. *See* Opposition at 26. She argues her Complaint "identifies specific misrepresentations about the subject: publications stating that Greek life was safe," Opposition at 27, but her Complaint merely quotes statements that Ms. Weckhorst attributes to K-State, without identifying what is false about them. *See, e.g.*, Complaint ¶¶ 57-59. Indeed, Paragraph

[16] Ms. Weckhorst herself disclosed her allegations of rape to public law enforcement agencies before K-State allegedly notified J.F., J.G, and the IFC. *See* Complaint ¶ 32. Thus, any argument on her part that K-State disclosed private information fails as a matter of law.

90 of her Complaint appears to state that the information K-State "post[ed]" about fraternities was technically accurate, albeit only "positive," and that Ms. Weckhorst thinks K-State should *also* have posted information "regarding risks." *Id.* ¶ 90. Ms. Weckhorst must plead *particular* statements that are alleged to be false and explain what specifically about those statements is false. *See Jamieson v. Vatterott Educ. Ctr., Inc.*, 473 F. Supp. 2d 1153, 1157 (D. Kan. 2007) ("Plaintiffs only identify the subject of the misrepresentation without specifically identifying what false representation was made about the subject."). She fails to do so.

In addition, Ms. Weckhorst fails to plead the timing of the statements. While she claims she pled the "approximate dates" of the statements, the paragraphs she cites refer to approximate dates that she had private conversations with K-State officials *after* the alleged rapes. *See* Complaint ¶¶ 22 and 46. These paragraphs do not plead that false representations were made to Ms. Weckhorst on these dates. *Id.* And it is not enough for Ms. Weckhorst to claim that the "false representations continued even after she became a K-State student," Opposition at 27, because she has been a K-State student since 2014, leaving a potential two year period when the statements could have been made. *See Linwood Group, LLC v. LP Linwood Village Apartments, LLC*, 2011 WL 3625000, at *2 (D. Kan. 2011) (finding plaintiff failed to comply with Rule 9(b) where plaintiff alleged fraud occurred over an 18 month period and stating "[f]ailing to identity a specific time period will not suffice under Rule 9(b)").

Ms. Weckhort's failure to plead "who" made the alleged false statements also cannot be excused by the assertion that K-State "controls its websites and printed materials." Opposition at 27. *United States ex rel. Hafter D.O. v. Spectrum Emergency Care, Inc.* 9 F. Supp. 2d 1273 (D. Kan. 1998), is a False Claims Act case where the court held a relator was not required to plead the particular contents of allegedly false payment claims a medical provider submitted to

Medicare because the documents were in the provider's control. *Id.* at 1273. But here, Ms. Weckhorst claims K-State—a *public* entity whose records are subject to open-records requests—made *public* false statements. Indeed, in cases since *Hafter*, this Court has repeatedly refused to excuse a plaintiff's failure to plead what specific persons employed by a corporate entity made allegedly false statements. *See, e.g.*, *Jamieson*, 473 F. Supp. 2d at 1158 (rejecting as insufficient pleading that attributed a college's alleged false statements merely to "Vatterott agents and employees of Vatterott"); *Balfour v. Medicalodges, Inc.*, 2006 WL 314521, at *5 (D. Kan. 2006) (dismissing claim where plaintiff failed to identify the "specific individual" at the defendant who "made false statements when defendant hired him").

2. Ms. Weckhorst fails to plead she was "aggrieved".

Separate and apart from her failure to satisfy Rule 9(b) in reference to the false misrepresentations, Ms. Weckhorst has failed to plead facts establishing she was "aggrieved."

Ms. Weckhorst cites *Griffin v. Security Pacific Automotive Financial Services Corporation*, 33 F. Supp. 2d 926 (D. Kan. 1998), for the notion she need only allege that she was "aggrieved" in conclusory fashion. Opposition at 28. Yet, *Griffin* did not consider the adequacy of the plaintiff's pleading at all. Instead, *Griffin* resolved a motion for summary judgment, where the adequacy of pleading had necessarily already been conceded. *Id.* at 927. In any event, the Supreme Court has since held a party cannot satisfy the lesser notice pleading standard by offering "labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Ms. Weckhorst also suggests that, because she has pled specific damages she claims to have suffered, she has necessarily pled that she was "aggrieved." Opposition at 28. But Ms. Weckhorst must plead *causation* as between alleged misrepresentation and damages to show she was aggrieved. *Finstad v. Washburn University of Topeka*, 845 P.2d 685, 691 (Kan. 1993); *see*

also Benedict v. Altria Group, Inc., 241 F.R.D. 668, 678 (D. Kan. 2007) (citing *Finstad* for the proposition that the KCPA requires a plaintiff to show a "causal connection"). Ms. Weckhorst does not plead causation at all; therefore, her claim fails.

C. Ms. Weckhorst Fails To State A Claim of Negligence

1. K-State did not have a duty to protect Ms. Weckhorst from the criminal acts of third parties.

Nero v. Kansas State University, 861 P.2d 768 (Kan. 1993), and *Gragg v. Wichita State University*, 934 P.2d 121 (Kan. 1997), foreclose the notion that an institution has a "special relationship" with students and guests requiring it to protect them from third-party criminal acts. Faced with these holdings, Ms. Weckhorst attempts to salvage her negligence claim based solely on the argument that K-State "assumed" a "legal duty" under § 324A of the Restatement (Second) of Torts to protect her from fraternity members because she allegedly pled facts "showing K-State controlled its fraternity system." Opposition at 28.

Notably, Ms. Weckhorst cites no case holding that a university can be sued in negligence under § 324A based on its alleged control over fraternities. Indeed, the various § 324A cases Ms. Weckhorst cites involve claims arising from undertakings to provide professional services. Opposition at 28-29. That Kansas courts would recognize such a novel theory after rejecting the more straightforward "special relationship" theory flies in the face of *Nero* and *Gragg*.

In any event, under § 324A, "[o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person for his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care . . . ." Restatement (Second) of Torts, § 324A. Kansas courts have construed this language to mean that "the extent of the undertaking should define the scope of the duty." *See McGree v. Chalfant*, 806 P.2d 980, 986 (Kan. 1991). Thus, for example,

if an individual undertakes to escort a drunk person to his car, but does not undertake to see him safely home, the individual cannot be liable in negligence if the drunk person decides to drive home drunk, causes a crash, and injures a third party. *Id.* at 986.

In this respect, Ms. Weckhorst's own Complaint alleges that K-State "delegates management of these exceptionally dangerous entities to untrained students," that K-State's event registration form "explicitly leaves the chapter with 'full responsibility' for the enforcement of [laws]," that K-State's police "do not have the same access to the fraternity houses as to other student housing," that K-State "allows fraternities free reign," and that K-State "refuse[s] to respond to fraternity sexual violence." Complaint ¶¶ 64, 66, 70, 74 and p. 17.

Far from pleading that K-State has assumed an undertaking to regulate the off-campus conduct of individual fraternity members (let alone their alleged criminal, sexual conduct), Ms. Weckhorst's Complaint pleads that K-State has *disclaimed* such an undertaking, and, in that respect, pleads her out of court. *See Kaufman v. Univ. of Colo. at Boulder*, 2015 WL 7014440, at *6 (D. Colo. 2015) ("In brief, [plaintiff] has pleaded himself out of court by alleging facts which show he has no claim.") (internal quotations omitted).

Ms. Weckhorst also appears to argue that K-State assumed a duty to speak truthfully about fraternities by "advertis[ing] and promoting its fraternity system," and therefore undertook to do so with "reasonable care." Opposition at 29. This is an entirely new theory, not pled in the Complaint. *See, e.g.*, *Car Carriers, Inc. v. Ford Motor, Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) ("However, it is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss."). Moreover, § 324A speaks to a duty that a party assumes when it "undertakes, gratuitously or for consideration, to render *services* to another." Restatement (Second) of Torts § 324A. Ms. Weckhorst cites no case holding that promotion constitutes the

rendering of a "service[] to another." Restatement (Second) of Torts § 324A.

Finally, to the extent Ms. Weckhorst alleges the duty is one to exercise reasonable care in speaking about fraternities, then Ms. Weckhorst must plead facts supporting that she *relied* on the alleged misrepresentations and suffered injury. *Id.* ("the harm is suffered because of reliance of the other or the third person upon the undertaking"). As discussed *supra*, Ms. Weckhorst does not plead that she read any statements about the safety of fraternities prior to her alleged injuries, let alone that she relied on them. Thus, her claim for negligent misrepresentation fails.

2. K-State is immune from Ms. Weckhorst's negligence claim.

Ms. Weckhorst appears to concede the KTCA's "enforcement of the law" exception at K.S.A. § 75-6104(c) bars her negligence claim to the extent it is predicated on K-State's alleged failure to enforce Title IX obligations.

Ms. Weckhorst argues the "discretionary function" exception of the KTCA does not apply to bar her § 324A claim because K-State had a "common law" duty under § 324A to protect Ms. Weckhorst from J.F. and J.G. Opposition at 30 (citing *Nero*). But post-*Nero* cases have clarified that discretionary function immunity remains available unless there is a *mandatory* duty to act in a specific way—a general common law duty to exercise reasonable care does not defeat immunity. *See Thomas v. County Com'rs of Shawnee County*, 262 P.3d 336, 339, Syllabus ¶ 5 (Kan. 2011) ("The existence of a general duty of care is distinct from a mandatory duty or guideline that eliminates the possibility of immunity under the exception.").

A "mandatory" duty is one that "leaves little to no room for individual decision making, exercise of judgment, or use of skill, and qualifies a defendant's actions as ministerial rather than discretionary." *Id.* at 354. Put simply, there is no Kansas law, statutory or otherwise, that governs how institutions like K-State should regulate, or not regulate, fraternities, much less how a public university should respond to alleged acts of criminal misconduct committed against

students outside of K-State's substantial control.[17] To the contrary, many cases hold that an institution's decisions regarding student conduct and student discipline are inherently *discretionary*, not mandatory. *See* Opening Brief (Doc. 13) at 29. Therefore, the discretionary function exception applies to bar Ms. Weckhorst's negligence claim.

D. This Court Should Not Give Ms. Weckhorst Leave To Amend

Hedging her bets, Ms. Weckhorst asks that this Court give her leave to amend in the event the Court finds her Complaint fails to state a claim. *See* Opposition at 28. Of course, she could have sought leave to amend after she reviewed K-State's motion pointing out the deficiencies, but she elected not to. Local Rule 15.1 is clear: a party wishing to amend her complaint must file a motion setting forth a "concise statement of the amendment or leave sought," and attaching the "proposed pleading or other document." *See* Local Rule 15.1(a). By circumventing the rule and making a cursory request in a brief, Ms. Weckhorst leaves the Court and K-State without any ability to evaluate, or respond to, the request. This Court has typically denied cursory requests for leave to amend made in briefs, and it should deny Ms. Weckhorst's similar request here. *See, e.g., McCoy v. City of Independence, Kan.*, 2013 WL 424858, at *1 n.3 (D. Kan. 2013); *Hammer v. Sam's East, Inc.*, 2013 WL 3756573, at *3 (D. Kan. 2013).

IV. CONCLUSION

Ms. Weckhorst inappropriately seeks to hold K-State liable for events that occurred off campus, in a private setting over which K-State lacked substantial control and based on alleged misrepresentations about safety that she apparently did not even read until after the alleged rapes. As such, her Complaint fails to state viable claims and this Court should dismiss all counts.

[17] To the extent Ms. Wechorst claims Title IX and its regulations provide such mandatory guidelines, she is wrong. *See Davis*, 526 U.S. at 647 ("Likewise, the dissent erroneously imagines that victims of peer harassment now have a Title IX right to make particular remedial demands. In fact, as we have previously noted, courts should refrain from second-guessing the disciplinary decisions made by school administrators.") (internal citations omitted). Indeed, *Yeasin*, rejected the notion Title IX creates a mandatory duty that has legal effect regardless of what an institution's policies actual say. 360 P.3d at 430.

Date: July 25, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2016, I filed the foregoing document via the Court's ECF system, which will cause a true and correct copy of the same to be served electronically on all ECF-registered counsel of record.

/s/ Derek T. Teeter
Attorney for Defendant

Exhibit A

Policies

Policy Prohibiting Discrimination, Harassment, Sexual Violence, and Stalkir Reviewing Complaints

Chapter 3010

Revised September 9, 2014

.010 Affirmative Action Policy

Kansas State University has a longstanding policy of non-discrimination in matters of employment. Our Affirmative commitment of the University to the continuing implementation of that policy.

The policy of Kansas State University is to assure equal opportunity to qualified individuals regardless of their race, sexual orientation, gender identity, religion, age, ancestry, disability, genetic information, military status, or veterar realization of equal employment opportunity for minorities and women through a comprehensive affirmative action will assure equal opportunity for persons with disabilities, disabled veterans, and Vietnam Era veterans regarding pc

The affirmative action policy covers all aspects of the employment relationship - including recruitment, hiring, assig compensation, selection for training, and termination. The policy applies to all units and governs employment of all employees, of Kansas State University.

Diversity has a value to be weighed in the hiring process. It is not enough for us to say that we will not discriminate to take positive action to ensure the full realization of equal opportunity for all who work or seek to work for Kansas special efforts to identify promising minority persons and women for positions in all areas and at all levels in which t under represented relative to their availability. Then, we must base our selections on the candidates' qualifications t positions and the University's affirmative action goals.

The administration of the University is committed to and reaffirms its support of the principle of equal employment within the University to conduct its recruitment and employment practices in conformity with this principle and in ac Plan. Responsibility for monitoring the implementation of this policy is delegated to the Office of Institutional Equity

.020 Policy Prohibiting Discrimination, Harassment, Sexual Violence, and Stalking

Kansas State University will maintain academic, housing, and work environments that are free of discrimination, ha harassment and sexual violence), retaliation, and stalking. Discrimination based on race, color,ethnic or national ori identity, religion, age, ancestry, disability, genetic information, military status, or veteran status is prohibited. Retal or objecting to discrimination or harassment is a violation of this Policy, whether or not discrimination or harassmer for, and will not be used to, infringe on academic freedom or to censor or punish students, faculty, employees, or st Amendment rights.

This Policy covers employees, students, applicants for employment or admission, contractors, vendors, visitors, gue sponsored programs or activities. The academic or work relationship sometimes extends beyond the University cam class hours. Therefore, in some situations, this Policy may apply to allegations of discrimination, harassment or reta campus or during after-hours functions sponsored by the University. Off campus occurrences that are not related t activities are investigated under this Policy only if those occurrences relate to discrimination, harassment, or retaliat

Supervisors and administrators must report complaints to the Office of Institutional Equity ("OIE") immediately upo after regular business hours), keep complaints confidential, protect the privacy of all parties involved in a complaint discrimination, harassment or retaliation; failure to do so is a violation of this Policy. Complaints must be filed withi

Marketing (/policies/ppm/3300/3320.htr

3350 Advertising Policy (/policies/ppm/3300/3350.htr

3400 Computing and Information Technology (/policies/ppm/3400/)

3700 Public Safety (/policies/ppm/3700/)

3900 Continuing Education (/policies/ppm/3900/)

4000 Employment General Policies and Procedures (/policies/ppm/4000/)

6000 General Accounting Procedures (/policies/ppm/6000/)

7000 Sponsored Research Projects (/policies/ppm/7000/)

7800 Division of Facilities (/policies/ppm/7800/)

8100 Alumni Association (/policies/ppm/8100/inde

8210 Foundation Funds - General Information (/policies/ppm/8200/)

8500 Student Life (/policies/ppm/8500/)

Questions relating to the information in each chapter of the Policies and Procedures Manual should be directed to the office issuing the chapter.

That information is usually located at the end of each chapter.

For policy update questions, please contact policy@ksu.edu (mailto:policy@ksu.edu).

calendar days of the alleged discrimination, harassment, or retaliation. Complaints are confidential and will not be d have a need to know – this requirement applies to complainants, respondents, witnesses, and any others involved v cannot guarantee absolute confidentiality, although the University will protect the privacy of all parties to the extent preventing future acts of discrimination, harassment or retaliation, providing a remedy to persons injured, allowing it warrants an administrative review, and complying with existing law. Complaint information may be disclosed to st agencies for investigations and during litigation. Where the University has knowledge of alleged behavior which, if t alleged victim does not file a complaint, the University may conduct an administrative review if it has reason to beli report of discrimination, harassment, or retaliation.

An impartial administrative review team ("ART") consisting of a representative of the Office of Institutional Equity a Administrators will evaluate each complaint and, if warranted, conduct a thorough and objective administrative revi annual training regarding this Policy and how to conduct investigations under it. If the ART decides to conduct an a complainant and respondent of the content of the complaint, allow each of them a full opportunity to be heard, and progress of the review. Complainants, respondents, and witnesses are generally not permitted to have an individual the ART. If sexual violence or another crime addressed by this policy is alleged, then the complainant and responde related meeting or proceeding by an advisor of their choice. The complainant and respondent shall provide prior not and whether their advisor is an attorney. Advisors (including attorneys) are not permitted to participate during the their advisee. An advisor who disrupts the process (as determined by the ART) may be excluded from the interview

The ART shall perform a prompt, fair, and impartial investigation. The time required for reviews will vary; however, 60 calendar days. At any point during the administrative review, the ART may refer either or both parties to the om Employee Relations, University Counseling Services, the Office of Student Life, Human Capital Services, the Center (CARE), dean or department head, Mediation Services, the human systems consultant, or other persons deemed ap

Possible outcome of the review is either: (1) a finding of no violation of this Policy; or (2) a finding of violation of th report of its findings and recommendations to the complainant, respondent, and the Deciding Administrator. When a include instructions to the Deciding Administrator to provide OIE with a written report concerning implementation o

Persons who violate this Policy are subject to sanctions, up to and including exclusion from the campus, dismissal fr the University. Remedial actions will be taken to restore any losses suffered as a result of a violation of this Policy. but are not limited to, reevaluation of a grade, an evaluation completed by someone other than the respondent, rec employment, placement in a position, back pay and lost benefits, withdrawal of a disciplinary action, alteration of cl With respect to alleged sexual violence, the University offers reasonably available changes to academic, living, trans requested by the complainant, regardless of whether the complainant chooses to report the crime to police or the a days before reporting.

All persons covered by this Policy are required to fully cooperate in administrative reviews and to provide informatic student files and records, and other materials necessary to complete a thorough review of complaints. Any person v who knowingly provides false or misleading information, or who violates the confidentiality provisions of this Policy, action will be taken against an individual who makes a good faith complaint, even if the allegations are not substant

The University will provide education to promote the awareness of rape, acquaintance rape, domestic violence, dati stalking to incoming students and new employees, as well as ongoing campus-wide prevention and awareness camp

This Policy shall supersede any other University policies or procedures that conflict with it.

.030 Definitions

A. Discrimination: In this Policy, discrimination is treating an individual adversely in employment, housing, or aca color,ethnic or national origin, sex, sexual orientation, gender identity, religion, age, ancestry, disability, genetic inf status without a legitimate, nondiscriminatory reason for the treatment, or maintaining seemingly neutral policies, p disparate impact on employment, on-campus housing, or academic opportunities of members of protected groups w reason.

B. Harassment: In this Policy, the term "harassment" can have two different definitions, depending on where the context. Harassment meeting either of these definitions is considered discrimination.

1. In the work, on-campus housing, or other non-academic environments, "harassment" is:

   Conduct toward a person or persons based on race, color,ethnic or national origin, sex, sexual orienta ancestry, disability, genetic information, military status, or veteran status that:

   (1) has the purpose or effect of:

   (a) creating an intimidating, hostile, or offensive work environment or on-campus housing environment for the person(s); or

   (b) unreasonably interfering with the work, or on-campus housing, of the person(s); and

   (2) is sufficiently severe or pervasive that it alters the terms, conditions, or privileges of a person's employment, use of on-campus housing, academic opportunities or participation in university-sponsored activities.

2. In the academic environment, "harassment" is:

Conduct toward a person or persons based on race, color,ethnic or national origin, sex, sexual orientation, gender i
disability, genetic information, military status, or veteran status that:

(1) has the purpose and effect of:

(a) creating an intimidating, hostile, or offensive educational environment for the person(s); or

(b) unreasonably interfering with the academic performance or participation in any university-sponsored activity of the person; or

(c) threatening the academic opportunities of the person; and

(2) is sufficiently severe or pervasive that it alters the terms, conditions, or privileges of the person's academic opportunities or participation in university-sponsored activities.

Whether conduct is sufficient to constitute "harassment" is evaluated under the totality of the circumstances, includ
severity, whether it is physically threatening or humiliating, or merely an offensive utterance. These factors are eva
objective viewpoints, considering not only effect that conduct actually had on the person, but also the impact it wou
person in the same situation. The conduct must subjectively and objectively meet the definition to be "harassment"
incidents, even where each would not, on its own, constitute harassment, may collectively constitute harassment ur

Depending on the circumstances, some occurrences may require evaluation under both definitions.

C. Sexual Harassment: In this Policy, the term "sexual harassment" is a type of harassment that involves unwelc
sexual favors, disparagement of members of one sex, or other conduct of a sexual nature when:

(1) (a) submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of an individual's employment, education, on-campus housing, or participation in a university-sponsored activity or program; or

(b) submission to or rejection of such conduct is used as the basis for or as a factor in decisions affecting that individual's employment, education, on-campus housing, or participation in a university-sponsored activity or program; or

(c) such conduct meets either "harassment" definition in B., above; and

(2) the conduct is sufficiently severe or pervasive that it alters the terms, conditions, or privileges of the person's employment, use of on-campus housing, academic opportunities, or participation in university-sponsored activities or programs.

Sexual harassment may occur between persons of the same or opposite sex, and either as single or repeated incide
constitute "sexual harassment" is evaluated under the totality of the circumstances, including the frequency of the
physically threatening or humiliating, or merely an offensive utterance. These factors are evaluated from both subj
considering not only effect that conduct actually had on the person, but also the impact it would likely have had on
situation. The conduct must subjectively and objectively meet this definition to be "sexual harassment" under this

Sexual harassment meeting this definition is considered discrimination.

D. Sexual Violence: In this Policy, the term "sexual violence" refers to a physical act perpetrated against a perso
incapacitated that he or she is incapable of giving consent due to the use of drugs or alcohol, or where a person is i
intellectual or other disability. A number of different acts fall into the category of sexual violence, including but not
sexual battery, domestic violence, and dating violence. Use of alcohol or other drugs by a perpetrator or victim doe

Criminal offenses and statutory references include, but are not limited to:

Rape – K.S.A. 21-5503
(http://www.kslegislature.org/li_2012/b2011_12/statute/021_000_0000_chapter/021_055_0000_article/021_055_

Sexual Battery – K.S.A. 21-5505
(http://www.kslegislature.org/li_2012/b2011_12/statute/021_000_0000_chapter/021_055_0000_article/021_055_

Domestic Battery – K.S.A. 21-5414
(http://www.kslegislature.org/li_2012/b2011_12/statute/021_000_0000_chapter/021_054_0000_article/021_054_

Sexual Exploitation of a Child – K.S.A. 21-5510
(http://www.kslegislature.org/li_2012/b2011_12/statute/021_000_0000_chapter/021_055_0000_article/021_055_

Unlawful Voluntary Sexual Relations – K.S.A. 21-5507
(http://www.kslegislature.org/li_2012/b2011_12/statute/021_000_0000_chapter/021_055_0000_article/021_055_

Indecent Liberties with a Child – K.S.A. 21-5506
(http://www.kslegislature.org/li_2012/b2011_12/statute/021_000_0000_chapter/021_055_0000_article/021_055_

Lewd and Lascivious Behavior – K.S.A. 21-5513
(http://www.kslegislature.org/li_2012/b2011_12/statute/021_000_0000_chapter/021_055_0000_article/021_055_

Criminal Sodomy – K.S.A. 21-5504
(http://www.kslegislature.org/li_2012/b2011_12/statute/021_000_0000_chapter/021_055_0000_article/021_055_

Incest – K.S.A. 21-5604
(http://www.kslegislature.org/li_2012/b2011_12/statute/021_000_0000_chapter/021_056_0000_article/021_056_

Other definitions include:

Domestic Violence – K.S.A. 21-5111(i)
(http://www.kslegislature.org/li_2012/b2011_12/statute/021_000_0000_chapter/021_051_0000_article/021_051_

Dating Violence – A type of domestic violence where the perpetrator is or has been involved in a social relationship
K.S.A. 21-5111(i)(1)
(http://www.kslegislature.org/li_2012/b2011_12/statute/021_000_0000_chapter/021_051_0000_article/021_051_

Sexual Intercourse – K.S.A. 21-5501
(http://www.kslegislature.org/li_2012/b2011_12/statute/021_000_0000_chapter/021_055_0000_article/021_055_

Consent – The determination regarding the presence or absence of consent shall be based upon the totality of circu
including the context in which the alleged incident(s) occurred. If an individual can comprehend the sexual nature
he or she has the right to refuse to participate, and possesses a rudimentary grasp of the possible results arising fr
has the capacity to consent. A person may be incapable of giving consent because of mental deficiency or disease,
alcoholic liquor, narcotic, drug or other substance, which condition was known by the offender or was reasonably ap
not necessarily be inferred from silence or passivity alone.

Sexual violence is considered sexual harassment, and is therefore considered to be discrimination.

E. Stalking: In this Policy, stalking is any conduct that meets the elements of K.S.A. 21-5427(a)(1)
(http://www.kslegislature.org/li_2012/b2011_12/statute/021_000_0000_chapter/021_054_0000_article/021_054_
and/or K.S.A. 60-31a02
(http://www.kslegislature.org/li_2012/b2011_12/statute/060_000_0000_chapter/060_031a_0000_article/060_031

F. Retaliation: In this Policy, retaliation is any attempted or completed adverse action taken without a legitimate
he or she has filed a complaint under this Policy, opposed a policy or practice the individual believed was discrimina
other protected activity such as making a request for a reasonable accommodation, or participated in the investigat
this Policy.

G. Responsible Administrator: In this Policy, the Responsible Administrator is typically the University official w
recommendations of an ART, and is usually the direct supervisor of a respondent who is a University employee. In
student as respondent, a representative of the Office of Student Life or the Graduate School, respectively, is the Re
involving a student or graduate student as complainant, a representative of the Office of Student Life or the Gradua
additional Responsible Administrator, if requested by OIE.

H. Deciding Administrator: The Deciding Administrator is always the University official with authority to implem
and is usually the direct supervisor of a respondent who is an unclassified University employee. For University Supp
Deciding Administrator is the ***Vice President for Human Capital ("VPHC")***. In cases involving an undergraduate
of the Office of Student Life is the Deciding Administrator. In cases involving a graduate student as respondent, the
Deciding Administrator. The Deciding Administrator will often serve as the Responsible Administrator for the same
does not serve as the Appeal Administrator regarding the same complaint, except in the case of USS employees as

I. Appeal Administrator: The Appeal Administrator is the direct supervisor of the Deciding Administrator, except
respondents. For USS employees ***when the sanction does not include suspension without pay, demotion or***
Committee evaluates an appeal based upon the same standards required of Appeal Administrators, ***makes a writt***
and the VPHC makes the final decision. For USS employees when the sanction includes suspension with
the USS Appeal Board evaluates an appeal based upon the same standards required of Appeal Administ
recommendation to the VPHC, and the VPHC makes the final decision.

If the University President is the Deciding Administrator, then there is no appeal available.

.040 Procedure for Reviewing Complaints

Step 1-The Initial Report. Any person covered by this Policy may either (a) report the complaint to the head of th
conduct occurred, but if that person's conduct is the reason for the complaint, then report the conduct to the next h
report the complaint to the Office of Institutional Equity. Students and graduate students respectively may also rep
Student Life or to the Graduate School. Persons may submit complaints regarding sexual violence ***or stalking*** to a

It is important for all persons to preserve any relevant evidence related to the complaint.

The initial report may be oral or written. The initial report should include as much information as possible regarding
including but not limited to: the dates and locations of the conduct; the effect the conduct has had on employment,
complainant's ability to participate in university programs or activities; and the name and title of the person alleged

In the event of a sexual violence ***or stalking*** complaint, a CARE coordinator should interview the complainant, with ***coordinator may, but*** is ***not*** obligated to ***refer a complaint to OIE or other appropriate University body***. ***If this Policy, the CARE coordinator will explain the OIE investigative process to the complaintant and ask would prefer keeping the complaint undisclosed by not referring it for investigation. The University enc whenever this Policy may have been violated, so that it can investigate. Regardless of whether a compl CARE will provide support and advocacy services to the extent feasible. Although this Policy protects co knowledge of complaints to those persons with a need to know, the University cannot ensure complete investigation begins.***

If a complainant believes that criminal conduct has occurred, then the complainant should make a criminal complair should also encourage the complainant to file a complaint with the police and will provide assistance in doing so if a advise the complainant that he/she may decline to notify the police. The criminal justice system and this Policy are reports must be made under both procedures if a complainant wishes that both go forward. Complainants may alsc order under the Protection from Stalking Act, K.S.A. 60-31a01, et seq. KSU police will enforce such orders on camp

If OIE determines either that it has no jurisdiction to investigate a complaint made under this Policy, or that the alle constitute a violation of this Policy, then OIE will notify the complainant that the complaint does not warrant further will explain OIE's decision and refer the complainant to the appropriate University office, if any. This determination

Step 2-Formation of the Administrative Review Team: The administrator who receives the report will inform tl report. Likewise, the Office of Institutional Equity staff member who receives the report will inform the head of the person's conduct is the reason for the complaint. The Office of Institutional Equity will then ask the president, provc president, an associate vice president or a dean to designate the Responsible Administrator to serve on the ART. Th Responsible Administrator(s) become the ART for the complaint.

Step 3- Administrative Review Team's Initial Evaluation of the Complaint: The ART will interview the compl report so that the ART members hear the complaint and get sufficient information to decide how to process the com alleged conduct, even if true, would not constitute a violation of this Policy, then the ART will notify the complainant further review under this Policy. That notice will explain the ART's decision and refer the complainant to the appropr determination by the ART is not subject to appeal.

A complainant's failure or refusal to participate in the ART process may prevent the ART from investigating the alleg the ART will proceed with an investigation if a report alleges conduct that would constitute a violation of this Policy.

Step 4-Written Complaint: If the complaint warrants further review, the ART will accept a written complaint, or w information obtained during the interview. In the latter case, the ART will ask the complainant to read and, if neces accuracy and sign the complaint.

Step 5-Investigation: With or without a signed complaint, the ART will:

1. Meet with the respondent to provide a copy of the complaint, explain procedures, caution against retaliation, a or written response within ten (10) calendar days, and inform the respondent that the review will proceed with
2. Receive, clarify and evaluate the respondent's response to the complaint, if a response is made; and
3. Interview any persons with specific knowledge of the alleged incident(s) and review relevant policies, procedur

Step 6-Determination and Written Report: The ART will consider all of the information it gathered and decide w this Policy, based on the preponderance of the evidence. If the ART determines that the respondent did not violate complainant, the respondent, and the Deciding Administrator a written report that describes the review, makes find recommendations, and describes what the complainant must to do to file an appeal. If the ART determines that the prepare a written report to the Deciding Administrator that describes the review, makes findings of fact, and provid (and, if appropriate, remedial actions, referrals, and follow-up). The complainant and the respondent shall be provi the same time as the Deciding Administrator.

Step 7-Appeal if No Violation Found: If the ART determines that there was no violation of this Policy, then the the Deciding Administrator. That appeal must be submitted in writing to the Deciding Administrator within ten (10) ART's determination letter was issued. The appeal must state every ground on which the appeal is based.

On appeal, the Deciding Administrator does not conduct a new investigation. The Deciding Administrator may only presented, whether the ART's determination was "clearly erroneous" (i.e., plainly in error). The Deciding Administra credibility decisions (e.g., who is telling the truth). If an error(s) was made that would not have changed the deter that error must be disregarded. In the event that a Deciding Administrator decides that an ART finding is clearly er shall refer the matter back to the ART for further investigation and shall provide the ART with a specific written basi determination.

If the Deciding Administrator determines that the ART's findings are not clearly erroneous, then the Deciding Admin not subject to further review within the University.

The Deciding Administrator should rule on an appeal in a timely fashion, preferably within thirty (30) calendar days should be made in writing, with copies to the complainant, respondent, OIE, and the Office of General Counsel.

Step 8-Decision on Sanction if Violation Found: If the ART determines that this Policy was violated, then the A regarding sanctions. The Deciding Administrator decides the sanctions. Within ten (10) calendar days from the dat issued, the complainant and respondent may submit written comments to the Deciding Administrator regarding the should be made in a timely fashion after the expiration of the ten (10) day comment period, and preferably within t of the ART's report. Once sanctions are decided, they shall be implemented immediately, regardless of whether the appeal.

If the Deciding Administrator determines that the ART's violation determination was clearly erroneous, as described Administrator shall remand the matter back to the ART for further investigation and shall provide the ART with a sp erroneous" determination. The process then returns to Step 5. A decision to remand to the ART is not subject to a

Decisions should be made in writing, with copies to the complainant, respondent, OIE, and the Office of General Cou sanctions should identify the appropriate Appeal Administrator and the ten-day period in which an appeal must be s

Step 9-Appeal of a Sanction: If the Deciding Administrator imposes a sanction, then a written appeal may be su within ten (10) calendar days from the date of the Deciding Administrator's written decision.

A respondent's appeal must be in writing and the appeal must state every ground on which the appeal is based. A writing, must state every ground on which the appeal is based, and may appeal only the severity of the sanction.

The appeal does not involve a new investigation. The appeal may only decide, based upon the written information Administrator's basis for imposing sanctions, and/or the sanctions themselves, were "arbitrary and capricious." This reasonable basis, under circumstances presented, to uphold the sanctions imposed by the Deciding Administrator. all credibility decisions (e.g., who is telling the truth). A Deciding Administrator who follows the ART's recommende have acted arbitrarily or capriciously, unless conclusively demonstrated otherwise.

If the Appeal Administrator determines that the ART's violation determination was arbitrary and capricious, then the the matter back to the ART for further investigation and shall provide the ART with a specific written basis for the "a determination. The process then returns to Step 5. A decision to remand to the ART is not subject to appeal.

If the Appeal Administrator determines that the Deciding Administrator's sanctions are arbitrary and capricious, the the matter back to the Deciding Administrator for further review and shall provide the Deciding Administrator with a "arbitrary and capricious" determination. The process then returns to Step 8. A decision to remand to the Decidinç appeal.

The Appeal Administrator should rule on an appeal in a timely fashion, preferably within thirty (30) calendar days a should be made in writing, with copies to the complainant, respondent, OIE, and the Office of General Counsel. A r affirms the Deciding Administrator's decision is not subject to further review within the University.

.045 Procedure for Reviewing Certain Domestic Violence Complaints in Student Hou

For complaints of domestic violence that involve roommates who have not been in a sexual relationship romantic nature, and that allegedly occurred in non-family, University-operated student housing, then t conducted by Housing & Dining under its agreement termination procedures and applying the definition & Dining determines that there has been a violation of this Policy, then it shall refer the matter to the S take appropriate action under its agreement termination procedures.

Complaints of domestic violence that do not meet these specific circumstances shall be reviewed under Complaints.

.050 Additional Resources

Information for students and employees about counseling, health, mental health, victim advocacy, legal assistance, sexual violence victims both on-campus and in the community can be found at: http://www.k-state.edu/affact/reso (http://www.k-state.edu/oie/resolution/resources.html)

.060 Questions

Please refer questions regarding this Policy to the Office of Institutional Equity, telephone 785-532-6220 (#).

Exhibit B

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS
SOUTHERN DIVISION, DALLAS OFFICE

June 10, 2004

Ref. No.: 06032054

Dr. David Schmidly, President
Oklahoma State University
107 Whitehurst
Stillwater, OK 74078

Dear Dr. Schmidly:

The U.S. Department of Education, Office for Civil Rights, Southern Division, Dallas Office, has completed its consideration of the above-referenced complaint received on March 31, 2003 filed against Oklahoma State University (OSU or University), Stillwater, Oklahoma. The complainant alleged that OSU discriminated against his daughter, the alleged injured party (AIP), on the basis of sex. Specifically, the complaint alleged that OSU:

1. Failed to respond to notice of the AIP's alleged sexual harassment; and

2. Failed to maintain grievance procedures that provide for the prompt and equitable resolution of student complaints alleging discrimination on the basis of sex.

OCR is responsible for determining whether organizations that receive or benefit from Federal financial assistance from the U.S. Department of Education or an agency that has delegated investigative authority to this Department are in compliance with Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, and its implementing regulation at 34 C.F.R. Part 106. Title IX states:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The University is a recipient of Federal financial assistance from the U.S. Department of Education. Therefore, OCR has jurisdictional authority to process this complaint for resolution.

During the course of its investigation, OCR obtained, reviewed, and analyzed documentation from OSU as well as the complainant, and conducted interviews with the complainant, the AIP and staff of OSU. With regard to allegation one, OCR determined that there is insufficient evidence to support a finding that OSU discriminated against the AIP by failing to respond to notice of alleged

sexual harassment. With regard to the second allegation, OCR determined that OSU had failed to maintain grievance procedures that provide for the prompt and equitable resolution of student complaints alleging discrimination on the basis of sex. Also, during the course of the OCR investigation, we examined whether the OSU had provided notice of the identity and office address and telephone number of its Title IX Coordinator and determined that the University had not done so. The bases for OCR's determinations are summarized below.

Allegation 1: OSU failed to respond to notice of the AIP's alleged sexual harassment.

The AIP alleged that four OSU football players sexually assaulted her on November 21, 1999 at the residence of one of the players, and that OSU failed to respond to notice of alleged sexual harassment (the sexual assault).

The AIP's alleged sexual assault was widely reported in the newspapers and it was apparent from these reports that it occurred in an off-campus residence not owned or controlled by OSU. The AIP's identity was not revealed in the news accounts. The Student Conduct Officer requested a copy of the police report, which revealed that the alleged assault occurred in an off-campus location and did not involve a university-related event. The AIP's name was redacted. An Assistant Dean became aware of the AIP's identity when the AIP informed her that she was the victim in the news accounts. The Assistant Dean informed OCR that she did not report the conversation with the AIP to any other university official because she assumed that those who needed to know already knew as a result of the wide publicity.

OCR has determined that OSU had notice of alleged sexual harassment of the AIP occurring off campus. However, the notice indicated clearly that the alleged assault did not take place in a University program or activity. A university does not have a duty under Title IX to address an incident of alleged harassment where the incident occurs off-campus and does not involve a program or activity of the recipient. OCR's investigation, which included a thorough review of documents provided by both the AIP and recipient, together with numerous telephone interviews of the AIP and recipient employees, substantiated that the alleged sexual assault of November 21, 1999 took place off-campus in a private residence. Therefore, OSU did not have an obligation to take any action under Title IX.

Allegation 2: OSU failed to maintain grievance procedures that provide for the prompt and equitable resolution of student complaints alleging discrimination on the basis of sex.

OSU officials informed OCR that the grievance procedures for use by students to raise allegations of sex discrimination, including sexual harassment are contained in Section IV of the OSU *Student Rights and Responsibilities Governing Student Behavior.* This section, entitled Disciplinary Responsibility, provides that a faculty member, staff member or student may file a complaint against a student alleging that a violation of the Code of Conduct has occurred. It also states that OSU itself may initiate a complaint. It lists examples of actions that are "unacceptable" and for which students are subject to disciplinary action. The list includes sexual misconduct, sexual harassment, and "Any act which allegedly violates federal, and/or state law, local ordinances or university policies on University premises or at university sponsored or supervised activities." Section IV also contains the procedures and the steps to be followed by a student

filing a complaint alleging a violation of the Code of Conduct, including an informal administrative hearing and a formal hearing process for allegations for which suspension or expulsion are possible, and for student discrimination grievances.

OCR's investigation revealed, however, that information provided to students regarding the procedure to be used and where to file a complaint alleging discrimination on the basis of sex is confusing and unclear, thereby thwarting the prompt and equitable resolution of such allegations. Section XIII of the *Rights and Responsibilities* document, entitled Other University Policies, under the heading Sexual Harassment and Discrimination, states that grievance procedures for students are available in the Office of the Vice President for Student Affairs, Associate Vice President for Multicultural Affairs, Campus Life Office, and the Director of Student Services in the respective academic colleges, suggesting that some procedures other than those in the *Rights and Responsibilities* document exist and are to be used for resolving allegations of sex discrimination. It does not refer to the *Rights and Responsibilities* document as containing the grievance procedures.

Another portion of the *Rights and Responsibilities* document also implies that there is another grievance procedure. Appendix B to the *Rights and Responsibilities* document concerns sexual harassment and states that grievance procedures are available for students in the Office of the Vice President for Student Services, the Student Activity Center, and the Director of Student Services in the respective colleges. Further, a different section of Appendix B (§2.03 under a subheading entitled Procedures), states: "persons who have a complaint alleging sexual harassment should state their complaint through normal administrative channels. Individual administrators empowered to receive complaints shall include department heads, academic deans, directors or administrative supervisors of an operational unit." The term "normal administrative channels" is not defined anywhere in the *Rights and Responsibilities* document. Also, OCR was informed that only the University staff specifically named as empowered to receive a complaint of sexual harassment/assault has a duty to pass along to the appropriate University official(s) information they are provided by a student regarding an alleged incident of sexual harassment. Any faculty/staff that are not specifically named would not be required by any University policy to report an alleged act of sexual harassment unless they personally witnessed the harassment/assault.

In addition, Appendix C to the *Rights and Responsibilities* document, entitled Sexual Misconduct, which provides information regarding sexual assault and harassment, states: "To consult about or report incidents of sexual harassment, against a student, go to the OSU student conduct office, and against OSU employees, go to the OSU Affirmative Action Office."

The *Rights and Responsibilities* document indicates that the Student Conduct Office should be contacted to help guide those who want to file a complaint. According to the Director of the Student Conduct Office, she handles those complaints that allege student-on-student sexual harassment. The Director of Affirmative Action handles complaints alleging employee-on-employee harassment. The individual identified as holding the title of Title IX Coordinator, however, only investigates complaints alleging employee-on-student complaints. This information is not contained in any of the sections of the above-described document.

Based on the foregoing, OCR determined that while the University possesses grievance procedures, they are not clear or easily understood so as to effectively provide students with sufficient knowledge of where to find the procedures, how they work, or how, and with whom to file a complaint alleging discrimination on the basis of sex. Therefore, they do not provide for the prompt and equitable resolution of complaints they may be raised under Title IX and its implementing regulation.

Additionally, during its investigation, OCR was informed of the name and position of the OSU official designated as the Title IX Coordinator for the University. However, OSU's current policies and publications do not contain a reference to the Title IX Coordinator, nor do they provide his identity, location and telephone number as required by the Title IX regulation. Based on the information and documentation reviewed by OCR in this investigation, OCR has determined that OSU has not provided the required notification regarding the Title IX Coordinator.

On May 7, 2004, OSU submitted the enclosed Commitment to Resolve (CTR). OCR has determined that upon full implementation, the CTR will satisfactorily resolve allegation two and the aforementioned concern regarding a Title IX Coordinator. As is our procedure, OCR will monitor OSU's implementation of this CTR per the language and deadlines contained therein. Should OSU fail to fully implement the action steps as set forth in the CTR, OCR will immediately resume its case processing activities.

This letter is not intended, nor should it be construed, to cover other civil rights issues that may exist, but are not included herein. Under OCR procedures we are obligated to advise the complainant and institution against which a complaint is filed that intimidation or retaliation against a complainant is prohibited by regulations enforced by this agency. Specifically, the regulations enforced by OCR, directly or by reference, state that no recipient or other person shall intimidate, threaten, coerce or discriminate against any individual for the purpose of interfering with any right or privilege secured by regulations enforced by OCR or because one has made a complaint, testified, assisted or participated in any manner in a investigation, proceedings or hearing held in connection with a complaint.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personally identifiable information which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Thank you for your cooperation. If you have any questions concerning this matter, please call me at 214-880-4911.

Sincerely,

Sandra W. Stephens

Sandra W. Stephens
Team Leader

Enclosure: As stated

Commitment to Resolve
Oklahoma State University (OSU)
OCR Case Number: 06032054

In order to resolve the allegation in the above referenced complaint regarding the prompt and equitable resolution of complaints of discrimination based on sex, Oklahoma State University (OSU or University) makes the following commitments to the Office for Civil Rights (OCR), pursuant to Title IX of the Education Amendments of 1972 (Title IX). OSU will implement the commitments specified below, within the specified timeframes:

1. By May 14, 2004, OSU will designate at least one employee as its Title IX Coordinator, the responsible employee designated to coordinate its efforts to comply with Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §1681, and its implementing regulation at 34 C.F.R. Part 106 (2003), which prohibit discrimination on the basis of sex.

2. By June 1, 2004, OSU will publish the name and title, office address, and telephone number of the individual(s) designated as the Coordinator(s) by sending electronic messages to employees and to students enrolled at OSU.

3. By July 1, 2004, OSU will publish the name and title, office address, and telephone number of the individual(s) designated as the Coordinator(s) by inserting notices on (1) electronic employee applications and other University publications that provide general information to employees about employee services and University policies. In addition, by inserting notices in (2) the on-line versions of the current *OSU Student Rights and Responsibilities Governing Student Behavior* publication, University Catalog, course schedule, and other University publications (e.g., student general information bulletin) that provide general information to students about student services and University policies and inserting notices on electronic student applications.

4. By July 1, 2004, OSU will begin conspicuously posting notices of the name and title, office address, and telephone number of the individual(s) designated as the Coordinator(s) in the following manner and in the following places:

    - Campus bulletin boards;
    - Campus housing;
    - The student union;
    - The University's web site;
    - Disseminated through organizational notifications; and
    - Other sites on campus where general campus information is disseminated to students and employees.

5. By August 1, 2004, as print publications are revised, OSU will begin including the name and title, office address, and telephone number of the individual(s) designated as the Coordinator(s) in the OSU *Student Rights and*

Responsibilities Governing Student Behavior publication, University course catalogs, and other publications (e.g., student general information bulletins) in which general campus information is disseminated to students and employees.

6. Publication of the name and title, office address and telephone number of the designated Title IX Coordinator(s) will continue indefinitely for all subsequent publications and printings, pursuant to Title IX and its implementing regulation, 34 C.F.R. §106.9 (2003).

7. By August 1, 2004, OSU will review and revise its current Title IX grievance procedures (paragraph IV. Disciplinary Responsibility of the *Student Rights and Responsibilities* publication) to ensure the prompt and equitable resolution of complaints alleging discrimination based on sex. The Title IX grievance procedures will include, but are not limited to, the following components:

   a. The form in which a written complaint is to be filed;
   b. Timeframes for filing a complaint;
   c. Timeframes for the conducting of an investigation;
   d. Manner in which an investigation is to be conducted, and how a decision will be made;
   e. Process to ensure the impartiality of an investigation;
   f. Right to present information relevant to the complaint;
   g. Afford the parties the opportunity to be advised by an individual of his or her choice throughout the proceeding;
   h. The time within which a complainant shall expect a response regarding the disposition of the investigation;
   i. The basis upon which the disposition is made and the authority of the person(s) involved in the decision of an equitable and prompt remedy;
   j. Afford the complainant an opportunity to comment/dispute the investigative findings;
   k. Prohibition against retaliation; and
   l. Confidentiality of complaint filing, investigation and disposition.

8. The Title IX grievance procedures will:
   a. Be contained within a document whose title and content clearly reflect that the grievance procedures are encompassed therein.
   b. Clearly delineate the scope of the grievance procedures i.e., what it is, who may utilize it and who it applies to.
   c. Clearly state that the grievance procedure may be used to file a complaint by students against both students and employees and define the term "grievance."
   d. Reflect that OSU will document the filing of all complaints and conduct an appropriate investigation of all complaints filed pursuant to the grievance procedures.

e. Designate a timeframe to respond to a complainant and document this response. The response will acknowledge receipt of the complaint and what action(s) OSU will take.
f. If the grievance procedures contain a definition of "discrimination," the definition should not contain any language that limits discrimination to conduct directed at an individual.
g. Ensure that any disciplinary investigation procedures are not applied to or take the place of investigations of complaints of discrimination based on sex, including sexual harassment, that are processed pursuant to the grievance procedures.

Title IX does not require a separate sexual harassment complaint procedure. OSU assures OCR that if it chooses to adopt a separate sexual harassment complaint procedure, it will comply with the requirements outlined above.

9. By August 1, 2004, OSU will review and revise its sexual harassment policies (Policies) to ensure the inclusion of the following:

a. The name and title, office address and telephone number of the designated Title IX Coordinator(s), together with a description of his/her role in the complaint process;
b. The identity of individuals (or offices) with whom a complainant may file a complaint;
c. A provision requiring all faculty members and administrators who receive a complaint concerning sexual harassment on campus, in a college-related event or venue, or observes conduct that he/she believes may constitute sexual harassment on campus or in a college-related event or venue, to report the complaint or observations to the Title IX Coordinator(s) or his/her designee;
d. Clear and understandable language cross-referencing the Policies to the University's grievance procedure under which claims of discrimination on the basis of sex are investigated and resolved; and
e. The possible remedies and sanctions the University may impose as a result of its investigation.

10. OSU will provide all University students and all employees with written notice regarding the availability of the 1) Title IX sexual harassment policies, and 2) grievance procedure, for resolving Title IX complaints, together with information on the manner in which they may obtain a copy of the Policies and grievance procedure.

a. By August 1, 2004, OSU will send electronic messages containing the notice to all University employees and insert the notice in the on-line versions of University publications that provide general information to employees about employee services and University policies. In addition, OSU will insert such notices in the on-line versions of the current OSU *Student Rights and*

Responsibilities Governing Student Behavior publication, course schedule, and other University publications (e.g., student general information bulletins) that provide general information to students about student services and University policies.

b. By August 15, 2004, OSU will insert such notices in the print version of the OSU *Student Rights and Responsibilities Governing Student Behavior* publication and any other University publications (e.g., student general information bulletins) that provide general information to students about student services and University policies.

11. Reporting to OCR:

a. Within 30 days of publication, OSU will provide OCR with copies of all publications that have been created or revised to incorporate the specific notification information specified in ¶¶ 2. – 5. and 10. above, and that have been distributed in accordance with this Commitment.

b. On or before July 1, 2004, OSU will provide OCR with a draft copy of the revised sexual harassment policies for OCR's review and comment.

c. On or before July 1, 2004, OSU will provide OCR with a draft copy of the revised or newly created grievance procedure for OCR's review and comment.

d. On or before August 1, 2004, OSU will provide OCR with the final revised sexual harassment policies.

e. On or before August 1, 2004, OSU will provide OCR with the final revised grievance procedure.

Dr. _____, President
Oklahoma State University, Stillwater, Oklahoma

Date Signed: 5/07/04

Exhibit C

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
THE ASSISTANT SECRETARY

February 17, 2016

Honorable James Lankford
Chairman
Subcommittee on Regulatory Affairs
and Federal Management
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, DC 20510

Dear Chairman Lankford:

Thank you for your letter to Acting Secretary John B. King, Jr., requesting information about policy guidance issued by the U.S. Department of Education's Office for Civil Rights (OCR). I am pleased to respond on behalf of the Acting Secretary.

The Department shares your belief that no student should be subjected to sex-based bullying, harassment, or sexual violence. Unfortunately, we know that these forms of discrimination persist at some of our nation's colleges and universities and other educational settings. Title IX of the Education Amendments of 1972 (Title IX)[1] plays a critical role in the Department's efforts to ensure that all schools that accept Federal financial assistance prevent and redress sexual harassment (including sexual violence) that creates a hostile environment for a student or set of students.[2] Title IX governs because sexual harassment that creates a hostile environment denies students, on the basis of sex, the benefits of the school's educational program in violation of Title IX. The Supreme Court has repeatedly confirmed that proposition, acknowledging OCR's guidance in its most recent Title IX sexual harassment decision.[3]

The Department's predecessor, the Department of Health, Education, and Welfare, promulgated its Title IX regulations in 1975 after notice-and-comment rulemaking. Those regulations, among other matters, prohibit educational institutions that receive Federal financial assistance from "[d]eny[ing] any person any such aid, benefit, or service" on the basis of sex or "[o]therwise limit[ing] any person in the enjoyment of any right, privilege, advantage, or opportunity" on the

[1] 20 U.S.C. §§ 1681-1688.
[2] In addition to Title IX, the Department's administration and enforcement of the Jeanne Clery Disclosure of Campus Security and Crime Statistics Act (Clery Act), which requires institutions that participate in the Federal student aid programs to provide an accurate and realistic view of crime on campus and in the surrounding community, is dedicated to improving campus safety for our nation's students and educators.
[3] *See Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 647-648, 651 (1999) (citing OCR's Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034 (March 13, 1997)).

basis of sex.[4] The regulations also require those educational institutions to adopt "grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by [these regulations]."[5]

The same Title IX regulations adopt portions of the Department's regulations enforcing Title VI of the Civil Rights Act of 1964, which provide that whenever a complaint by any person or other information received by OCR "indicates a possible failure to comply with [these regulations]," OCR "will make a prompt investigation;" and that if the investigation "indicates a failure to comply" with the regulations, OCR "will so inform the recipient and the matter will be resolved by informal means whenever possible."[6] If OCR determines that the matter cannot be resolved voluntarily by informal means (after sending a letter of finding to the recipient describing the facts determined and the regulations and legal standards applied), then OCR must initiate proceedings in front of a neutral, independent Department hearing officer to terminate Federal financial assistance or seek compliance through any means otherwise authorized by law (such as referring the matter to the Department of Justice for initiating a lawsuit).[7] If the hearing officer agrees with OCR, the recipient has additional opportunities to challenge that officer's finding both within the Department and then in court.[8]

Instead of requiring recipients and members of the public to discern for themselves solely from the text of the regulations what Title IX requires as applied to particular facts and what actions would result in OCR initiating proceedings to terminate Federal financial assistance, if voluntary resolution by informal means was not possible, OCR has elected to issue additional types of written materials as authorized by Federal law. OCR issues guidance documents -- including interpretative rules, general statements of policy, and rules of agency organization, procedure, or practice -- in order to further assist schools in understanding what policies and practices will lead OCR to initiate proceedings to terminate Federal financial assistance (absent resolution by voluntary means) under existing regulations implemented to effectuate Title IX and other civil rights laws. As you note, the Supreme Court unanimously confirmed in March 2015 that, under the Administrative Procedure Act, agencies may issue such guidance without notice-and-comment procedures because such guidance does not have the force and effect of law and is therefore expressly exempt from those requirements.[9] The Department does not view such guidance to have the force and effect of law. Instead, OCR's guidance is issued to advise the public of its construction of the statutes and regulations it administers and enforces.

Your letter asks the Department to clarify the legal authority for certain statements made in two OCR "Dear Colleague" guidance letters. First, your letter asks for the legal basis for the statement on page 6 of OCR's October 26, 2010, Dear Colleague letter on harassment and

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[4] 34 C.F.R. § 106.31(b).
[5] 34 C.F.R. § 106.8(b).
[6] 34 C.F.R. § 106.71 (incorporating, among other provisions, 34 C.F.R. § 100.7(c)-(d)).
[7] 34 C.F.R. § 106.71 (incorporating, among other provisions, 34 C.F.R. §§ 100.8, 100.9(a)); *see* 20 U.S.C. § 1682 (permitting termination of funds only if the Department has "advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means"); *see also* OCR, Case Processing Manual §§ 303(b), 305 (Feb. 2015) (describing what must be included in an OCR letter of finding and OCR letter of impending enforcement action).
[8] 34 C.F.R. § 106.71 (incorporating, among other provisions, 34 C.F.R. §§ 101.104, 106); 20 U.S.C. § 1683.
[9] *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015); 5 U.S.C. § 553(b)(3)(A).

bullying (2010 DCL) that provided examples of conduct that can constitute "sexual harassment." The legal standards for identifying conduct that could constitute sexual harassment described in the 2010 DCL are the same standards that were set forth by OCR in 1997 in a guidance document that went through notice-and-comment and, as noted earlier, was acknowledged and cited by the Supreme Court.[10] That guidance document was replaced with a revised guidance in 2001 that also went through notice-and-comment.[11] Both the 1997 and 2001 documents included extensive citations to relevant Federal case law discussing the types of conduct that could constitute sexual harassment.[12] In 2006, the prior Administration reissued the 2001 document.[13] In 2008, the prior Administration published a pamphlet on sexual harassment that used the same examples that your letter cites.[14] OCR repeated these examples again in 2010 to help schools understand the types of conduct that constitute sexual harassment covered by Title IX, citing repeatedly to the 2001 document.[15] In each of these documents, OCR has also consistently made clear that such conduct, even if characterized as sexual harassment, is not prohibited by Title IX as unlawful sexual harassment unless it creates or contributes to a hostile environment and the educational institution fails to take prompt and effective steps reasonably calculated to eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.

Your letter also asks about the statement in OCR's April 4, 2011, Dear Colleague Letter on Sexual Violence (2011 DCL) regarding educational institutions using the preponderance-of-the-evidence standard to resolve complaints of sexual violence. The guidance reminded schools that the requirements of Title IX for addressing sexual harassment also cover sexual violence and reminded schools of their responsibilities to take immediate and effective steps to respond to sexual violence in accordance with the requirements of Title IX. The standards outlined in the 2011 DCL stem from the Department's Title IX regulations, including, but not limited to, the requirement that educational institutions adopt "grievance procedures providing for prompt and equitable resolution" of complaints.[16] Prior to the 2011 DCL, OCR had determined in letters of findings issued during multiple Administrations that in order for a recipient's procedures to be "equitable," they must use the preponderance of the evidence standard (i.e., more likely than not) to determine whether sexual violence has occurred.[17] As OCR's practice in these cases confirms, it is Title IX and the regulation, which has the force and effect of law, that OCR enforces, not OCR's 2011 (or any other) DCL. OCR's 2011 DCL simply serves to advise the public of the construction of the regulation it administers and enforces.

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[10] Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 61 Fed. Reg. 42728 (August 16, 1996), 61 Fed. Reg. 52172 (October 4, 1996), and 62 Fed. Reg. 12034 (March 13, 1997).

[11] Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 66092 (November 2, 2000) and 66 Fed. Reg. 5512 (January 19, 2001).

[12] *See, e.g.*, 1997 Sexual Harassment Guidance, 62 Fed. Reg. at 12046-47 n.6; 2001 Revised Sexual Harassment Guidance at 24 n.6, available at www.ed.gov/ocr/docs/shguide.pdf.

[13] *See* Dear Colleague Letter: Sexual Harassment Issues (January 25, 2006), available at www.ed.gov/ocr/letters/sexhar-2006.html.

[14] *See Sexual Harassment: It's Not Academic* at 3-4 (September 2008), available at www.ed.gov/ocr/docs/ocrshpam.pdf.

[15] *See* 2010 DCL at 2 n.8, 7 n.16, 8 n.17, 9-10.

[16] 34 C.F.R. §106.8(b).

[17] *See, e.g.*, Letter from OCR to Georgetown Univ. (May 5, 2004), available at ncherm.org/documents/199-GeorgetownUniversity--11032017DeGeoia.pdf; Letter from OCR to The Evergreen State College (Apr. 4, 1995), available at www.ed.gov/policy/gen/leg/foia/misc-docs/ed_ehd_1995.pdf.

OCR's construction of the Title IX regulation is reasonable and, as explained in the 2011 DCL, is based on case law, mainly under Title VII of the Civil Rights Act of 1964 (prohibiting sex discrimination in the employment context), which courts have relied upon in analyzing Title IX.[18] The construction is also practicable, as evidenced by the fact that, even before 2011, most colleges and universities were already using the preponderance-of-the-evidence standard for sexual violence cases.[19]

I appreciate your careful attention to civil rights in our Nation's schools.

If you have additional questions or concerns, do not hesitate to have your staff contact Lloyd Horwich, Acting Assistant Secretary for the Department's Office of Legislation and Congressional Affairs, at (202) 401-0020.

Sincerely,

Catherine E. Lhamon
Assistant Secretary for Civil Rights

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[18] *See* 2011 DCL at 11 n.26. The Supreme Court has found the preponderance of the evidence standard sufficient for civil rights cases, *see Herman & Maclean v. Huddleston*, 459 U.S. 375, 390 (1983) (in weighing the balance of interests for each party, the "interests of defendants in a securities case do not differ qualitatively from the interests of defendants sued for violations of other federal statutes such as the antitrust or civil rights laws, for which proof by a preponderance of the evidence suffices"), and State courts have applied the preponderance of the evidence standard in civil cases involving sexual assault. *See. e.g. Jordan v. McKenna*, 573 So.2d 1371, 1376 (Miss 1990); *Ashmore v. Hilton*, 834 So. 2d 1131, 1134 (La Ct. App. 2002).

[19] The Foundation for Individual Rights in Education, for example, found that prior to the issuance of the 2011 DCL, 80 percent (135 of 168) of institutions that specified an evidentiary standard for adjudicating allegations of sexual harassment and sexual assault used the preponderance-of-the-evidence standard or lower. http://www.thefire.org/pdfs/8d799cc3bcca596e58e0c2998e6b2ce4.pdf.

Exhibit D

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
MIDWESTERN DIVISION, CHICAGO OFFICE
CITIGROUP CENTER
500 WEST MADISON STREET, SUITE 1475
CHICAGO, ILLINOIS 60661

TEL: 312-730-1560
TDD: 877-521-2172
FAX: 312-730-1576

AUG 6 2008

Dr. John D. Wiley
Chancellor
University of Wisconsin-Madison
161 Bascom Hall
500 Lincoln Drive
Madison, Wisconsin 53706

Re: 05-07-2074

Dear Dr. Wiley:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation with respect to the above-referenced complaint filed against the University of Wisconsin-Madison (University). The Complainant (Student A) alleged that the University discriminated against her on the basis of sex when it subjected her to sexual harassment from April 2004 until June 2006. Additionally, Student A alleged that, since July 2005, the University failed to promptly and appropriately respond to her reports of sexual harassment.

OCR enforces Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681, and its implementing regulation at 34 C.F.R. Part 106. Title IX prohibits discrimination on the basis of sex in education programs and activities receiving Federal financial assistance. As a recipient of Federal financial assistance from the Department, the University is subject to the provisions of Title IX. The University is also required to adopt and publish grievance procedures providing for prompt and equitable resolution of student complaints alleging a violation of the Act or regulations.

During the complaint resolution process, OCR interviewed Student A and other witnesses and reviewed documents provided by Student A and the University. Additionally, OCR conducted an on site investigation on November 1, 2007, and interviewed an additional witness on January 8, 2008. Based on its investigation, OCR determined that there is insufficient evidence to substantiate the allegations made in the complaint. The bases for OCR's conclusion are set forth below.

I. SUMMARY OF EVIDENCE

A. Student A's complaint

Student A was enrolled as a freshman at the University during the 2003-2004 school year. At that time she was a member of the University's crew team. On April 4, 2004, she went to a

fraternity party where she became intoxicated. During the party she began talking to two male University students, Students B and C, who were also members of the University's crew team. Later that evening, Student A left the party with Students B and C with the intention of going to another party. Instead of going to the next party, the students stopped at Student B's off campus residence. At Student B's residence, Students B and C engaged in sexual activity with Student A. Student A stated that because of her intoxication she was not aware of everything that happened. The next day Student A met with Students B and C to find out what happened the night before. According to Student A, Student B admitted that he raped her.

On July 13, 2005, Student A filed a sexual assault complaint against Students B and C with the University's Office of the Dean of Students (ODOS) pursuant to the University's non-academic misconduct policy. She alleged that Students B and C sexually assaulted her on April 4, 2004. Additionally, on July 19, 2005, Student A reported the alleged sexual assault to the University's police department (UW-PD). By the time that Student A made these charges Student C had already graduated from the University and Student B was entering his senior year.

Student A explained that she did not immediately complain about the alleged sexual assault because she was in denial and did not want to hurt her participation on the crew team. However, she felt uncomfortable with male crew team members after the incident, and she dropped out of the crew team after the fall 2004 season. Over time Student A learned more about sexual assault and came to believe that Students B and C had assaulted her. Student A talked to Student B at a party in July 2005. Student B apologized for his conduct in April 2004 and she believed that Student B was ready to take responsibility for his actions. She decided to file a sexual assault complaint in hopes that he would admit his conduct and she could resolve the issue.

Student A asserted that the University was responsible for the alleged assault. She stated that the off campus apartment where the assault occurred was owned by the crew team's boat-master and was rented exclusively to crew team members. Student A further stated that she had been told by another student and the University police department that there had been prior sexual harassment incidents involving the crew team. According to Student A, the University knew about these incidents and should have known about the risk of such behavior by crew team members.

She also alleged that because the University failed to take appropriate responsive action she was subjected to sexual harassment from the date of the assault until June 2006, when Student B graduated from the University. She cited an interaction with Student B at a fraternity party on November 12, 2005, as an example of continuing harassment that occurred because the University failed to take appropriate action. Although Student A's complaint stated that she was subject to continuing harassment and stalking-like behavior, the only

example of alleged harassment after she reported the assault that she told the University about related to this fraternity party.[1]

In addition to disagreeing with the outcome of the investigation, Student A raised a number of objections concerning the adequacy of the University's response to her report of the sexual assault, including its investigation.

B. University Policies

The University prohibits discrimination on the basis of sex, including sexual harassment, in all University programs and activities. The University's sexual harassment policy states that allegations of student-to-student sexual harassment should be filed with the University's Office of the Dean of Students (ODOS), and such complaints are normally handled by ODOS, under the University's "Student Nonacademic Misconduct Policy."

The University's "Student Nonacademic Misconduct Policy," which is codified at UWS Chapter 17, covers conduct that constitutes a serious danger to the personal safety of a member of the University community, including sexual assaults and harassment. Students who violate Chapter 17 can be placed on probation, suspended or expelled. Chapter 17 does not exclude off campus conduct, but does not specifically indicate that it is covered either.

Pursuant to ODOS procedures, when a complaint of non-academic misconduct is made against a student, an investigating officer (IO) is appointed by the University to investigate the complaint and determine an appropriate course of action . Chapter 17 does not include a time frame for the investigation. If the IO determines that non-academic misconduct occurred, and that one of the disciplinary sanctions listed in UWS Chapter 17 is appropriate, the IO prepares a written report and delivers the report to the alleged offender who can request a hearing before a non-academic misconduct hearing committee to contest the IO's determination. The procedures do not require a written report if the IO decides that the University should not pursue the matter. There are no appeal rights for such a decision.

UWS Chapter 17 also contains procedures governing the judicial process. Section 17.17 states that a student may be temporarily suspended pending final institutional action in response to a report of nonacademic misconduct where the investigating officer has offered the alleged offender the opportunity for discussion, the investigating officer recommends a sanction of suspension or expulsion, and the chancellor determines that the student's continued presence on campus would constitute a potential for serious harm.

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[1] Student A's complaint to ODOS mentioned the July 2005 party at which Student B apologized to her, but she did not complain that this interaction was an instance of sexual harassment. Student A also told OCR about an incident where she was standing with a group of people and Student B came over to talk to some friends who were also standing with the group. This incident occurred after November 2005. However, she did not tell the University about this incident.

The University's 2005-2006 Student-Athlete Handbook states that student athletes are expected to conduct themselves in a responsible manner at all times. If the Athletic Department receives information that a student athlete admits to, has been charged with, or was convicted of a criminal offense, the athlete will be suspended form participation in athletics. The Athletic Department refers allegations of misconduct to ODOS and does not take action against the athlete until the ODOS disciplinary process has been completed.

C. University Responsibility for Alleged Sexual Assault

OCR investigated Student A's assertion that the residence where the alleged sexual assault occurred (Student B's rented apartment) was owned by the University's crew team boat-master and rented to three University crew members. OCR also investigated her claim that there were prior known incidents of sexual harassment by members of the crew team.

The information submitted by the University indicates that the individual who owned the property rented by Student B was employed by the University as a Recreation Specialist. In this position, he was responsible for maintaining the crew team's boats and equipment. His employment by the University did not include any responsibilities relating to housing for the crew team members. This individual owned three rental properties in Madison and occasionally rented the properties to University student-athletes. He estimated that crew team members made up 10% of his rentals. He charged the student-athletes the same market rent as his other tenants and did not use the properties as a recruiting tool for the University crew team. Although all of Student B's roommates were crew team members, all of the crew team members did not rent from the boat master.

The University Housing office told OCR that the University is not involved in placing students in off-campus privately owned housing. However, the University Visitor and Information Programs office (VIP) maintains a referral service where owners of off campus housing can list their houses, apartments or rooms for rent for a nominal fee. University students who use the service to search for off campus housing are not charged a fee. The University's VIP website specifically disclaims any responsibility for the properties listed.

With respect to Student A's assertion that there were prior incidents in which male crew team members had committed sexual assaults, the University reported that the only other allegation of sexual harassment involving the crew team occurred in 1998 or 1999 when a member of the women's crew team reported an alleged sexual assault by a male crew team member. An investigation concluded there was no evidence of non-consensual sex. This incident did not involve Students B or C.

D. The ODOS and UW-PD investigations

The University first became aware of Student A's allegations of sexual harassment on July 13, 2005, when Student A met with an Assistant Dean of Students (Assistant Dean) at

ODOS. According to the Assistant Dean, Student A told her that in April 2004, Students B and C sexually assaulted her at Student B's off campus residence. Student A admitted that a portion of the sexual activity was consensual, but she believed that Students B and C also engaged in sexual activity with her without her consent. Student A also told her that at the time of the assault she and Student B were intoxicated, but Student C was sober. Student A did not complain to the University of any subsequent harassment by Students B or C occurring between the time of the alleged assault and her July 13, 2005 report.

The Assistant Dean said she discussed the ODOS student judicial process with Student A and told her she could also report the sexual assault to the UW-PD. She also told Student A about the various resources on and off campus that might be helpful in dealing with the trauma associated with sexual assault. Student A told the Assistant Dean that she would think about her options and let her know what she decided to do. ODOS staff informed OCR that they did not believe that emergency disciplinary action should be pursued given the lapse of time between the alleged assault and the report.

On July 26, 2005, Student A contacted UW-PD Detective G about the alleged rape by Students B and C. Detective G informed OCR that she explained the criminal investigation process to Student A and told her that, because the assault happened off campus, the Madison police department had jurisdiction over the offense and she would refer Student A's complaint to the Madison police pursuant to normal practice. Detective G forwarded a summary of Student A's interview to the Madison police department.

On July 26, 2005, Student A emailed the Assistant Dean and stated that she had decided to initiate an ODOS investigation against Student B. At this time, the Assistant Dean was acting as Student A's victim advocate, a role outlined in ODOS procedures for sexual assault cases.

On August 2, 2005, Student A, along with the Assistant Dean, met with the investigating officer (IO 1) assigned to Student A's complaint. On August 3, 2005, IO 1 sent Student B a charge letter, informing him of Student A's sexual assault complaint, and advising him that he should have no direct or indirect contact with Student A. The University took no action against Student C because he had graduated and it had no jurisdiction over him.

On August 4, 2005, IO 1 scheduled a meeting with Student B for August 16, 2005 to discuss Student A's complaint. However, on August 10, 2005, Detective G asked IO 1 to delay her interview with Student B so that Detective G could question him first. Detective G told OCR that it was her normal practice to ask ODOS to refrain from interviewing an alleged criminal offender until after the UW-PD interview. She routinely makes such a request because she wants to see the individual's initial reaction when first confronted in the criminal investigation process. Detective G and ODOS advised Student A via emails as to the reasons ODOS would postpone its interviews, and Student A did not object.

On August 16, 2005, Detective G met with Student A. Detective G informed Student A that the Madison police had declined to investigate her complaint. According to Detective G, Student A reiterated that she wanted Students B and C prosecuted. Detective G told Student A she would investigate Student A's complaint herself and forward her investigation to the Dane County prosecutor's office. She also told Student A that the investigation could take a while, as she had three other criminal cases to investigate. During this meeting, Student A provided Detective G with further details about the alleged sexual assault. According to Detective G's written summary of the meeting, Student A told Detective G twice that she did not remember Student B raping her. However, Student A said that Students B and C had told her that Student B raped her.

On September 27, 2005, in response to a question from Detective G, Student A stated that after the alleged sexual assault in April 2004, she went over to Student C's residence twice. Student A explained that she thought Student C liked her. On both occasions, Student A and Student C engaged in consensual physical contact. Additionally, on one of these occasions, Student B was at Student C's residence and Student A watched TV with Student B.

Detective G told OCR that she tried to contact Student B in September 2005, but had a hard time reaching him. She finally managed to interview Student B on October 10, 2005. During the interview, Student B stated that he and Student A engaged in consensual sexual activity, but he denied that he sexually assaulted her. After interviewing Student B, Detective G tried to contact other individuals who Student A said would have information about the alleged sexual assault. However, many of these individuals never returned her phone calls.[2]

According to ODOS emails, on October 10, 2005, and October 27, 2005, ODOS contacted Detective G to check on the status of her investigation. Detective G told ODOS that she was trying to contact Student C. On November 17, 2005, Detective G interviewed Student C. He told Detective G that Student A initiated the sexual activity and that Student B only engaged in the sexual activity to which Student A consented. He also told Detective G that Student B did not sexually assault Student A, and he denied telling Student A that Student B had sexually assaulted her. Student C confirmed that, after the alleged sexual assault, Student A came to his residence on two occasions and they engaged in consensual sexual activity.

Detective G had a fourth interview with Student A on November 17, 2005. Student A had contacted her via email on November 16, 2005, indicating that she and Student B had contact with each other at a party at a fraternity house on November 12, 2005, in violation of the ODOS August 3, 2005 no contact order. According to Detective G's written statement, Student A told Detective G that she had initiated the conversation with Student B in the hope that he would admit the alleged sexual assault. Student A also told Detective G that when she first spoke to Student B, he stated to Student A that he was not allowed to talk with her.

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[2] Detective G tried to contact these individuals again in the spring of 2006. Only Students D and E returned her calls. The substance of their statements is discussed below.

Student A also informed Detective G that after Student B walked away from her she pursued him into another room. Student A said she followed him because she knew he wanted to talk with her. Student A admitted to Detective G that she hugged Student B a couple of times at the November 12, 2005 party. After the interview with Student A, Detective G contacted ODOS, informed them about the contact between Students A and B on November 12, 2005, and recommended that Student B not be punished because Student A had initiated the contact.

Detective G's account of Student A's description of the contact at the November 2005 fraternity party significantly differs from the description Student A gave OCR. In the OCR complaint, Student A claims that Student B followed her around at the party, initiated a conversation with her, cornered her and threatened her violently while pounding the walls around her. He told her that he would lie if charged with a crime. Student A claims that the UW-PD promised her that it would issue a no contact order concerning this incident, but it never did so. OCR asked Detective G about this assertion. Detective G stated she had no authority to issue this kind of order and did not promise to issue one.

OCR's investigation revealed that the fraternity party incident occurred off campus at a party that was not sponsored by the University. The University stated that while it does register student fraternities, the fraternity party was not under its control.

Sometime in November 2005, Detective G talked with the Dane County prosecutor about the results of her investigation. The Dane County prosecutor told her they would not prosecute Students B and C. Detective G then informed Student A of the decision and told ODOS that it could interview Student B.

After Detective G advised Student A of the Dane County prosecutor's decision, Student A again requested that Detective G try to contact various individuals, including Students D and E, whom she characterized as friends who heard Student B admit his guilt. Detective G stated to OCR that during the period from late November 2005 until May 2006, she attempted to contact these people. However, she had difficulty doing so because of the winter holiday break, and refusals by some of the individuals to talk with her. According to Detective G, no one is required to talk to the police under these circumstances. In addition to the difficulty obtaining witness cooperation, Detective G was distracted by other priority investigations and her preparation for in-court testimony.

In November 2005, IO 2 was appointed to replace IO 1 on Student A's complaint, because IO 1 had left ODOS' employ. IO 2 had received training in investigating sexual assaults and had investigated over a dozen sexual assault cases. After being appointed as the IO, she contacted the UW-PD on two or three occasions to find out the status of their criminal investigation, but did not discuss the case with them or review their case file. She stated that it was not unusual for ODOS to delay their interviews when a student also elected to file a criminal complaint with the UW-PD.

In November 2005, Student A informed IO 2 about the fraternity party incident. Student A admitted she initiated the contact with Student B. On December 2, 2005, IO 2 met with Student A and her mother to discuss the alleged violation of the no-contact order. Student A told her, for the first time, that Student B had followed her from room to room at the November 12, 2005 party. Student A also told her that Student B pounded a wall with his fist while he was talking to her. Based upon these new facts, IO 2 sent Student B a second charge letter on December 14, 2005, alleging a violation of the August 3, 2005 no-contact order. IO 2 sent an email to Student A on December 15, informing Student A that the charge letter had been sent.

On December 8, 2005, IO 2 emailed Student A and told her that once Student A provided her with a written statement, she would forward the statement to the appropriate person in the Athletic Department. On this same date, ODOS staff spoke with the Athletic Department to determine who in the Athletic Department should receive Student A's statement. IO 2 received Student A's statement on December 15, 2005.

On December 21, 2005, Student B sent ODOS a letter discussing the alleged rape and the alleged violation of the no contact order. Student B denied the rape allegations and described his interaction with Student A at the November 12, 2005 fraternity party. The theme of the party was "no pants." Student B stated he wore his underwear and Student A was also only wearing underwear. He said that for most of the evening Student A stared at him. Later that evening, when he was leaving the party, Student A reached out and touched his arm while he was walking past her chair and told him she wanted to speak to him off the record. Student B told Student A that he was not allowed to speak with her and wanted to leave the party before she fabricated lies about him. Student A asked him to sign a statement indicating that he witnessed Student C rape Student A. Student A told him that if he signed the statement he would get off "scott free." Student B told her that the offer was ridiculous because she had fabricated the alleged rape. At this point Student A began to scream at him, cry, and make a scene. He quickly left the party and went home.

Student A told OCR that she felt that the no contact order was violated, even if she talked to Student B first, because Student B was supposed to leave the premises when Student A was present. She did not realize that she was precluded from initiating a conversation with Student B, as no one told her not to talk to him. Emails indicate that after the November 12 party Student A asked ODOS for clarification of the no contact order. ODOS responded that she should not initiate contact with Student B. ODOS explained to Student A that this warning is not usually necessary because students requesting no contact orders generally do not want to have any contact with the alleged perpetrator. Detective G independently advised Student A that if she had felt bothered by Student B at the party she did not have to talk with him but could have asked him to leave or she could have left the party and asked a friend to accompany her if she felt her safety was threatened.

Student A also complained to OCR that ODOS did not interview other individuals who attended the November 12 party who could corroborate her account. ODOS staff told OCR that it did not pursue an investigation or further action against Student B in connection with this incident because Student A admitted that she had initiated the conversation, thus contributing to the contact that occurred.

On December 19, 2005, IO 2 met with Student A and the Assistant Dean for approximately 30 minutes. IO 2 and the Assistant Dean stated that IO 2 asked Student A to clarify certain portions of her December 15 statement. At one point, IO 2 asked her to explain what she meant when she wrote about certain sexual acts that Student B performed. IO 2 and the Assistant Dean stated that Student A became angry and asked IO 2 why she was asking that question. At this point, Student A was crying so they took a break and decided to schedule a follow-up interview. IO 2 and the Assistant Dean stated that they did not feel that IO 2 was cross-examining Student A at this interview.

Student A's characterization of this interview differs from the University's description. She describes the meeting as adversarial and accusing. Student A claims that at the meeting IO 2 created a mock trial setting. Student A was distressed to the point that the questioning ceased and the Assistant Dean encouraged Student A to back down because she was not a strong enough person. Student A claims that the meeting occurred during finals week and Student A failed her next exam because the Assistant Dean had not alerted her professors of her situation. OCR could not find any documentation that Student A had requested ODOS staff to intervene with her professors in this way, and Student A did not tell OCR that she specifically requested such assistance. The only assistance Student A requested in writing was that she be given counseling appointments on a priority basis, which the Assistant Dean arranged.

IO 2 met again with Student A and the Assistant Dean on December 22, 2005, and on January 4, 2006. At the December and January meetings, IO 2 asked Student A more questions concerning her December 15, 2005 statement. At one of these meetings, Student A said she wanted to change her written statement to make her case stronger by stating that she was too intoxicated in April 2004 to consent to sexual intercourse with Student B. IO 2 told Student A she should be truthful in her statement.

On December 27, 2005, Student A forwarded a revised statement to ODOS for the Athletic Department, and sent the Assistant Dean an email asking that this statement be forwarded to the Athletic Department by the start of 2005-2006 school year's spring semester. The Assistant Dean told OCR that she did not forward Student A's statements to the Athletic Department, as the Assistant Dean was uncertain whether the statement should be released before ODOS concluded its investigation and she conveyed this concern to Student A by telephone.

IO 2 and the Assistant Dean advised OCR that a few days after the January 4, 2006 meeting, Student A asked for a new IO, explaining that her mother is Hispanic (as is IO 2), and Student A felt that she was experiencing transference of tensions she had with her mother to IO 2. Student A felt this might explain her defensive attitude towards IO 2 during the questioning. IO 2 recused herself from the case. About two weeks later, IO 3 was appointed to investigate Student A's complaint.

IO 3 had received sexual assault training and had investigated ten sexual harassment cases prior to her involvement with Student A's complaint. Prior to her appointment as the IO in Student A's case, IO 3 had met briefly with Student B when he arrived for an interview in August 2005 that was postponed at Detective G's request. IO 3 also told OCR that she met with Student B in January 2006, before she was appointed IO, but she did not conduct a formal interview.

On January 19, 2006, IO 3 sent an email to Student A requesting an interview with her. However, no interview took place because Student A's attorney objected. On February 1, 2006, Student A's legal counsel wrote to IO 3 and the Assistant Dean, indicating that, as Student A had provided sufficient information to ODOS, he did not believe further interviews were needed, but if necessary he would attend. He proposed that any necessary questions should be forwarded in writing. After talking with IO 3, the Assistant Dean sent an email to Student A indicating that Student A's written statement and information from IO 2 should be sufficient.

In an April 6, 2006 email, Student A told the Assistant Dean that since the University investigation was no longer in progress she thought it would now be appropriate to send her statement to the Athletic Department. The Assistant Dean replied to Student A via email the same day, advising her that she had discussed the issue with her supervisor, the Associate Dean, and he felt Student A could send the statement to the Athletic Department if she wished. On April 6, 2006, Student A forwarded her statement to the Interim Associate Director (Director) of the Athletic Department. On April 17, 2006, the Director sent Student A an email telling her he had been out of the office but acknowledging receipt of her statement.

IO 3 told OCR that she did not interview other individuals during her investigation. Nor did she review the UW-PD file that contained witness statements. IO 3 explained that there were only three people who actually knew what happened between Students A and B at the apartment on April 4, 2004, i.e., Students A, B, and C. IO 3 did not interview Student C because he was no longer at the University and therefore had no obligation to talk with her, lived out of the Madison area, and, as an alleged accomplice to the alleged sexual assault, was unlikely to support Student A's account. Additionally, IO 3 pointed out that there was no physical evidence that an assault occurred, and alcohol was involved, which clouded the perceptions of Students A and B as to what happened on the night of the alleged sexual assault.

IO 3 stated that she considered the evidence for a long time before she arrived at a decision in the case. After reviewing all of the evidence, IO 3 talked with the Associate Dean who agreed that there was insufficient evidence to support a finding that Student B sexually assaulted Student A. On April 19, 2006, the Assistant Dean advised Student A of IO 3's decision. On April 20, 2006, IO 3 sent a letter to Student B, advising him that the investigation did not substantiate the assault charges, but warning Student B of the dangers of excessive drinking.

On April 25, 2006, IO 3 and the Assistant Dean met with Student A at her request to discuss IO 3's decision on her complaint. IO3 told Student A that she was not pursuing the matter because there were no eyewitnesses other than Students A, B, and C concerning the events that happened at Student B's residence. Additionally, Students A and B were not clear on what happened at Student B's residence and that alcohol played a part in their lack of clarity.

Student A told OCR that she informed IO 3 and the Assistant Dean, for the first time, that Student B's roommate, who had been sleeping in another room of the apartment, might have relevant information. In written remarks to IO 3, Student A stated that Student B's roommate "woke up from all the activity, I do not know what he would know, but I know he may be a witness." ODOS did not interview Student B's roommate.

Shortly after the ODOS decision, the Associate Dean met with Student A and her mother. Student A gave the Associate Dean a 2005 psychologist report stating that she may have been the victim of sexual abuse. At Student A's request, the Associate Dean reviewed all of the materials in the file. He found insufficient evidence to support Student A's allegation and so advised her.

On May 5, 2006, the Athletic Department sent a letter to Student A, acknowledging her statement, and noting that Student A had filed complaints with ODOS and the University police. The letter also stated that Department was doing everything possible to ensure that their student-athletes are engaging in lawful, safe and healthy behaviors. In addition, the Athletic Department provided information to OCR indicating that all of their coaches and administrative staff attended a sexual harassment workshop by the Campus Equity and Diversity Resource Center in the summer or fall of 2006 and that the Department was also working on an orientation for all freshmen student athletes. The Department also planned to have a meeting with all male athletes to discuss their role in the prevention of violent behavior.

The UW-PD investigation was still open and ongoing in the spring 2006. Detective G interviewed Student D on May 1, 2006, after trying to make contact with him for several months. Student D stated he was a friend of Student A and he knew Students B and C. Student D told Detective G that he could not recall the April 4, 2004 party. Student D never

heard Student A say she was sexually assaulted by anyone, and had no other information to corroborate Student A's account.

On May 22, 2006, Detective G interviewed Student E. He stated that he dated Student A in the latter part of April through the first part of June 2004, but he did not present any evidence that corroborated Student A's account of the incident. Student E confirmed that Student A was intoxicated and somewhat flirtatious at the April 2004 party. Student A had never told him that Students B and C assaulted her.

In May of 2006, Detective G sent the Dane County Prosecutor's office all of the summarized interview statements she compiled. Based on her investigation, she did not think Student A's case was strong enough to prosecute. Detective G denied that she had ever told Student A that she had a strong case (as Student A had reported to OCR). After reviewing the statements, the Dane County Prosecutor's office concurred with Detective G's assessment and again declined to prosecute Student A's complaint.

II. LEGAL STANDARD

The Title IX regulation, at 34 C.F.R. §106.31(a), states that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity operated by a recipient. Sexual harassment of a student in an educational program or activity that is sufficiently serious to deny or limit the student's ability to participate in or receive the benefits, services, or opportunities in the school's program may constitute discrimination prohibited by Title IX. Sexual harassment is defined as unwelcome conduct of a sexual nature, which can include can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. OCR considers the totality of the circumstances to determine if a hostile environment has been created, i.e., if sexually harassing conduct is sufficiently serious that it denies or limits a student's ability to participate in or benefit from the school's program based on sex.

A recipient has a responsibility to respond promptly and effectively to such student-to-student sexual harassment that it knows about, or reasonably should have known about. Title IX requires that once a recipient has notice of possible sexual harassment of a student, the recipient should take immediate and appropriate steps to investigate or otherwise determine what occurred. If the recipient determines that sexual harassment occurred, it should take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again. A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment. In addition, it may be appropriate for a recipient to take interim steps during its investigation.

III. ANALYSIS

Student A alleged that the University discriminated against her on the basis of sex when it subjected her to sexual harassment from April 2004 until June 2006. Additionally, Student A alleged that the University, since July 2005, failed to promptly and appropriately respond to her reports of sexual harassment.

A. Alleged sexual harassment

Student A asserted that the University was responsible for the alleged sexual assault that occurred on April 4, 2004, and for the alleged subsequent harassment of her that occurred. For the University to be responsible under Title IX, the harassment must have occurred in the context of an educational program or activity operated by the University, and the University must have had notice of the harassment.

As indicated above, the information submitted by the University indicates that although the University's nonacademic misconduct policies applied to the alleged misconduct by Students B and C, the University did not regulate or control the premises at which the alleged assault took place on April 4, 2004. OCR found that the owner of the apartment was a University employee who, in his private capacity, listed his rentals with the University's office that handles available off campus rentals, and a few crew team members rented an apartment from him. In addition, although Student A asserted that there were prior incidents in which male crew team members had committed sexual assaults, the University reported only one prior report of sexual harassment by a crew member made four or five years earlier, which did not involve Students B or C and was not substantiated when investigated by the University

Based on the above, OCR determined that the alleged assault did not occur in the context of an educational program or activity operated by the University. OCR also determined that the information about one prior unsubstantiated report of sexual harassment by previous crew members was not sufficient to support a determination that the University knew or should have known of possible later sexual harassment by members of the crew team. Therefore, there is insufficient evidence to conclude that the University subjected Student A to sexual harassment with respect to the April 4, 2004 alleged assault.

With respect to alleged subsequent harassment, Student A asserted she was subjected to continuing sexual harassment and stalking-like behavior by Students B and C after the date of the assault until June 2006. She indicated that, as a result, she quit the crew team and failed her exams. However, the only example of alleged harassment after the assault that she complained to the University about related to the November 12, 2005 fraternity party. For purposes of analysis, OCR assumed that the fraternity party contact, which was allegedly in violation of a University no contact order, was sufficiently connected with the University to be considered a University program or activity. Based on the totality of circumstances, particularly Student A's admission that she initiated the contact with Student B at the

November 12 fraternity party, OCR determined that there is insufficient evidence to establish that the University subjected Student A to a sexually hostile environment.

B. University's response

Student A also alleged that the University failed to respond promptly and appropriately to her complaint of sexual assault. As noted, Student A did not file a complaint of sexual assault with the University until over a year after the alleged April 2004 assault. The University handled the complaint under its established student nonacademic misconduct policy and procedures. As indicated above, Title IX requires a recipient that has notice of possible sexual harassment of a student to take immediate and appropriate steps to investigate or otherwise determine what occurred. However, the specific steps in a recipient's investigation of alleged sexual harassment may vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. In all cases the inquiry must be prompt, thorough, and impartial.

Student A identified numerous inadequacies in the University's investigation and overall response to her complaint, each of which are discussed below. Based on OCR's investigation, OCR concluded that the evidence indicates that the University responded promptly and appropriately to Student A's complaint.

Student A's chief concern was that the ODOS investigation of her sexual assault complaint took too long. OCR's investigation determined that the ODOS investigation took nine months. Student A filed her complaint on July 13, 2005 against Students B and C. Later in July, Student A limited her complaint to Student B. On April 19, 2006, following an investigation by three investigating officers, the University informed Student A that the investigation did not support a finding that Student B had sexually assaulted Student A. OCR found that the University decided not to pursue emergency disciplinary action against Student B in July 2005 because it had been fifteen months since the alleged assault and there had been no reported intervening harassment.

OCR found that, although the ODOS investigation took nine months, the University took interim steps while the investigation was underway to protect and prevent harassment of Student A and there was a reasonable explanation for the investigation's length.[3] ODOS sent Student B a no contact order and appointed an investigating officer and victim advocate within one week of Student A's decision to pursue an investigation. The University also issued a second no contact order to Student B after the November 2005 incident even though Student A admitted that she had initiated the contact. Per its usual practice in a dual

[3] OCR has provided the University with technical assistance concerning its Student Nonacademic Misconduct Policy; specifically, OCR has recommended that the policy be revised to include designated and reasonably prompt timeframes for the major stages of investigations of sexual harassment or assault complaints under the Policy.

investigation, ODOS allowed UW-PD to interview the alleged perpetrators first. ODOS resumed its investigation shortly after the alleged perpetrators were interviewed and before the UW-PD investigation was completed. The ODOS investigation was further delayed when the case was reassigned at Student A's request. OCR found no evidence of a lack of diligence on the part of University personnel, and ODOS staff kept Student A informed throughout the investigation.

Student A also raised several objections to the manner in which the ODOS investigation was conducted.

1. Adversarial ODOS Interview. Student A asserted that the treatment of her by ODOS during an interview was unnecessarily adversarial and caused her stress during finals and that ODOS did nothing to intervene on her behalf with her professors. OCR confirmed that ODOS did not contact Student A's professors on her behalf following the interview, but determined that the University was not required to contact Student A's professors. The evidence also confirmed that the interview was stressful for Student A. Because the IO was conducting an investigation, she needed to know the details of sensitive topics. When Student A broke down during the questioning, the interview was postponed. The University agreed to change the IO upon Student A's request. Student A's attorney later told the new ODOS investigator that he did not think it was necessary for ODOS to interview Student A again. The evidence did not indicate that IO 2 treated Student A disrespectfully or unprofessionally during the interview.

2. Witnesses identified by Student A. Student A also asserted that ODOS failed to interview all of the witnesses whose testimony might have affected the outcome of the investigation. She specifically stated that ODOS did not interview all of the witnesses whose names she provided and that one of the investigating officers did not interview her. OCR's investigation confirmed that the ODOS did not interview all of the witnesses suggested by Student A and that IO 3 did not interview Student A. The ODOS did not interview other witnesses suggested by Student A because these individuals did not witness the alleged assault. IO 3 also presented a legitimate reason for not interviewing Student C, in that she correctly believed that his testimony would not corroborate Student A's version. Furthermore, Detective G interviewed Students C, D, and E, about the April 2004 incident, and none of them provided corroborative evidence.

Student A also asserted that ODOS failed to interview other individuals who attended November 12 party at which Student B allegedly harassed her. ODOS did not take disciplinary action against Student B regarding the alleged violation of the no contact order because Student A acknowledged that she was responsible for initiating the contact. Additional interviews would not have changed this result.

After she was informed of the outcome of the investigation, Student A mentioned for the first time that Student B's roommate might have relevant information. ODOS' decision not to

interview Student B's roommate after the investigation had been concluded did not adversely affect the adequacy or reliability of the investigation, especially because Student A did not provide ODOS with any specific information to suggest that the roommate would corroborate her allegation of sexual assault.

Finally, IO 3 did not interview Student A because Student A's attorney told ODOS that he believed that Student A had provided sufficient information in prior interviews and that an additional interview was not necessary.

3. Student B's participation in the ODOS investigation. Student A also complained that ODOS did not notify her of Student B's testimony, provide her with notice of a decision making meeting with Student B, or provide her with an opportunity to rebut his statements. She also claims that the University sent Student B an exoneration letter before she was advised of the decision concerning her sexual assault complaint.

The evidence indicated that ODOS did not formally interview Student B. Student B met briefly with ODOS staff. The brief meeting was not a formal hearing or a decision-making event, and Student A did not have a right to attend or be given notice of that meeting under the University's procedures and practices. The evidence also revealed that Student A was interviewed on several occasions during the ODOS investigation, and was asked about discrepancies between her statement and Student B's version of the events. She had an opportunity to rebut his version of the events in her interviews and written statements to the University. Moreover, Student B was not present at or notified of any of these interviews. As to the timing of communications concerning the determination, the evidence showed that the University verbally advised Student A of the determination on April 19 *prior to informing* Student B of the decision in an April 20 letter.

4. Written findings and review process. Student A complained that ODOS did not provide her with written findings and that the review of the investigation by ODOS administrators was inadequate. The University's disciplinary procedures do not require that a written finding be provided to a student who files a sexual assault charge or provide the student with a right to file an appeal. In any event, the evidence revealed that the University verbally informed Student A of the findings and IO 3 met with her to explain why the evidence did not support her complaint. In addition, after IO 3 informed Student A of her decision, the Associate Dean talked to Student A and her mother, reviewed the evidence again as they requested, and found insufficient evidence to support Student A's allegation.

In conclusion, the above objections raised by the Complainant, including the investigation's length, the perceived adversarial nature of an ODOS interview, ODOS' decision not to interview all of the witnesses identified by Student A, Student B's participation in the investigative process, the absence of written findings and Student A's dissatisfaction with the review process, do not provide a basis for concluding that the University's response to Student A's complaint and notice of possible sexual harassment was not sufficiently prompt

and appropriate. As noted, the University took interim and effective steps reasonably calculated to protect Student A and prevent her from being subjected to harassment during the investigation and provided explanation for the investigation's length. The University's investigation of her complaint was adequate, reliable and impartial, and provided Student A with an opportunity to present evidence and identify witnesses. Student A had multiple opportunities to present information to support her version of the alleged harassment both in writing and in person to ODOS. The University also provided Student A with notice of the outcome of the investigation.

Finally, Student A objected that the University's response to her sexual harassment complaint was also inadequate because of the responses of ODOS and the UW-PD to Student B's alleged violation of no contact order, because the UW-PD did not refer her complaint to the District Attorney's Office and because ODOS did not sent her written statement to the Athletics Department. As noted, if a recipient determines that sexual harassment occurred, it should take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again. A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment.

Student A complained about Detective G's failure to issue a no contact order as promised, or to offer any protection when the ODOS order was violated by Student B at the November 12 party. She also complained that both entities had failed to warn her against talking with Student B, or instruct her as to what she should do if Student B refused to leave a location where she was present. The evidence did not confirm that Detective G had promised Student A it would issue a no contact order. Moreover, the evidence further revealed that Student A initiated the contact and that, after the November 12 party, ODOS explained that generally parties who request no contact orders do not initiate conversations with the alleged perpetrators. The UW-PD also reminded Student A that she could have avoided talking to Student B at the party by leaving the party herself. Under the circumstances, the University's response to the November 2005 contact was reasonably calculated to prevent further interaction between Students A and B and possible harassment of Student A. In fact, Student A did not report any further instances of harassment to the University after the November 2005 contact.

Student A also objected that UW-PD did not refer her case to the District Attorney's Office as promised. She asserts the District Attorney has no record of the referral. The evidence does not support Student A's objection. Detective G stated that she did refer the case for prosecution. The District Attorney's office decided not to prosecute the case and may not have a record of the referral for that reason.

Student A also complained that ODOS did not forward her written statement to the University Athletic Department. Instead, Student A forwarded her statement in April 2006. Although it appears that ODOS staff had initially agreed to send Student A's statement to the

Athletic Department, the University contended that the delay was occasioned by concern as to whether sharing the statement would be appropriate while the investigation was proceeding. In any event, the Athletic Department policy did not provide for possible disciplinary action prior to completion of the ODOS investigation. This policy clearly stated that any violations of UWS Chapter 17 received by the Athletic Department were to be immediately reported to ODOS for action in accordance with its investigative procedures. Accordingly, even if Student A's statement were sent to the Athletic Department before April 2006, the Athletic Department could not have taken action against the alleged perpetrator until the ODOS investigation was completed and action recommended. Thus, OCR cannot conclude that the decision not to forward Student A's written statement to the Athletic Department rendered the University's response to her complaint inadequate.

IV. CONCLUSION

Based on the above, OCR concludes that the University did not subject Student A to a sexually hostile environment in any educational program or activity operated by the University, or fail to respond promptly and appropriately upon receiving a complaint from Student A alleging that she was sexual harassed. Accordingly, OCR has determined that there is insufficient evidence to conclude that the University subjected Student A to discrimination based on sex as alleged. This concludes OCR's consideration of this complaint.

We wish to thank you and your staff for the cooperation and courtesy extended to OCR during this case. In particular, we wish to thank Mr. John Dowling, Counsel for the University. If you have any questions regarding this matter, please contact Ms. Barbara Wolkowitz, OCR Attorney, at (312) 730-1616.

Sincerely,

Dawn R. Matthias

Dawn R. Matthias
Team Leader

cc: Mr. John Dowling