



SPECIAL COUNSEL'S REPORT

**OKLAHOMA AGRICULTURAL & MECHANICAL COLLEGES
BOARD OF REGENTS**

POLICIES AND PROCEDURES REVIEW TASK FORCE

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EXECUTIVE SUMMARY

The Board of Regents for the Oklahoma Agricultural and Mechanical Colleges (Regents), under the directive of its Chairman, Andy Lester, created the Policies and Procedures Review Task Force (Task Force) in July 2012, with the mission of conducting a comprehensive review of board and institutional policies, practices and procedures of the universities and colleges governed by it. During the commission of the Task Force, several highly publicized sexual assaults were reported by students at Oklahoma State University, prompting OSU President Burns Hargis to ask the Task Force to assess the University's response to those incidents.

The Regents employed outside Special Counsel to advise them during this process. Special Counsel's review found that, in public responses to the media, Oklahoma State University misinterpreted applicable federal laws regarding the reporting of sexual assaults. Special Counsel also found that Oklahoma State University's delayed reporting of these sexual assaults did not contravene any federal or state laws or University policies and procedures. Special Counsel interviewed four out of the six student-complainants whose cases prompted the Task Force to enlarge its work. The complainants shared their impressions of the processes involved in their individual cases and made recommendations for future policy changes. Oklahoma State administrators were also interviewed by Special Counsel. The administrators recounted their role in the handling of sexual assault cases under review and shared their recommendations for policy and procedure changes.

Upon conclusion of the review, Special Counsel recommends two changes to the policies and procedures at the Oklahoma Agricultural and Mechanical Colleges. First, Special Counsel recommends a policy change mandating the creation of an Independent Advocate for sexual assault victims. Second, Special Counsel recommends a policy change mandating reporting to police of all sexual assaults when an institution first learns of their occurrence.

**THE BOARD OF REGENTS FOR THE OKLAHOMA AGRICULTURAL AND MECHANICAL
COLLEGES POLICIES AND PROCEDURES TASK FORCE**

The Board of Regents for the Oklahoma Agricultural and Mechanical Colleges, under the directive of its Chairman, Andy Lester, created the Policies and Procedures Review Task Force in July, 2012, with the mission of conducting a comprehensive review of board and institutional policies, practices and procedures of the universities and colleges governed by it. The Task Force was a proactive effort on the part of the Regents to avoid the kind of incidents that devastated the Penn State University community as well as innocent third parties, and that occur on other campuses nationwide.

The work of the Task Force was originally scheduled to conclude in January 2013, with the recommendation of proposed policies for approval by the Regents. However, a series of highly publicized sexual assaults on campus were reported to OSU during the late Fall of 2012, prompting OSU President Burns Hargis to ask the Task Force to enlarge its work to include an assessment of the University's response to those incidents. The Regents employed outside counsel to advise them and the Task Force during this process.

FACTUAL BACKGROUND

On November 7, 2012, officers and advisors of Farmhouse fraternity [Farmhouse] met with OSU administrators to learn how its members might report allegations of sexual misconduct. At this meeting, Farmhouse disclosed that two fraternity members might have been victims of sexual misconduct that allegedly occurred in off-campus housing involving another senior fraternity member as the suspected offender.

The evidence from this initial meeting reflects that the group discussed “all options available,” including the victims' right to file a complaint under the Student Conduct procedures, to report the incident to the Stillwater Police Department (SPD), to file a Title IX Complaint, or to do any combination of these remedies.¹ OSU gave the fraternity representatives five sexual assault "packets," which are provided as a matter of policy to all persons requesting more information about sexual assault from the Office of Student Conduct.² No names of possible victims were disclosed to OSU at that meeting, but it was confirmed that none of the potential victims were under the age of 18.³

Several days later, on November 9, 2012, first alleged victim filed a written complaint with the Office of Student Conduct. He alleged that he was sexually assaulted on or about November 2 or 3, 2011 in off-campus housing.⁴ Under the Rules of Student Conduct, a complaint of misconduct should be filed with the Office of Student Conduct within 180 days of the incident.⁵ However, OSU waived the 180-day limitation and allowed the complaint to proceed.⁶ The alleged victim met with representatives of the Office of Student Conduct and all of his rights and

¹ Interview with Mackenzie Wilfong, in Stillwater, Ok. (Jan. 9, 2013); Interview with Lee Bird, in Stillwater, Ok. (Jan. 9, 2013); Interview with Aleigha Mariott, in Stillwater, Ok. (Jan. 9, 2013); Interviews with Victims A, B, C and D, in Stillwater, Ok. (Jan. 22, 2013); and Memorandum from Mackenzie Wilfong to Gary Clark, in Stillwater, Ok. (Dec. 14, 2012).

² *Id.*

³ Memorandum from Mackenzie Wilfong to Gary Clark, (Dec. 14, 2012).

⁴ *Id.*

⁵ Interview with Lee Bird, in Stillwater, Ok. (Jan. 9, 2013); Interview with Aleigha Mariott, in Stillwater, Ok. (Jan. 9, 2013).

⁶ *Id.*

options were explained to him.⁷ Interviews with the victim and with members of the OSU administration, together with examination of relevant documents, clearly indicated that this victim understood his right to go to SPD instead of or in addition to initiating an action under Student Conduct procedures.

Each of the interviewed complainants provided an account of the advice he received from representatives of the Office of Student Conduct and other OSU administrators. Some complainants recalled being advised that they could file a report and seek action from SPD; whereas, others do not remember receiving advice that reporting a complaint to police was an alternative.

On November 13, 2012, a second alleged victim filed a complaint. The complaint alleged that Respondent sexually assaulted him at a private off-campus residence approximately three weeks earlier, on October 22, 2012. On November 16, 2012, the second complainant met with a representative of the Office of Student Conduct. OSU administrators recalled that all options and procedures were explained to him, including his right to report the allegations to SPD.⁸ They further stated that the complainant was given written materials and a "packet" prepared for all victims that clearly set forth these rights, including the right to report the misconduct to SPD. However, the complainant did not remember being advised of his rights to report the assault to SPD until the conclusion of the Student Conduct proceedings.

⁷ Interview with Mackenzie Wilfong, in Stillwater, Ok. (Jan. 9, 2013); Interview with Lee Bird, in Stillwater, Ok. (Jan. 9, 2013); Interview with Aleigha Mariott, in Stillwater, Ok. (Jan. 9, 2013); and Memorandum from Mackenzie Wilfong to Gary Clark, (Dec. 14, 2012).

⁸ *Id.*

On November 19, 2012, the accused offender (Respondent) met with representatives of the Office of Student Conduct. He denied the allegations.⁹

On November 28, 2012, three additional students filed complaints against Respondent. Each of the alleged victims met in person and as a group with representatives of the Office of Student Conduct. All of the complainants were advised of the same rights and procedures previously described. Two of the three sexual assaults allegedly occurred on OSU property, while the other assault took place at an off-campus private residence.¹⁰ OSU administrators stated that they informed the complainants of their right to report Respondent's misconduct to SPD, and that complainants were handed prepared materials explaining this right. The three complainants' recollections of these initial meetings vary and not all recalled being told of their right to notify SPD before their hearings.

On November 30, 2012, the Office of Student Conduct held hearings on all five sexual assault complaints. Respondent was found responsible for sexual misconduct in four of the five complaints. He received an immediate "no-contact" order and was placed on a three-year suspension beginning December 14, 2012, at the end of the Fall semester.¹¹ On December 3, 2012, OSU mailed the hearing panel's findings to all five complainants.¹² On the same day,

⁹ *Id.*

¹⁰ Memorandum from Mackenzie Wilfong to Gary Clark (Dec. 14, 2012). Additionally, one of alleged sexual assaults occurred in 2011, and OSU waived the 180-day requirement for filing a complaint with the Office of Student Conduct.

¹¹ *Id.*

¹² *Id.*

Respondent met with representatives of the Office of Student Conduct and was informed of the findings against him.¹³

On December 6, 2012, a sixth complainant came forward to report that he had been sexually assaulted by Respondent.¹⁴ After discussing his options with the Office of Student Conduct and receiving the same information as the first five complainants, he decided not to file a complaint through the University, but chose instead to report the assault to SPD.¹⁵

On December 8, 2012, representatives of the Office of Student Conduct e-mailed four Clery Act reports, based on the findings of the hearing panel, to the Oklahoma State University Police Department [OSUPD].¹⁶ On December 11, 2012, the decisions of the hearing panel became "final orders" since no appeal was filed by Respondent.¹⁷

THE CONTROVERSY

Controversy over OSU's handling of the sexual assaults erupted on December 7, 2012 when the media, acting on an anonymous tip, reported that the Stillwater Police Department was investigating "allegations of sexual assault involving a former member of an OSU fraternity house."¹⁸ Questions arose as to whether these or similar incidents had been properly reported to police by OSU, whether the University had given proper notice of these assaults under applicable

¹³ Memorandum from Mackenzie Wilfong to Gary Clark (Dec. 14, 2012).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See various media accounts in December, 2012.

laws, policies and regulations, and whether OSU had withheld information that should have been made public.¹⁹ Moreover, issues arose as to whether OSU was properly interpreting applicable law and policies relevant to the handling and reporting of sexual assaults on its campuses.²⁰

**OSU'S PUBLIC RESPONSE TO THE MEDIA AND CAMPUS COMMUNITY
MISINTERPRETED APPLICABLE FEDERAL LAWS
REGARDING THE REPORTING OF SEXUAL ASSAULTS**

OSU released a response to media inquiries about its alleged failure to timely disclose the sexual assaults either to the police or the public on December 11, 2012.²¹ In its prepared statement, OSU said that it “followed all laws, including the federal Family Privacy Act [FERPA] and policies while carrying out its student conduct process.”²² The University further explained that “since no minors were involved, under the Family Educational Rights and Privacy Act, OSU could not release the names of any victim or witnesses without their consent.”²³ In its internal communications and legal analysis, OSU took the position that until a final unappealed order was entered by the Office of Student Conduct in the sexual assault cases, no public announcement or reports to police identifying the Respondent could be made.²⁴

¹⁹ *Id.*

²⁰ *Id.*

²¹ OSU Student Conduct Outcome media release (December 11, 2012).

²² *Id.*

²³ *Id.*

²⁴ Memorandum from Mackenzie Wilfong to Gary Clark (Dec. 14, 2012); Memorandum from Mackenzie Wilfong to Gary Clark (Dec. 10, 2012); Memorandum from Mackenzie Wilfong to Gary Clark (Dec. 12, 2012); Interview with Mackenzie Wilfong, in Stillwater, Ok. (Dec. 9, 2013); OSU Student Conduct Outcome media release (Dec. 11, 2012); E-mail from Mackenzie Wilfong to Gary Clark (Dec. 12, 2012, 3:41 p.m. C.S.T.); E-mail from Mackenzie Wilfong to Gary Clark (Dec. 11, 2012, 12:28 p.m. C.S.T.).

OSU also took the position that FERPA prohibited disclosure of the identity of Respondent to the police until the conclusion of the Student Conduct Office proceedings, including any appeals therefrom.²⁵ Relying upon 20 U.S.C. § 1232g(b)(1) and 34 C.F.R. § 99.30, OSU released the results of the Student Conduct proceedings to the *complainants* in what it believed was a timely manner after the conclusion of the hearings.²⁶

In doing so, OSU specifically rejected any disclosure to individuals other than the complainants prior to the conclusion of the Student Conduct appeals process described above. In rejecting several exceptions to FERPA, OSU carefully analyzed and documented its belief that none of the exceptions applied to the facts of these sexual misconduct cases. First, it reasoned that the "legitimate educational interest" exception to FERPA, under 20 U.S.C. § 1232g(b)(1)(A); 34 C.F.R. § 99.31(a)(1), was inapplicable since it did not believe that OSUPD had a "legitimate educational interest" in student disciplinary issues.²⁷ It also argued that the FERPA exception, under 20 U.S.C. § 1232g(b)(6)(B), which permits *unlimited disclosure* of the "final result" of a university disciplinary proceeding involving student violence and/or sexual assault was inapplicable to any notification requirement other than to the victim until the appeals process had concluded.²⁸ Finally, OSU reasoned that a third possible FERPA exception, under 20 U.S.C. § 1232g(b)(1)(I), permitting notification prior to a final appeal where the acts alleged

²⁵ *Id.*

²⁶ *Id.*

²⁷ Memorandum from Mackenzie Wilfong to Gary Clark (Dec. 14, 2012).

²⁸ *Id.*

constituted a "health or safety emergency," did not apply because it believed that the conduct alleged in this case did not rise to that level.²⁹

OSU's interpretation of these exceptions to FERPA was misplaced. Whether or not the facts and circumstances of these individual cases warranted disclosure to the police prior to the entry of a final unappealed order of the Office of Student Conduct can be resolved by an entirely different provision of FERPA. As some newspaper reporters pointed out in questions to OSU, FERPA regulations also provide:

Nothing in the Act prohibits an educational agency or institution from contacting its law enforcement unit, orally or in writing, for the purpose of asking that unit to investigate a possible violation of, or to enforce any local, State or Federal law. 34 C.F.R. § 99.8(c)(1).

Yet, OSU's internal documents rejected this basis for disclosure.

The provisions outlined in 34 C.F.R. § 99.8 discuss[ed] the differences between a record *created* by a law enforcement agency (emphasis ours) for law enforcement purposes (which are not covered by FERPA) and does not supersede the consent or exceptions to consent requirements as specifically stated by FPCO [Family Policy Compliance Office].³⁰

That is not what § 99.8(c)(1) says. That provision **explicitly** allows the "educational agency or institution" to contact "its law enforcement agency....for the purpose of asking that unit to investigate" a possible violation of the law.³¹ OSU could have notified the police immediately after it became aware that the sexual assaults had been committed. When OSU first learned of the incidents, no Student Conduct proceedings were pending and, therefore, no educational

²⁹ *Id.*

³⁰ *Id.*

³¹ 34 C.F.R. § 99.8(c)(1).

records had been created. Moreover, after the conclusion of the Student Conduct proceedings but before the time period for a final appeal expired, OSU could have reported the results of the proceedings to the police, identifying Respondent, even while not disclosing the complainants' names without their consent.

This is different from OSU's interpretation that FERPA simply did not apply to "law enforcement" records. Moreover, OSU continued to argue against disclosure after the Student Conduct hearings had concluded, even in the face of disagreements expressed by the United States Department of Education (Department of Education). The Family Compliance Office of the Department of Education faxed OSU's legal department explanatory notes to FERPA specifically discussing whether a university must wait until a final unappealed Student Conduct Office determination was entered before disclosing the results of the hearing. The fax bracketed the following:

Therefore, we have defined 'final results' to allow institutions to disclose the results of disciplinary proceedings before all internal reviews and appeals have been exhausted.³²

However, members of OSU's legal staff resisted the Department of Education's interpretation, pointing out that language elsewhere in the explanatory notes stated that this approach will "benefit students who have been victims of violent crimes and non-forcible sex offenses" and, therefore, disclosure was intended only for such victims.³³ But that interpretation is also misguided. Rather, as the Department of Education pointed out, disclosure prior to a final appeal was consistent with "the need for students to be aware of how the institution responds to these

³² Fax from Bernie Cieplak of the Family Compliance Office of the United States Department of Education to Gary Clark (Dec. 11, 2012).

³³ Memorandum from Mackenzie Wilfong to Gary Clark (Dec. 14, 2012).

incidents,³⁴ clearly evidencing an intent for broader dissemination than simply to the victim. This position was also expressed during one or more phone calls between officials of the Department of Education and members of the OSU legal staff.

Indeed, there appear to have been varying interpretations of FERPA between OSU's legal department and the Board of Regents Office of Legal Counsel (Regents Legal Counsel) as well. OSU's legal department argued that provisions of § 98(c)(1), allowing pre-final hearing notification to police, were not applicable:

The quick answers are no, the cited provision does not override consent, or the exceptions to the consent rule.³⁵ "No, it does not allow the information to be shared, due in part to how OSU FERPA policy notification is written and due to the historical practice of student conduct....No, we could not have shared the name of the alleged responsible party before the final determination . . .³⁶

Yet, a member of the Regents Legal Counsel staff saw the issue differently:

I don't think we couldn't contact the police but the issue was that in the absence of victim consent there wasn't anything to tell the police.³⁷

OSU's public position on these issues was a misinterpretation of federal law. It could have notified police when it first became aware of the sexual assaults, before and separate from disclosing any information obtained in a Student Conduct hearing. In addition, it could have

³⁴ Fax from Bernie Cieplak of the Family Compliance Office of the United States Department of Education to Gary Clark (Dec. 11, 2012).

³⁵ E-mail from Mackenzie Wilfong to Gary Clark (Dec. 12, 2012, 3:41 p.m. C.S.T.).

³⁶ *Id.*

³⁷ E-mail from Doug Price to Gary Clark (Dec. 12, 2012, 9:34 a.m. C.S.T.).

notified police immediately after the Student Conduct Office reached its decision, and not awaited a possible appeal from that order.

**THERE IS NO EVIDENCE THAT OSU DELAYED REPORTING
THE ALLEGED SEXUAL ASSAULTS FOR ANY IMPROPER PURPOSE
OR THAT THE TIMING OF THE DISCLOSURES
VIOLATED ANY LAWS OR POLICIES**

OSU's position against notifying police and identifying the alleged offender prior to issuing a final unappealed Student Conduct Order was grounded in its historical policy, concerns with victims' rights, as well as pragmatism. In addition, OSU was focused on protecting the privacy of its students, including the victims. There is no evidence that OSU delayed reporting or disclosure of the sexual assaults for the purpose of covering up their occurrence or for any other improper purpose. Indeed, even OSU's Clery Act notices of campus crimes are historically delayed until the conclusion of the Student Conduct hearing process.³⁸

This policy position is based at least in part on the pragmatic concern that without the victim's identity, a report naming only the alleged offender would significantly restrict the ability of authorities to investigate a possible crime.³⁹ This concern is compounded by sensitivity for rights of victims and fear that revealing the victim's identity without consent might serve as a potential deterrent for reporting and preventing sexual assaults on campus. Additionally, there is the risk that once an alleged perpetrator is identified to police for questioning, the perpetrator could deduce the victim's identity and retaliate against the victim merely because the crime was

³⁸ Interview with Lee Bird, in Stillwater, Ok. (Jan. 9, 2013); Interview with Aleigha Mariott, in Stillwater, Ok. (Jan. 9, 2013).

³⁹ E-mail from Doug Price to Gary Clark (Dec. 12, 2012, 9:34 a.m. C.S.T.).

reported. Unlike the incidents under review by the Task Force, many sexual assaults involve only a single victim. In this case, police could have been notified sooner, and the number of victims prevented Respondent from identifying the complainants. That would not be true in the case of a single victim.

Moreover, while FERPA did not *prevent* OSU from reporting the suspect's name prior to the entry of a final unappealed order in the Student Conduct proceeding, *neither did it require OSU to do so.*⁴⁰ OSU may have misinterpreted FERPA in its *public response* to the disclosure of the sexual assaults, but its *actual conduct* in this case did not contravene FERPA or its own internal policies and procedures.

OSU's position on both its own policies and its interpretation of FERPA was made in good faith with an apparent concern for student privacy and an abundance of caution. Like many institutions of higher education, OSU did not want to run afoul of the law. FERPA potentially denies federal funds to educational institutions that have a "**policy**" or "**practice**" of disclosing "educational records" or "personally identifiable information" contained in "educational records" (emphasis ours) without a student's prior consent. 20 U.S.C. § 1232g(b). But FERPA is **not violated upon "isolated instances of disclosure."** See *Daniel S. v. Board of Educ. of York Com. High Sch.*, 152 F. Supp. 2d 949 (N.D. Ill. 2001). Moreover, the remedy for a violation of FERPA is a possible loss of federal funding, a consequence without historical precedent. 20 U.S.C. § 1232g. In addition, the United States Supreme Court has held that, under FERPA, no private cause of action exists that would allow a student to sue an institution for disclosing an educational record. *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

⁴⁰ 34 C.F.R. § 99.8(c)(1).

It is important for an educational institution to be mindful of all appropriate state and federal laws and regulations. Pre-existing policy and practice are also important components of an institution's culture and deserve careful attention. However, the safety and well-being of a university community necessitates a re-examination of those policies that deal with notification of police and the campus community when a sexual assault has occurred. This is precisely the focus of the Task Force.

COMPLAINANTS' IMPRESSIONS OF OSU'S RESPONSE AND POLICY VIEWS

We conducted interviews with four of the six complainants who contacted the Office of Student Conduct as described above. The remaining two complainants did not respond to several calls from us seeking interviews. All of the interviews were conducted in-person after a brief introduction by telephone. The description of complainants' impressions of OSU's response to their cases and to possible policy changes is described in the following paragraphs. To protect the privacy of complainants, each complainant is identified only by a letter, and their incidents are profiled in random order.

COMPLAINANT A

Complainant A believed OSU was very responsive to his needs arising from the sexual assault. He confirmed that he was furnished a "packet" containing victim information before he met with representatives of the Student Conduct Office, and he explicitly remembered OSU administrators telling him that he had the right to go to police instead of or in addition to the Office of Student Conduct. He stated that "Aleigha Mariott⁴¹ helped (him) more than anyone."

⁴¹ Aleigha Mariott is the Assistant Coordinator of the Student Conduct Education and Administration (Student Conduct Office).

Complainant A wanted his incident with Respondent to be dealt with swiftly ("nipped in the bud") and without any publicity ("without a big spotlight"). Although Complainant A chose not to pursue a criminal complaint, he left open the possibility of going to police "later . . . at [his] own pace."⁴²

When asked whether OSU should have provided earlier notification of his sexual assault to police, Complainant A replied, "Absolutely not." He stated that "[he] would go to the police when he was ready." Complainant A said, however, that he would favor a policy change that permits OSU administrators to notify police in all cases of sexual assault, but the policy should be limited to reporting only the identity of the alleged perpetrator and not the identity of the victim. Complainant A stated that such a policy would not have deterred him from reporting Respondent to the Office of Student Conduct. Complainant A was very troubled by the publicity surrounding his sexual assault and the Student Conduct proceedings. He said that he was "not happy about the school newspaper . . . that is what has ruined this case." He stated that intense media coverage prevented him from persuading other potential victims "to come forward" with additional complaints against Respondent. Complainant A, however, thought that OSU's punishment of Respondent was "not severe enough." He otherwise felt that the University "could not have handled (the case) any better or differently . . . [OSU] cared about my well-being." In future cases with similar facts, however, this complainant believed that an offender found responsible for sexual assault should be expelled.

⁴² Interview with Complainant A, in Stillwater, Ok. (Jan. 22, 2013).

COMPLAINANT B

Complainant B stated that he did not immediately report Respondent's sexual assault because he thought that his incident was "not severe enough" to warrant proceedings. However, when Complainant B discovered Respondent's "serial predator behavior," he felt it necessary to contact the Office of Student Conduct. Complainant B was further alarmed by Respondent's leadership roles that put Respondent in positions of authority over younger students. Complainant B stated that he did not want a "Penn State" situation to arise at OSU. He knew that Respondent had significant access to freshman students in overnight settings at Camp Cowboy freshmen orientation, and Complainant B worried that it would be easy for Respondent to victimize others in this type of setting.⁴³

Complainant B believed that the Student Conduct proceedings were "very easy," and "smooth." "Aleigha [Mariott] gave me all the information I needed." Yet this complainant does not remember being advised of his right to contact the police instead of or in addition to initiating an action with the Office of Student Conduct *until the conclusion of the Student Conduct proceedings*. His memory of this particular issue is at odds with the recollections of OSU administrators involved in the Student Conduct proceedings. However, Complainant B emphasized that he would not have contacted police in any event, regardless of when he was advised of his right to do so. He stated that he encouraged other students to report Respondent, but they did not want to contact police. Complainant B agreed that policy changes mandating the immediate reporting of sexual assaults to police in which the alleged offender (but not the complainant) is identified would not have deterred him from filing a complaint with the Office of

⁴³ Interview with Complainant B, in Stillwater, Ok. (Jan. 22, 2013).

Student Conduct. In fact, he believed that OSU administrators should have been quicker to report his sexual assault to police. Although Complainant B felt he was "treated well" by the Office of Student Conduct, OSU's failure to notify police "sooner" was his "only complaint."

Complainant B also believed that students should be made "more aware" of the Office of Student Conduct, and OSU should use greater efforts to publicize the complaint processes available to students who have been sexually assaulted. Complainant B also complained that the discipline OSU imposed on Respondent was not severe enough and, in the future, he thought OSU should expel offenders for this type of misconduct.

COMPLAINANT C

Complainant C lauded the way OSU conducted the Student Conduct process, but he was upset that Respondent was cleared of the assault in his case. "The University handled it [the Student Conduct office proceeding] well . . . It was done responsively and timely." However, this complainant did not believe that OSU informed him of his right to contact the police before the Student Conduct proceedings commenced.⁴⁴ This belief is at odds with statements from OSU administrators involved in the handling of his complaint. Nevertheless, if Complainant C had been advised of this right, he would not have exercised it. He recalls being advised of the right to contact the police by members of his fraternity, not OSU administrators. He does not believe that he would have been deterred from coming forward to the Office of Student Conduct if OSU changed its policy to mandate reporting of all sexual assaults to police. He would support a policy change that required identifying the alleged offender but not the victim. He

⁴⁴ Interview with Complainant C, in Stillwater, Ok. (Jan. 22, 2013).

made no criticism of OSU for not contacting police sooner, believing that he alone had the right to decide if or when a criminal complaint should be filed against Respondent.

Complainant C was disturbed that Respondent was not found responsible for sexual assault in his case. He felt that OSU responded discriminatorily to his complaint based on his gender. Complainant C believed that a female complainant under the same facts would have been treated differently, and Respondent would have been held accountable. Alcohol was a significant factor in the incident involving Complainant C, which in his opinion eliminated any possibility of his consent to the alleged acts. Complainant C believed that a female victim in the same situation would not have been found to have consented to Respondent's actions.

COMPLAINANT D

Complainant D came forward to the Office of Student Conduct, but declined to file a complaint. Instead, Complainant D contacted SPD to pursue a criminal charge against Respondent.⁴⁵

Complainant D's decision to report the assault to SPD instead of pursuing action through the Office of Student Conduct was rooted in his disappointment in how OSU had handled an earlier unrelated sexual assault involving another offender. In that case, the offender was found responsible for sexually assaulting him and punished. But upon hiring an attorney to perfect an appeal, the offender's punishment was reduced. Complainant D contended that the "threat of a lawsuit" induced OSU to backpedal on the offender's discipline. Like Complainant C, he

⁴⁵ Interview with Complainant D, in Stillwater, Ok. (Jan. 22, 2013).

believed that he was a victim of gender discrimination, stating that a female victim would have received greater protection and the offender would have received stiffer punishment.

Complainant D stated that he "knew of the police" option at the time of the incident with Respondent, but initially was concerned with "ruining the Respondent's life" by having him face criminal charges. He waited several months to contact the Office of Student Conduct "due to the way he was treated on the first case."

Complainant D eventually reported Respondent to SPD, but was appalled by the treatment he received by the first police officer assigned to investigate his complaint. Complainant D stated that the interviewing officer "made a joke" out of the reported allegations and told him that there was "nothing we [police] could do about it," and that pursuing the case would be "a waste of time for the District Attorney." Subsequently, a different police officer was assigned to investigate Complainant D's claims and the interview proceeded satisfactorily.

**SUMMARY OF COMPLAINANTS' IMPRESSIONS OF THE STUDENT CONDUCT PROCESS
AND POTENTIAL POLICY CHANGES**

Nearly all of the complainants interviewed believed that the OSU Office of Student Conduct responded to their assaults in a speedy and efficient manner. Some were unhappy with the results, but not with the processes or the pace of the proceedings. They all believed that they were treated respectfully and with dignity. Not all complainants remembered being notified by the Office of Student Conduct of their right to file complaints with police, or having received this notification before their hearings concluded, but each complainant was well aware of the right to involve police at some point in the investigation of their cases.

None of the complainants would have been deterred from filing their complaints with the Office of Student Conduct if there was a mandatory policy that required immediate law enforcement notification of all sexual assaults. As presented, this policy would not mandate the identification of the complainant, but it would identify the alleged offender. All of the complainants were unhappy with the publicity surrounding their cases, and most expressed a desire for privacy and confidentiality. None of the complainants blame OSU for the public attention that the case has drawn. Some of the complainants expressed a belief that OSU policy should be changed to make it easier to permanently expel students guilty of predatory sexual misconduct. There was also a feeling among a number of the complainants that male victims of sexual assault are not treated in an equal manner to female victims.

INTERVIEWS WITH OSU ADMINISTRATORS

Each OSU administrator who played a role in this case was interviewed. This included representatives of the Office of Student Conduct, the legal staff of OSU, the legal staff of the Board of Regents, and other OSU officers, employees and administrators with knowledge of the facts of this case. All witnesses were very cooperative. They were open in their recollections of the facts and produced all documents that were relevant to the reviewed sexual assault cases and to the issues of the Task Force. They openly considered and recommended policy changes, even those that differed from the historical practices at OSU.

FACTUAL THEMES FROM OSU INTERVIEWS

a. Conduct of The Proceedings

For the most part, all of the OSU administrators described the events surrounding the Student Conduct proceedings with a similar recollection of the facts. A fraternity president and

other representatives from the fraternity alerted OSU administrators to possible sexual assaults by one of their members and requested alternatives for handling the situation. No victim was present at this initial meeting. The administrators described giving the fraternity representatives a detailed explanation of the procedures involved in a Student Conduct proceeding, as well as a description of the rights afforded complainants under such procedures. Five "packets" were distributed to the fraternity representatives, which contained a detailed explanation of these rights. Interviews with complainants from the fraternity confirm that they received the packets. Among the alternatives presented to complainants: (1) reporting the incident(s) to police; (2) filing a complaint with the Student Conduct Office; or (3) both. Complainants who elected to do both were not restricted by timing or sequence, meaning that complaints could be reported contemporaneously to police and the Student Conduct Office, or complainants could pursue one reporting alternative followed by the other without adverse consequences (e.g., contacting police, then proceeding with a Student Conduct hearing). These rights were also listed on a "checklist" of the procedures involved in a Student Conduct proceeding that was provided to complainants. Additionally, administrators provided a verbal explanation of these rights and procedures to complainants individually.

b. Policy Basis for Timing of Notification

News coverage criticizing OSU's handling of complainants' allegations has focused on the decision to delay notification of the sexual assaults to police until after Respondent's right to appeal the Student Conduct proceedings expired. Administrators explained that, historically, OSU policy dictated that they wait until the *conclusion* of Student Conduct proceedings—including any appeal—before notifying law enforcement. However, victims are notified as soon as the panel conducting the Student Conduct hearing reaches a decision. An accused is then

given seven (7) business days to file an appeal. The Clery Act, which governs notification to law enforcement of campus crimes, merely requires that such notification occur in a “timely” manner after the student reported an incident.

An imminent threat exception exists to the current reporting policy if administrators believe a danger exists to the campus community. However, none of the administrators considered Respondent an imminent threat. They reasoned that, because Respondent was "known" to his victims and his conduct did not cause severe bodily harm, advanced notification to law enforcement was not permitted before the appeals process expired. Examples OSU administrators gave to illustrate the type of conduct warranting immediate notification included "an outbreak" of disease, "terrorism," or an assailant “jumping out of the bushes” to sexually assault victims. Discounted by all administrators that we interviewed was the threat Respondent’s predatory conduct posed to students who became acquainted with Respondent. His serial offenses over an eighteen month period indicated a pattern of behavior that presented a significant threat to others around him.

c. Views of Possible Policy Changes

Most administrators recognized deficiencies in OSU’s current sexual assault policy, and several came to their interviews with prepared recommendations to improve OSU’s response to victims and protection of the campus community as a whole. The following compiles and summarizes their suggestions for change:

(1) Immediate Notification To Police When Sexual Assault Is Alleged

Most administrators favored changing OSU policy to require immediate notification to police when a crime of sexual assault is involved, regardless of whether or not an action is pending

before the Office of Student Conduct. Under the present policy, notification is delayed until an accused is given time to appeal the decision rendered by a hearing panel. Importantly, an immediate notification requirement removes any contravention of FERPA because there can be no disclosure of student records related to the alleged offense since no records have been created by Student Conduct proceedings. A police investigation operates independently of the Student Conduct proceeding and would not depend on the written findings of a hearing panel. This approach also maximizes the safety of the campus community by alerting law enforcement to the presence of a possible offender.

(2) Police Notification Should Disclose The Accused Offender's Identity
But Not The Complainant's Identity

Administrators favoring immediate notification that identifies the accused offender agreed with a proposed policy that would keep the victim's name confidential, unless the victim consented to such disclosure. Admittedly, the lack of cooperation by a victim will likely hamper a police investigation into the alleged offense, but the victim has the right to make such a choice. Administrators agreed that mandatory reporting of complainants' identities would probably deter some students from reporting sex-based crimes.

(3) Mandatory Training For Notification Requirements

Some of the administrators suggested enhanced mandatory training for all OSU faculty, staff, and OSUPD officers who may encounter the reporting of sexual assaults within the scope of their jobs. A uniform approach to the implementation of University policies and procedures would reduce confusion and promote efficiency when handling sex-based crimes.

(4) Sexual Assault Coordinator

Some OSU administrators recommended designating one professional to coordinate the interaction of each member of the OSU community that has a role responding to sexual assaults. Some of these diverse groups have little interaction with one another on a regular basis, which could lead to a breakdown in communication. These groups include: OSUPD, SPD, the Office of Student Conduct, the OSU General Counsel's staff, students, fraternity representatives, counselors, and health care providers.

(5) Sexual Assault Victim Advocate

Most administrators favored the creation of a new position charged with protecting sexual assault victims and guiding them through the entire process of reporting the assault.

(6) Enhanced Training, Staffing, and Funding

A number of administrators called for increasing training for those charged with responding to sexual violence in the OSU community. They also felt that this issue was important enough to justify additional staff and increased funding for these efforts. As a part of this focus, some wanted additional initiatives in the area of sexual assault prevention, including enhancing community awareness of the issues surrounding sexual violence and the resources available to victims.

(7) Unify Reporting Centers

One OSU administrator described the reporting of campus crimes as presently "owned" by different departments on campus. The Office of Student Conduct has a role in this, as does OSUPD, and other university departments. It was suggested that consideration should be given

to unifying the intake of all reported campus crimes under a single department to promote consistent interpretations of varying policies, laws and regulations governing the required law enforcement notifications.

(8) Change OSU Policy That Does Not Include OSUPD As An Administrator With An “Educational Interest In Student Records”

OSU excluded application of the FERPA exception permitting early notification of sexual assaults based on its belief that OSUPD did not have a "legitimate educational interest" in student records. 20 U.S.C. § 1232g(b)(1)(A); 34 C.F.R. § 99.31(a)(1). This interpretation is grounded in the historical policy of OSU but appears inconsistent with the role of OSUPD as well as student and campus safety.

SUMMARY OF ADMINISTRATORS' VIEWS OF PROCEDURES AND POLICY

Most administrators thought that the policies OSU relies upon in sexual assault cases could be improved, and they volunteered solid proposals to achieve this end. They believed that they had responded to the sexual assaults involving Respondent in accord with current OSU policy and relevant laws and regulations. But they also felt that those policies could be improved when reviewing the circumstances of Respondent’s case with the knowledge that only comes through hindsight. Most administrators felt that increased training, funding, and substantive changes in the policies surrounding the reporting of sexual assaults on campus were necessary to improve the quality of OSU's future response to victims.

STRUCTURAL ISSUES IN PROVISION OF LEGAL ADVICE TO OSU

OSU receives legal advice from several sources, but primarily from its own General Counsel's Office [OSU General Counsel] and, secondly, by the Regents Legal Counsel. This is a fairly recent development in that, historically, the Regents Legal Counsel was the *only* general counsel office in the A&M system, which includes a number of other colleges and universities in addition to OSU. The Regents govern each of these schools and, in the past, the Regents Legal Counsel provided advice to all of these institutions. In 2011, the Regents created the OSU General Counsel's Office to serve only Oklahoma State University

The 2011 document that accompanied the creation of the OSU General Counsel separated the functions of that office from those of the Regents Legal Counsel. Certain substantive areas of law were given to the OSU General Counsel, and others to the Regents Legal Counsel. However, it appears that this separation of substantive areas of legal advice evolved at least in part based upon the skill sets of the individual attorneys in the respective offices rather than from an overall strategic plan dividing those responsibilities. This fractured responsibility led to knowledge "gaps" between the two legal offices that were detrimental in responding to media inquiries about OSU's reporting of sexual assaults.

For example, the 2011 document designated the Regents Legal Counsel with some jurisdiction over issues relating to student privacy laws, such as FERPA. It appears that the Regents Legal Counsel has expertise in this area. Yet, much of the day-to-day interaction between OSU administrators and staff on student privacy issues lies with the OSU General Counsel, and those issues are closely related to other legal areas assigned to its handling of

student affairs. While there is an excellent working relationship between these two legal departments, the primary source of legal advice to OSU is the OSU General Counsel.

Indeed, this case demonstrates clearly the need for a more strategic structural relationship between the two legal departments. While the OSU General Counsel was publicly arguing that FERPA prevented the University from notifying police of the sexual assaults before the conclusion of the Student Conduct Proceedings, the Regents Legal Counsel had an opposing view. But with the day-to-day physical proximity between the OSU General Counsel's office and the OSU administration, the Regents Legal Counsel's advice was not taken.

With the recent evolution of the separate OSU Office of General Counsel, it would appear to be consistent with best practices to undertake a strategic study on how to divide its responsibilities from the Regents Office of Legal Counsel. Board of Regents Policy 1.02 itself provides that these offices will "annually . . . review this document and recommend to the Board any needed changes." The proposed study should look beyond the skill sets of current staff and attempt to structure a model consistent with best practices for both OSU and the Oklahoma Agricultural and Mechanical Colleges system as a whole.

SPECIAL COUNSEL'S POLICY RECOMMENDATIONS

After interviewing all the available witnesses and reviewing all documents relevant to these cases, certain factual issues stand out and a number of policy recommendations appear relevant.

(1) The Board of Regents Should Create The Position of Independent Advocate For Victims of Sexual Assaults

A number of administrators and others have proposed adding a "sexual assault" coordinator to the team of OSU personnel assigned the responsibility of responding to sexual assaults. While

that is a worthy goal, we believe that it is even more critical to first create an independent sexual assault advocate for all victims throughout the OSU/A&M system.

An advocate is different from a coordinator in several important respects. An advocate has a duty to the victim, not to the institution. All too often, staffs charged with responding to complaints of sexual assault have conflicting duties with various constituencies that may be at odds with advising the victim. They must equally represent the University, the alleged offender, and the victim. They are tasked with prosecuting the complaint while simultaneously protecting the rights of both the complainant and the accused. Additionally, an inherent conflict exists if a multi-tasking coordinator is confronted with a complainant's interests that are adverse to the University's interests.

The creation of an Independent Advocate position will protect the victim and assist in streamlining the response to sexual assaults. The Independent Advocate can ensure that the victim is fully aware of all of his or her rights and assist the victim in dealings with police, medical personnel, and University administrators.

It is proposed that the Regents create an Independent Advocate position that would service all of the schools and campuses within the OSU/A&M system. For organizational purposes, the Independent Advocate could retain an office at one designated campus or at the Board of Regents office, but the Independent Advocate would be available to students at all campuses. The Independent Advocate would serve at the direction of the Regents and have no reporting responsibility to any institutional administrator within the OSU/A&M system. This will ensure the independence of the Independent Advocate and make such services available to students on all campuses.

**(2) Mandatory Reporting Of All Sexual Assaults At the Time
A Complaint is Filed**

A great part of this controversy has stemmed from the inherent conflict between protecting the rights of the victim, including his or her privacy rights, and protecting the community against sexual predators by giving timely notice of alleged sexual assaults. In addition, a valid concern exists that the mandatory reporting of sex-based crimes to police may deter victims from seeking help from the Office of Student Conduct. But the presence of the independent sexual assault advocate can help minimize this possibility. Indeed, most of the students we interviewed would not have been deterred from filing complaints with the Office of Student Conduct if mandatory police reporting was a requirement. Most of the administrators interviewed also approved of this proposed change.

Under this proposed policy, all of the colleges and universities within the OSU/A&M system would immediately notify police upon learning of a sexual assault on campus, on campus-owned property, or to one of their students. The decision whether to first notify an institutional police department or an external police department would be determined by jurisdictional issues, although the institutional police department should be notified in all cases. This notification would occur simultaneously with the commencement of any Student Conduct proceedings and before the creation of student records relevant to the assault. The notification would not identify the complainant without his or her consent.

CONCLUSION

The intersection of the work of the Task Force and the sexual assault cases that arose at OSU in the fall of 2012 presented both the University and the entire system of institutions governed by the Regents a unique opportunity to combine policy with experience. By having to deal with a series of cases in a short period of time, the Regents and the entire community of the institutions that they governed were in a position to examine their historical policies and practices. These incidents presented an opportunity for administrators, victims, Regents and others to examine the way sexual assaults were responded to on their campuses and to search for better and innovative responses.

In their interviews during this process, many OSU administrators voluntarily pointed out shortcomings in their rules, regulations and traditions and suggested new and innovative ways to deal with the issues under review. In addition, victims offered important perspectives on how their individual cases were handled and how cases like theirs could lead to the implementation of improved policies and procedures that would make for a more efficient system and a safer campus. Finally, the media asked important questions about these cases that made the Task Force's work even more grounded in the actual facts and experiences of student life.