

Report to the Board of Directors of Oregon Health & Science University

SCOTT D. SCHNEIDER

SCHNEIDER ———
EDUCATION &
EMPLOYMENT
——— LAW

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Schneider Education and Employment Law (the firm) was retained by the Oregon Health and Science University (OHSU or the University) Board of Directors to conduct a comprehensive, impartial, and independent investigation and review of OHSU's handling of a matter involving a former employee, Dr. Dan Marks, which was under review by the Board. This matter has become a subject of considerable public interest.¹

The firm was specifically requested to assess:

- Whether OHSU's system and leadership responses to reports of discriminatory misconduct aligned with OHSU's policies and processes?
- The role and responsibilities of management when OHSU's Office of Civil Rights Investigations and Compliance (OCIC) or Human Resources initiates an investigation.
- OHSU's current processes and the appropriate decision-maker related to compensation, regular or additional, for individuals not in good standing with the organization.
- How OHSU can better respond in the future, including recommendations for practice beyond compliance with policy and procedure?

I. Introduction

OHSU failed its students in its response to what was a straightforward complaint of inappropriate conduct by a faculty member. As discussed in detail below, a remarkably understaffed Affirmative Action and Equal Opportunity's (AAEO)² initial mishandling of this matter was replete with fundamental errors.

Institutions make mistakes, especially institutions as large and complex as OHSU. Responding effectively to reports of discrimination is challenging work that rarely lends itself to perfection. What institutions tell the community when inevitable mistakes are made

¹ See e.g., Crombie, Noelle. "A top OHSU doc resigns after internal investigation finds he secretly photographed women students." The Oregonian, January 3, 2024; Crombie, Noelle. "OHSU doc who snapped secret photos of women students given \$46k bonus on his way out." The Oregonian, January 10, 2024; Effinger, Anthony. "OHSU Dean Sends Internal Letter Describing His Role in Scandal Spurred by Picture-Taking Colleague." Willamette Week, January 29, 2024

² AAEO became OCIC in early 2023.

matters. Appropriate communication, which includes a thoughtful diagnosis about the cause of the errors paired with concrete and actionable plans to fix the cause, is essential to rebuilding community trust. Perhaps more importantly, a sincere apology coupled with appropriate support for those harmed and a plan of action to address concerns and rebuild trust can go a long way to remedy the harm caused to participants in a process that has gone awry.

In this case, unfortunately, AAEO's initial failures were compounded by public pronouncements that at times failed to acknowledge mistakes were made and how they would be fixed going forward and by public finger-pointing that was unbecoming and fundamentally inconsistent with the needs of the University community. They were further compounded by the failure to provide coordinated and appropriate supportive services to the student reporters and the many other students negatively impacted by this matter.

This report provides a detailed account of OHSU's handling of the Marks matter and assigns fault where appropriate. In doing so, the aim is not to publicly flog the employees who worked on this matter, but to hopefully provide the University with meaningful information to guide changes which improve the institution's response to reports of discrimination. This is especially important for the community's remarkable contingent of graduate students who are especially vulnerable to discrimination and have various disincentives to report.

In fairness, a disclaimer is warranted. This review primarily critiques AAEO's handling of a case during a particularly challenging time for that department. As discussed below, the department was woefully understaffed. This was a long-running issue which was exacerbated by fallout from the Covington Report. The staffing shortages were also part of a national trend where personnel in Title IX and Title IX-adjacent offices across the country were leaving the profession because of the pressure and public scrutiny faced by those personnel.³

The staffing situation has subsequently improved but remains considerably short of ideal. Additionally, the institution has taken other steps to improve its process. Those are mentioned below. More needs to be done.

With that as backdrop, while investigating institutional civil rights reports is complicated work, this matter was not. An OHSU graduate student captured an image of former School of Medicine Senior Associate Dean Dan Marks with his OHSU-issued iPhone under a

³ For perhaps the most thoughtful piece on this trend, see Sarah Brown, *Life Inside The Title IX Pressure Cooker*, September 5, 2019, <https://www.chronicle.com/article/life-inside-the-title-ix-pressure-cooker/>

table, the camera on, and aimed across the table at two female students wearing skirts. As an experienced investigator interviewed as part of this review aptly put it, the photo is “as close to a smoking gun as we ever get in any of these cases, that quite frankly never happens.”

The student shared the photo with leadership of the University and AAEO in November 2022. It was not until May of 2023 — or approximately six months later — until anyone at OHSU presented the professor with the photo and asked him to provide an explanation. When finally asked to provide that explanation, this is how the professor responded according to the University’s September 2023 investigation report:

When Respondent reviewed the photo that Complainant #1 had provided and was asked if he could explain his conduct in the photo, Respondent said he was “not going to give an explanation” and stated that the photo was “horrifying.”

Respondent said he did not remember holding his phone under the table with the camera app open, but he said, “I certainly understand the concern.” Respondent acknowledged that “the camera obviously was on,” and said, “There it is.”

Respondent stated that he was not intentionally collecting photos of students and stated that he also did not record any videos. Respondent reiterated that he did not have photos of students . . . on his phone.

Respondent stated that when he saw the photo, he was “on the verge of vomiting.” Respondent said, “Based on that, I totally get it. It’s just sickening.”⁴

It took over a year from the time the photo was shared with the University until Dr. Marks ultimately resigned from the University in lieu of initiation of termination proceedings. Prior to his departure, on October 13, 2023, the University paid him a \$46,234.12 President’s Recognition Award.

As discussed below, there were numerous missteps in OHSU’s handling of the Marks matter. For avoidance of doubt, though, Marks’ alleged misconduct was reported out of the

⁴ OHSU was clear that this firm’s review of this matter was “not a new investigation into Dr. Marks’s actions. That investigation occurred, and the findings were reported to the National Institutes of Health.” Consequently, the firm expresses no opinion on the correctness of OHSU’s findings that Marks violated institutional policy and has taken those findings as a given throughout the course of this review. Additionally, the firm did not seek to interview Dr. Marks and simply notes without additional comment that he previously denied ever intentionally taking surreptitious photos of any students with sexual intent.

School of Medicine and elevated to AAEO/OCIC. Put another way, while the initial student disclosures could have been handled more empathetically, this is not primarily a failure-to-report case. While there was a somewhat earlier opportunity to report this matter, **the missteps and subsequent institutional maelstrom chronicled in this report are primarily attributable to an understaffed AAEO office's complete mishandling of the report.**

In the firm's opinion, those missteps were subsequently compounded by finger-pointing, corresponding defensiveness, and remarkable levels of institutional distrust. More importantly, they were heightened by a fundamental failure to proactively communicate with and support the group most negatively impacted by this matter — the University's graduate students. Instead, the University's communications compounded AAEO's errors with assertions not supported by the evidence and rhetoric that was inconsistent with the reality students faced navigating the University's clumsy response to their reports.

There is a clear rift between the leadership of the School of Medicine and the President's Office. The firm heard from many leaders in the School of Medicine who expressed concerns that the senior leadership of the University refuses to take responsibility for failures that fall within their portfolio of responsibilities and is quick to point the finger at others. University leaders outside of the School of Medicine shared their view that the School of Medicine was resistant to change and wanted to continue to handle reports of discrimination the "old way."

It is beyond the firm's scope to umpire various historical grievances which clearly exist. However, to the extent this dysfunction extends to the University's response to reports of discrimination, and especially when it negatively impacts students, the firm would be remiss not to flag the issue and suggest it warrants intervention. As discussed below, the ongoing tension negatively impacted the University's response to this matter.

It is the firm's hope that this report will refocus the University's attention on what's important: significantly improving OHSU's response to reports of discrimination. As this matter demonstrates, there is considerable work to be done.

Under the best of circumstances, there are many barriers for graduate students to report misconduct committed by faculty. Graduate students are especially vulnerable in this regard and the power differentials are significant.

Further complicating matters for OHSU, graduate students have well-founded skepticism that their reports will be handled appropriately, that their "confidential" reports will play out publicly on the front page of the local newspaper and elsewhere, and that they will be

largely left to battle the attendant fallout on their own and with minimal support from the University. There should be a sense of urgency to fix the problems identified in this report.

While this report largely tells a dim tale, it is not without glimmers of hope:

- After far too long and way too many missteps, a robust investigation into the students' complaints was conducted, significant due process was provided, reasonable findings were made, and the person who was found responsible is no longer part of OHSU. This is significant.
- It was an honor to review the advocacy work done by the University's short-staffed Confidential Advocacy Program. The University only landed in the right place because of CAP's dogged determination on behalf of graduate students. The input Kelsey Arias provided throughout this review was invaluable to the firm, and the OHSU community is blessed to have her. It needs more like her.
- The University's Associate Vice President of the Office of Civil Rights Investigation and Compliance, Angela Fleischer, is well regarded, and the firm strongly believes she is the right person for this very difficult job. While she only joined the University in June 2023, her insights and counsel throughout this matter were spot on. She needs and deserves resources and the support of the OHSU community.

There is also this review. Perhaps too often in large institutions, serious problems are identified in the community and the approach is to send out polished public relations statements and hope for the furor to die down. In this instance, OHSU's Board requested an honest account of what happened, and no one within the institution has attempted to interfere with the candid conclusions in this report. The Office of General Counsel, and particularly Alice Cuprill Comas, have been responsive to all requests for information and no one has tried to exercise undue influence over the report's contents. There is also an earnest desire to get this right going forward.

The firm's hope is that by identifying specific errors, the University is armed with important information to guide meaningful and specific changes designed to minimize the risk of repeating the same mistakes.

This report will avoid making vague pronouncements or advocate for making enormous structural changes for their own sake. Instead, the overarching recommendation is a simple one: responding to reports of discrimination, supporting University members who are impacted by such reports, thoughtfully and fairly assessing those reports, and designing training to educate community members on their reporting obligations and/or prevention

programming requires many exceptional people. Changing department names, reporting structures, etc., is ultimately an exercise in futility if OCIC is not appropriately staffed. It was clearly not appropriately staffed at the time the students' reports were made, and while there has been modest progress, OCIC remains inappropriately staffed for an entity as large and complicated as OHSU.

Of course, there needs to be a disclaimer. Institutional policing of civil rights matters is complicated, emotional, and time-consuming work. In the best operations, mistakes are made. Exceptional personnel burn out and leave the profession. Even when a matter is handled appropriately, these offices may be criticized. In what has become an aphorism in this work, "100% of the time, 50% of the people are upset with the end result." The firm is confident that, if the University makes the changes identified below, it will have a system that the University community can have more confidence in, and which provides appropriate support to employees and students. It will never be a system immune from criticism. It will also never be a perfect system.

Finally, and most importantly, the firm is grateful for the participation of graduate students throughout the course of this review. The hope is that through their invaluable assistance to this review, OHSU can better serve them.

II. Methodology

The firm started with no knowledge about the Marks matter or OHSU in general. The initial step in the review was to read media reports regarding the situation. OHSU then provided the firm with a bevy of documents from various institutional stakeholders identified as relevant to the review. These included, but were not limited to, the complete AAEO/OCIC files regarding this matter.

After reviewing the file materials, the firm prepared a list and order of fact witnesses to be interviewed. It also requested additional evidence, including most notably, various email files. The firm received tens of thousands of pages of responsive material. OHSU was fully cooperative and responsive to all requests for information.

Witness interviews began in late February 2024. Various interviewees expressed concerns regarding retaliation and the firm has taken pains to protect their anonymity while also sharing the substance of their concerns in this report when helpful.

In addition to interviewing witnesses specifically identified by the firm, the firm solicited the participation of those in the OHSU community who might have relevant evidence or

otherwise helpful information to reach out for interviews. This feedback from members of OHSU's community was critical in shaping many of the recommendations below. In total, the firm interviewed over 50 witnesses and conducted follow-up interviews with several of those witnesses.

The firm is comfortable that it has sufficient information to provide this report.

III. Re-Centering on What's Important: Better Serving OHSU Graduate Students

Under the best of circumstances, the reasons why students may be reluctant to report misconduct by their faculty⁵ should be obvious:

- Faculty members have significant power over their academic and professional futures, and students fear retaliation or damage to their academic reputation (especially in narrow academic fields).
- Students fear reporting discrimination could harm their future career prospects, both within academia and beyond. They fear being labeled as troublemakers or difficult to work with, which could impact their ability to secure recommendations or future job opportunities.
- Some students lack confidence in the institution's ability or willingness to address discrimination complaints effectively. They may believe that reporting the discrimination will not result in any meaningful action being taken, or they may fear that their concerns will be dismissed or minimized.
- Students may feel isolated and unsupported.
- They also may not understand what is a complicated and poorly communicated process.
- Students may be unsure about what constitutes discrimination or whether their experiences qualify. Without clear guidelines or support, they may hesitate to report incidents for fear of being wrong or making a fuss over nothing.

⁵ Many of these barriers to reporting exist for employees as well.

- Experiencing discrimination can be emotionally distressing, and some students may prefer to avoid reliving the experience by not reporting it. They may also worry about being re-traumatized during any investigative process.

All these factors clearly apply at OHSU and in this specific case. They were heightened in this case because of Dr. Marks' prominent role within the MD/PhD program and his long-time professional relationship with Dr. David Jacoby, the program's then-Director.

For emphasis, the students who brought the underlying reports in this matter felt remarkably vulnerable. They reported reluctantly and with genuine fear that their reports could have significant negative repercussions on their continued participation in a lengthy education program and throughout their careers.

Especially in a case like this, it is important to stress that how a recipient initially responds to disclosure of possible discrimination can go a long way in either exacerbating the reporter's worst fears or making the reporter feel supported. Additionally, after a report is made, subsequent check-ins and even small shows of support can be enormously powerful antidotes to fears of retaliation. As one student witness sagely put it, "a little bit of empathy can go a long way."

There are also broader issues unique to OHSU which may disincentivize reporting.⁶ First, the firm did not meet with every OHSU graduate student, but the clear consensus from the graduate students it did meet with is that there is a gulf between the University's rhetoric about how OHSU responds to reports of discrimination and the reality of how OHSU responds. While the firm did not carefully review other investigation files from student reports of discrimination, OHSU's handling of the Marks matter underscores these concerns, as do several anecdotal accounts. For students, this disconnect is disorienting, has fed cynicism, and has been retraumatizing.

The attendant media attention and campus interest regarding this matter is a double-edged sword. On the one hand, some students correctly pointed out that the campus and media attention highlighted problems that may otherwise have been swept under the rug. With that said, none of the students who made reports of discrimination here wanted their reports to play out in local media or in competing campuswide communications. They did not want

⁶ Under recently promulgated Title IX regulations which are effective in August, institutional Title IX Coordinators will be required to:

- (1) Monitor the recipient's education program or activity for barriers to reporting information about conduct that reasonably may constitute sex discrimination under Title IX or this part; and
- (2) Take steps reasonably calculated to address such barriers.

to be contacted by investigative reporters. They wanted their reports appropriately handled by OHSU. The firm and students are rightfully concerned that subsequent discrimination reports may be stymied because students are understandably concerned that these confidential matters will be splayed across the front page of the local newspaper and elsewhere.

As a prominent public institution subject to public records laws (and with a community which, at times, seems to have outsized and counterproductive expectations of what they are entitled to know), this may be an unfixable problem. If it is, the University needs to enhance its support for students who find their private reports become matters of public concern. At a minimum, OHSU leaders should avoid needlessly fanning the media flames. Alternatively, the hope is that OHSU can return to norms of confidentiality regarding these matters while designing processes that allow for accountability when things go awry so that participants can effectively seek redress from within the institution.

Finally, several students expressed concerns about retaliatory lawsuits and concerns about protecting their privacy in a matter that has, through no fault of their own, garnered considerable public interest. More pointedly, these students have indicated that they have largely been left to deal with these issues on their own.

The recommendations made in Section XIV below are designed to address these concerns.

IV. The Covington Report

On December 9, 2021, OHSU issued “the Covington Report.” The report was prepared by a team of almost 40 personnel from the law firm Covington & Burling LLP and came at an estimated cost of \$6.5 million. It was initiated, in part, in response to a lawsuit brought against the school and former anesthesiology resident Dr. Jason Campbell, which was ultimately settled for \$585,000. Among the issues raised in that lawsuit was whether OHSU personnel appropriately reported misconduct and whether OHSU appropriately investigated the reports it received.⁷

Relevant for purposes of this review, the report noted that:

⁷ According to the Covington Report, OHSU “asked Covington to address how OHSU has handled, and how it should handle in the future, reports of inequitable treatment, discrimination, or harassment based on . . . protected characteristics . . . including whether community members feel comfortable reporting these issues and whether they are appropriately investigated and addressed . . . and whether OHSU acts in accord with best practices regarding communication of reports, investigations, and outcomes.”

[c]ertain of the issues raised by [the plaintiff in the Campbell litigation] illustrate some of our broader findings, described below. For example, there is **widespread consensus at OHSU that the institution did not appropriately handle the complaints against [another doctor accused of violating institutional policy]**. That investigation lasted more than a year and many people, including AAEO leadership, OHSU senior leaders, and other senior faculty, noted that **the investigation took too long**. As described below in Finding 5, this comports with our view that **AAEO is understaffed** and a widespread perception that **complaints are not handled in a timely manner**.

According to the report, the lawsuit “also raised issues regarding reporting concerns under OHSU’s Complaints of Discrimination, Harassment, and Retaliation Policy. [The plaintiff in that lawsuit] alleged that numerous individuals were required by the Mandatory Reporting Policy to report concerns raised by her and another individual about Dr. Campbell’s conduct and failed to do so.” However, Covington determined that “OHSU’s Mandatory Reporting Policy is not clear, did not necessarily apply to each of these situations, and had never been previously enforced.”

There are other notable portions of the report for purposes of this review:

- “Although there may be confidentiality concerns restricting the ability to discuss specific complaint outcomes or disciplinary decisions with complainants, **reporters should understand the process that will be followed to investigate their concerns and be kept informed of the status and outcome of the issues they raised**. In fact, Title IX and EEOC guidance note that it is best practice for both parties to be informed of the investigation’s progress. In sum, hotline reporters’ experiences suggest that community members receive incomplete and, at times, conflicting information about how reports are investigated and what to expect in the process.”
- “OHSU has not provided HR with sufficient resources to address the volume of complaints it receives . . . AAEO, like HR, does not have enough staff to adequately fulfill its responsibilities. The caseload handled by AAEO has increased significantly over recent years, but the size of the department has not grown with it . . . **Every AAEO employee who spoke with Covington noted that the AAEO Department is not adequately resourced and staffed to properly carry out its mission**. One employee noted that AAEO has ‘always felt understaffed’ due to the increasing caseload. As with HR, AAEO personnel have also proposed staff

expansions, to no avail. In June 2021, Stadum submitted a proposal to Moawad and Dr. Jacobs, requesting an increase in AAEO staffing, but the proposal was not implemented . . . These staffing constraints are felt by the community, with only 8% of focus group participants believing that HR and AAEO are adequately staffed. Additionally, over two-thirds of the focus group participants who reported misconduct and many hotline reporters felt that their complaints were not handled appropriately as to timing, communication, or attention, resulting in a lack of trust of HR. Report mishandling can be caused, at least in part, by the volume of complaints these employees are managing . . .”

V. AAEO/OCIC Staffing Situation During the Relevant Time Period

Responding effectively and fairly to reports of discrimination is difficult and time-consuming work. It requires many employees, and the employees doing the work must be intelligent, thoughtful, and empathetic. The importance of experience cannot be overemphasized.

As the Covington Report made plain, AAEO historically had not been appropriately staffed. The Covington Report provided the following staffing snapshot at the time of their review:

In 2017, AAEO had 10 staff members and 457 reports and requests, resulting in a caseload of approximately 46 reports per AAEO employee. By 2020, AAEO was handling over 800 reports, including accommodation requests and civil rights matters, or matters into prohibited discrimination and harassment based on any protected class, but the number of employees remained the same, increasing the caseload to approximately 81 reports per AAEO employee.

When the Covington Report was issued in December 2021, it was clear that AAEO did “not have enough staff to adequately fulfill its responsibilities.” Remarkably, over a year later, the staffing situation was even worse. Witnesses interviewed as part of this review described a work environment within AAEO during the Covington review process and in the immediate aftermath, where staff routinely cried from the attendant stresses.

This, coupled with additional factors not unique to OSHU⁸, led to the departure of what the firm believes were talented and experienced civil rights staff. In internal email communications around this time, the staffing situation was described as in a “state of crisis” as the department was down a director, three Equal Opportunity Officers, and administrative staff. In fact, on December 28, 2021, or about three weeks after release of the Covington Report, AAEO’s only remaining Equal Opportunity Officer resigned due to work-related stress.

At the beginning of 2022, attempting to address this staffing shortage, OHSU entered into contract negotiations for the provision of “Interim Title IX Coordinator & AAEO Director Services” with a company called Grand River Solutions. On April 13, 2022, an email went out to internal stakeholders about Grand River Solutions’ new role. This role was further fleshed out on July 19, 2022, when a representative from Grand River Solutions sent out an email to AAEO staff announcing that Jackie Hennard would be the interim AAEO Director and Title IX Coordinator with assistance from Kim Anderson, another Grand River Solutions colleague. Hennard would also be responsible for managing the Title IX “inbox.”

Notably, throughout the time the Marks report was processed by AAEO/OCIC (and especially during AAEO’s first handling of the report from November 2022 until February 2023), AAEO/OCIC had **fewer** staff (even when contracted staff are included in the count) than they had when Covington correctly concluded they were inadequately staffed.

October 2022 – August 2023			
#	Name	Job Title	Notes
1	Jackie Hennard	Director	Grand River Solutions
2	Kim Anderson	Title IX Coordinator	Grand River Solutions
3	Collin Baer	Equal Opportunity Officer	Grand River Solutions
4	Martin Stanberry, JD	EOO then ADA Coordinator (ADA only)	Grand River Solutions; 20 hours/week
5	Myra Waddell	Equal Opportunity Officer (ADA only)	Grand River Solutions; 10 hours/week
6	Jessica Asai, JD	Sr. Equal Opportunity Officer	Assigned ADA accommodations work from about Oct. 2022 to Sept. 2023
7	Lars Hubbard, JD	Equal Opportunity Officer	Hired Feb. 2022/Resigned March 2023

⁸ See footnote 2.

8	Jenna Minard, JD	Equal Opportunity Officer	Hired July 2022
9	Theresa Payne, JD	Equal Opportunity Officer	Hired Jan. 2023
10	Rosa Abbruscato	Equal Opportunity Officer	Hired March 2023
11	KC Covington, JD	Equal Opportunity Officer	Hired June 2023
12	Angele Fleischer	Associate Vice President	Hired June 2023
13	Anais Keenon	ADA Coordinator	Hired June 2023
14	D'Anne Evans	Administrative Coordinator	Admin support; hired May 2022
15	Sophia Nguyen	Administrative Assistant	Admin support

From an overview of internal documentation during this time, AAEO was clearly dealing with a remarkably large number of reports (including a backlog of reports), some of which were exceptionally complicated.⁹

It is the firm's opinion that this bleak staffing situation played a significant role in AAEO's initial mishandling of the Marks report.

MARKS INCIDENT REVIEW

VI. Initial Report of Incident

On the afternoon of October 20, 2022, Student 1 emailed Dr. David Jacoby asking if he had time to meet. In this initial correspondence, Student 1 did not mention the purpose of the meeting or reference concerns regarding Dr. Marks in particular. Dr. Jacoby responded via email 30 minutes later and offered to meet with Student 1 that afternoon. He also noted he was leaving for Thailand for a work-related trip the following morning and would not return to campus until November 2.

Dr. Jacoby and Student 1 met briefly that afternoon. According to Dr. Jacoby, Student 1 told him that in July of 2022, "she had seen Dr. Marks taking pictures with his cell phone"

⁹ For additional context, throughout the relevant period, AAEO/OCIC continued processing disability accommodation requests (significantly, that changed on or around August 2023). When OHSU moved disability accommodations outside of OCIC's purview, Martin Stanberry was hired as manager of that newly formed department. Four Accommodation Specialists positions were created as Stanberry's direct reports. Stanberry also supervised a Leaves Supervisor, and the Leaves unit had several other staff. Put another way, OHSU created an office of five people to manage the accommodations work AAEO/OCIC had been handling while AAEO/OCIC was also tasked with responding to other civil rights reports.

in a required Journal Club class. During his interview as part of this review, Dr. Jacoby said that during this short conversation, he did not think Student 1 “seem[ed] tremendously upset by this. And she asked me specifically to talk to [Marks] about it.” He also pointed out that the picture-taking incident took place three months earlier. During their meeting, Dr. Jacoby agreed to speak with Dr. Marks. He also said he told Student 1, “there may be an innocent explanation for this, like [Marks] wanted pictures for the website or something like that.”

When Dr. Jacoby returned from Thailand¹⁰, he met with Dr. Marks and told him about the concern. According to Dr. Jacoby, Marks said, “he didn't remember taking pictures” and asked, “why would I be taking pictures?” Dr. Jacoby responded, “I don't know, that's why I am asking. Whether you remember it or not, you can't be taking pictures of students.”

Dr. Jacoby and Student 1 met again on November 2, 2022, via Webex for their annual one-on-one evaluation meeting. Student 1 asked to reserve the last ten minutes of the meeting to revisit what they had discussed on October 20, since that meeting had been, in Student 1's words, “too brief to fully communicate everything I wanted to communicate.” Student 1 also “felt Dr. Jacoby had not grasped the seriousness of the situation.”

During that meeting, Student 1 again discussed her observations and concerns about Dr. Marks taking photos in the class and told Dr. Jacoby that she was “uncomfortable in a room with Dr. Marks.” According to Student 1, Dr. Jacoby said words to the effect of, “I'm sure it's innocent” but indicated that he would discuss it with Dr. Marks again and tell him he is “making women in the program uncomfortable.”

Significantly, towards the end of her November 2 one-on-one meeting, Student 1 also provided Dr. Jacoby with the photo of Dr. Marks. As noted previously, in that photo, Dr. Marks has his phone under a table, the camera on, and directed across the table at, among others, two female students wearing skirts. During his interview as part of this review, Dr.

¹⁰ While Dr. Jacoby was out of country, another incident involving the Journal Club was brewing where students expressed concerns about discriminatory language used by a lecturer. Dr. Marks was the person responsible for handling this report which was promptly reported to AAEO. In response to the report, OHSU's interim Title IX Coordinator noted, among other things, “It might be a good idea to have a joint conversation with leadership in the department to make sure they don't engage in anything that could be perceived as disciplinary without providing [the lecturer] an opportunity to respond and making a determination about Policy violations.” According to an AAEO report provided as part of this review, Dr. Marks took steps to remove the lecturer “from relevant programs/committees and ensure that comments like the ones made are not repeated in the future.” Based “on the actions taken by the Department,” AAEO ultimately elected not to open its own investigation into the matter.

Jacoby acknowledged “this may be a failing on my part,” but when “I looked at that picture . . . I didn't immediately jump to the conclusion that this picture was sexual in nature.”¹¹

Dr. Jacoby met with Dr. Marks following his one-on-one meeting with Student 1 and discussed the concern again. He did not, however, report the matter to AAEO. He also did not follow up with Student 1 about his meeting with Dr. Marks.

Having not heard anything, on November 17, 2022, Student 1 sent a follow-up email to Dr. Jacoby asking for an update. Dr. Jacoby responded that he “spoke with Dr. Marks about this last week and made it clear that this was upsetting to, as I put it to maintain anonymity, multiple female members of the class.” Dr. Jacoby noted that Dr. Marks “is sorry to have caused this distress and will not do it again.” Further, Dr. Marks “volunteered not to bring his cell phone to the Journal Club going forward.”

The following day, Student 1 responded in writing to Dr. Jacoby:

I am grateful for the work you have done on behalf of students in the program so far. It's difficult to have these conversations, but considering the seriousness of Dr. Marks' behavior, I know addressing it is the right thing to do.

I feel unsure that Dr. Marks' agreement to leave his cellphone is the response that will make learners feel safe and secure in the program. I am glad that Dr. Marks has promised not to take concealed pictures of students at journal club anymore. However, he remains the type of person to take concealed pictures of students. His secret behavior violated the trust of every student who attended journal club this summer. I think a private apology relayed to you does not go far to mend that.

Maybe you and I aren't prepared to deal with the severity of this situation alone. If it's ok with you, I would like to loop in Dr. Bumsted today so we can work together and ensure a resolution that reinstates a program environment that is built on transparency and trust.

Dr. Jacoby did not attempt to dissuade Student 1 from going to Dr. Bumsted and responded, “[g]iven your concerns, reaching out to Dr. Bumsted may be a reasonable next step for you

¹¹ The firm received no credible evidence that Marks (who had a considerable tenure with OHSU) had ever been accused of comparable misconduct before this report. All colleagues interviewed as part of this review expressed shock at the report of misconduct. Indeed, several students reached out to the firm to vouch for their positive experiences with Dr. Marks.

to pursue.”¹² But, the firm believes it bears emphasis that Student 1 should not have been put in the position of having to go to Dr. Bumsted to deal with issues that impacted the “program environment.” That was fundamentally Dr. Jacoby’s responsibility as he was the M.D./Ph.D. Program Director. And while Dr. Jacoby may not have appreciated the seriousness of the incident during his meetings with Student 1, the language of the student’s November 18 email is clear: the behavior was “serious” and there were concerns about students not feeling “safe and secure in the program.”

Immediately thereafter, Student 1 emailed Dr. Bumsted:

During weekly journal club meetings this past summer I witnessed Dan Marks use his phone to secretly take photos of students in the audience. I saw this on two occasions. Once he concealed his phone with his hand, and the other time he took photos under a table.

Dr. Jacoby and I have spoken about this a couple of times in the past month, and he graciously took on the task of discussing it with Dr. Marks. Thus far the solution has been for Dr. Marks to promise not to take concealed photos of students in the future. He also privately relayed an apology to Dr. Jacoby.

This behavior is a serious breach of all MD-PhD students' trust. Members of my cohort and I do not feel comfortable with Dr. Marks continuing to hold a position of power in the program, and feel that the suggested resolution allows for his behavior to be kept a secret from our peers.

Witnessing this behavior, reporting it, and attaining an incommensurate resolution has led to a great deal of stress on my part. I emailed Dr. Jacoby this afternoon to let him know I would be looping you in; he agrees that this is a good next course of action. I am hoping that I can communicate to you what I witnessed, including a photo of the behavior in question, and you and Dr. Jacoby can work together to help us feel safe and supported in the program once again. It is of equal importance to me that I maintain my professional and positive relationship with Dr. Jacoby and a feeling of security for my place in the program as well.

¹² Dr. Tracy Bumsted is the Associate Dean for undergraduate medical education and, among other things, has student affairs responsibilities for the medical student program. In his January 29, 2024, Statement regarding this matter (which is discussed in Section XII below), Dr. Jacoby said, “I followed up by texting Dr. Bumsted and speaking to her that day to ensure that she would expect the student and assist in bringing the matter to AAEO.” While the first part of this is accurate, there is no evidence to support Dr. Jacoby’s assertion that he told Bumsted to assist Student 1 “in bringing the matter to AAEO.” That decision was Bumsted’s.

Dr. Bumsted immediately responded that Student 1's concerns "are important" and that she was happy to meet and discuss further. Dr. Bumsted noted, "I also think this falls into the realm of AAEO/Title IX reporting. Here is the [webpage] with links and forms to report . . ." For clarity, Dr. Bumsted's response was appropriate.

Student 1 responded, "Thank you for your speedy response and for sending that link. I am inclined to talk ASAP--this has been weighing on me pretty heavily, and I am cognizant of the short week next week!"

Dr. Bumsted spoke with Student 1 that night. Following that conversation, Student 1 sent Dr. Bumsted the picture. In an interview as part of this review, according to Bumsted, when "she sent it to me, it reinforced my previous [view that] this absolutely should go to Title IX because of this picture." According to Dr. Bumsted, she thought "oh, my lord, this absolutely should go" to Title IX. She also noted, "a picture is worth 1000 words, right?"

That day (November 18, 2023), both Dr. Bumsted and Student 1 submitted reports to AAEO. Of note, when asked to identify the type of discrimination involved in her report, Dr. Bumsted checked "Other." When prompted by the reporting form why she checked "Other," she explained: "I am not sure if what the medical student reported to me constitutes sexual misconduct or harassment. I am submitting this brief report given my role as a mandatory reporter."

Student 1's report also selected "Other" when asked to identify the type of discrimination involved. In her report, she noted, "I cannot say that the incident was sexual/discriminatory in nature. I am reporting here at the encouragement of Tracy Bumsted."¹³

In her report, Student 1 also provided the following detailed description of the incident:

July 14th or 21st during the noon hour MD-PhD journal club presentation I saw Dr. Marks take pictures of students without their knowledge. I saw him hold his phone vertically, propped on his knee at about seated chest height, with the camera app open. His phone was pointed at the bank of chairs to his right, with his other hand over the screen as though to conceal it. Through his fingers I could see him take several pictures of the students sitting in that bank of seats (I recall the identity of two of the students, but I can't remember if there were more). On July 28th I and two of my classmates were sitting in that bank of seats and I saw him holding his phone in the same attitude as

¹³ In Student 1's online report, one of the prompts was, "Are you interested in learning about informal resolution options?" Student 1 responded, "Yes." The firm does not believe informal resolution in this case was appropriate for a variety of reasons. Nevertheless, there is no evidence that AAEO provided Student 1 with additional information about OHSU's informal resolution options.

when he had taken photos . . . Later in the presentation he leaned forward and braced his elbows on his knees. He held his phone under the table and the camera app was active, pointing toward students sitting on the opposite side of the room. I took a picture of this behavior. Although he does tend to have his phone in his hands during journal club, I have not seen Dr. Marks taking pictures since that time. I have asked 7 other people in my cohort of students if they have witnessed the same thing. They have not.

She also noted she “brought this up with Dr. Jacoby on October 20 and November 2” and that [o]n November 17 he responded to my email to tell me he had spoken to Dr. Marks the week prior. He reported that Dr. Marks did not deny that he took pictures of students. Dr. Jacoby did not offer a reason why Dr. Marks took the photos. He told me that Dr. Marks expressed his regret to Dr. Jacoby, and promised Dr. Jacoby not to bring his phone to journal club in future.

Student 1 also noted that: “After I told him I thought the suggested resolution did not mend our trust in Dr. Marks, Dr. Jacoby supported me having a conversation with Tracy Bumsted about my concerns. Dr. Bumsted encouraged me to file this report. I have a photo of Dr. Marks carrying out the described behavior that I would be happy to share.”

VII. First Handling By AAEO

Given some of the public discourse regarding this case, the firm thinks it is important to clarify upfront that once a report of possible discrimination is made to the appropriate institutional department (in OHSU’s case, AAEO/OCIC), it is incumbent upon impacted management to stand down and allow that department to conduct its investigation and administer other parts of its process, including the provision of supportive and interim measures, without interference. In the context of Title IX, it is the Title IX Coordinator’s responsibility to decide what measures need to be put in place to support impacted parties, to decide whether interim measures (such as a paid leave of absence) should be implemented, and to oversee a process where the report is equitably investigated and a determination is made about whether institutional policy has been violated.¹⁴

¹⁴ See 34 C.F.R. 106.44.

With that as backdrop, AAEO's handling of Student 1 and Bumsted's reports from November 18, 2022, until they initially closed the Marks matter in February 2023 is replete with significant and fundamental errors.

For starters, when Student 1 and Dr. Bumsted filed their initial reports with AAEO, they received no immediate response from AAEO. In fact, neither heard anything from AAEO for over a month. This simply cannot happen and is unacceptable.

Having not heard anything from AAEO, on December 18, 2022, Student 1 was compelled to prompt a response and sent an email to titleix@ohsu.edu stating, "I filed an AAEO report on 11/18 and I haven't had anyone reach out for more information since then. I just wanted to check that everything when through ok!."

AAEO initially responded to Student 1 that they were unable to locate her report. A couple of days later, though, and after Student 1 was asked to resubmit her report, AAEO located the pair's November 18 reports. Concerningly, there does not appear to have been any meaningful follow-up regarding how the reports fell through the cracks or whether the office had missed similar reports during this period.

In AAEO's boilerplate response to Student 1 following receipt of her second report, AAEO noted, among other things, that "our standard practice is to reach out to any potential complainants **(or any named individuals who may have experienced harm)**, to provide them with information about resources (including confidential services) and response options (including the option to speak with us, or not)."¹⁵ As noted below, though, AAEO made no effort to reach out to other students subsequently identified by Student 1, including the two students who were in the picture.

In subsequent correspondence regarding this matter, OHSU leadership asserted:

an investigation was not conducted in November 2022 because AAEO understood the student was not filing a formal complaint. OHSU policy and best practice allows a reporting party agency in determining how to move forward when deciding whether to proceed with a formal investigation.

¹⁵ On December 20, 2022, a similar email was sent by AAEO to Dr. Bumsted apologizing "for the delay in our response but we will follow up as appropriate. For your information, it is our general practice to reach out to any identified individuals who may have had a concerning experience to provide them with information about resources and response options. . ."

In Student 1's second report to AAEO, she noted, "The other students in my cohort and I do not feel comfortable as learners in a program where the co-director has taken secret photos of students for his own purposes during a required program activity."

This is incorrect for several reasons. First, an investigation was not conducted in November 2022 because AAEO lost Student 1 and Dr. Bumsted's reports and only found them in mid-December. Second, Student 1 did file a detailed complaint on OHSU's portal for filing complaints and did want the complaint investigated.¹⁶ Indeed, as discussed below, AAEO specifically told Student 1 more than once that it was investigating her complaint.

While a degree of reporting party agency is a well-established best practice, in this case, students other than the reporting individuals were directly impacted by the alleged misconduct (*i.e.*, the picture did not include Student 1 or Dr. Bumsted, it included other students). As subsequent developments would make plain, it was incumbent upon AAEO to identify and reach out to those other students who may have experienced harm to notify them and assess how they would like to proceed¹⁷, even if Student 1 (or Bumsted) did not want an investigation (which was not the case in any event).

In addition, more than one interviewee emphasized that OHSU's public assertions that AAEO believed Student 1 did not want an investigation were "retraumatizing" and "felt like gaslighting." Regarding the latter, and for the avoidance of confusion, any attempt to cast AAEO's missteps (especially from November 2022 until March 2023) as consistent with best practices or honoring the requests of impacted students is incorrect.

The reports regarding Dr. Marks were assigned to AAEO Equal Opportunity Officer Lars Hubbard.¹⁸ Hubbard was hired by OHSU in February 2022 after working for several

¹⁶ The firm has attempted to better understand why multiple people apparently believed Student 1 did not want her report investigated. The only significant evidence the firm was ever able to find which tangentially supports the institutional assertion that Student 1 did not want AAEO to investigate her complaint were notes from a **May 2, 2023** meeting between Student 1 and Kim Anderson where Anderson stated, "Explaining understanding that [Student 1] did not wish for an investigation/to participate in the investigation." Anderson's notes attribute the following to Student 1: "I don't think that was from me. – I could have said something that made Lars draw that conclusion, but not sure what. I said I never want to see [Marks] again – not going to demand this – but I want you to decide."

Some AAEO witnesses told the firm that their understanding was based on information shared verbally with them by Hubbard; however, Hubbard also sent the relevant file materials via email.

¹⁷ The one counterargument articulated to this was that because the students did not know they were being photographed, they had not, in fact, been harmed and alerting them may have been needlessly traumatizing. There are many problems with this argument, but it is enough to point out that every student interviewed as part of this review was disappointed that they were not notified, and that the respondent was allowed to continue to have largely unfettered access to them while they were oblivious to there even being a potential issue.

¹⁸ The firm reached out to Hubbard to schedule an interview via email and otherwise, but he elected to not respond and was not interviewed. Obviously, he could have provided helpful context on why certain decisions were made. In any event, while this report is critical of his decisions, the firm would be remiss to not point out that inexperienced personnel make mistakes which is why they are provided with oversight and seek guidance from more experienced supervisors. In this case, Hubbard regularly solicited the input of his supervisors. Additionally, in his one performance evaluation while at OHSU, he received "top performer" marks, and his performance was lauded by his then supervisor.

months on a contractor basis with the University. A 2018 law school graduate, prior to joining OHSU, Hubbard had no experience investigating discrimination reports.¹⁹

As noted previously, in December 2022, AAEO had an interim director, Hennard, who worked for third-party contractor Grand Rivers Solutions and had been in the interim role at OHSU since June 15, 2022. Hennard was supported by another Grand Rivers colleague, Anderson, who appears to have been serving as OHSU's Title IX Coordinator.

On December 21, 2022, Hubbard emailed Hennard regarding the Marks reports. In his email to Hennard, Hubbard said he would follow up with Student 1 "as soon as possible." Hennard responded, "If you haven't already done so, please make outreach to the student so we can learn more about their understanding of the nature of the photos. We may need to refer this back to the program but we need more information and I think it makes the most sense for us to do the intake."

On January 6, 2023, Hubbard sent Anderson an email regarding Student 1's report. In it, Hubbard asked Anderson for her "thoughts on if this should be approached as a Title IX matter." Anderson responded by asking if Hubbard had spoken with Student 1 and noted, "It's possible this could implicate Title IX, but it would really depend on who/what the student is alleging was the subject and purpose of the photos. It seems as if the implication is that this was based on sex, but I would want to confirm that, and why that is the conclusion."

On January 9, 2023, Hubbard emailed Student 1 to schedule an "intake interview to better understand the concerns you submitted to AAEO regarding Daniel Marks. As I understand it there have some administrative delays since your report - for that I apologize." This was the first substantive communication AAEO had with Student 1 since she filed her report approximately seven weeks earlier.

That interview took place January 12, 2023, and was summarized in a seven-page, January 13, 2023 "Memorandum to the File." Significantly, the purpose of the meeting appears to have pivoted from an "intake interview" (*i.e.*, an interview to assess whether the matter even fell within AAEO's authority or implicated various regulatory requirements under Title IX) to an investigatory interview. To that end, according to his Memorandum, Hubbard specifically told Student 1 this was an "**investigation**" and that the "**investigation** is not a 'legal' process and the **investigator** is a neutral party who reviews information in

In that performance evaluation, Hubbard also presciently noted that he faced "workloads that are not feasible – this is just a reality of my position and department at this time."

¹⁹ Hubbard ultimately resigned for personal reasons on February 16, 2023, with an effective date of March 8, 2023.

relation to OHSU policy.” He also discussed the “**investigation** process, expected timeline for the **investigation**, and closure process.”

Regarding Anderson’s salient instruction for Hubbard to assess “who/what the student is alleging was the subject and purpose of the photos,” in addition to identifying multiple instances where Dr. Marks was allegedly taking surreptitious photos of students, Student 1 provided Hubbard potentially powerful evidence: the picture of Marks holding his phone under the table with the camera application on and directed at two female students (Students 2 and 3) who were wearing skirts. Student 1 then specifically identified Students 2 and 3 and other impacted students by name. Hubbard asked Student 1 if she “could think of any practical reason Marks would take pictures during the journal club,” and she said she could not.

When Hubbard asked Student 1 what her “desired resolution” was, she said she wanted “student facing recognition of the inappropriate behavior by Marks.” Significantly, she also said she did not “want Marks to have a continued role in her program,” did not “want to interact with him,” and did “not want to see him again.” Regarding the impact of the incident on her educational program, Student 1 noted that she was “apprehensive about returning to the club with Marks’ continued involvement.”²⁰

Further cementing Student 1’s understanding that Hubbard was investigating her report, when Hubbard transmitted his memorandum summarizing the interview to Student 1, he included a “Policy Packet September 2021.pdf” document which, according to Hubbard, were “**the policies that guide my investigation. . .**”

That “Policy Packet” included seven OHSU policies, some of which had no bearing on Student 1’s report (*e.g.*, it included the “Employment of Family Members Policy” and the “Religious Exercise and Religious Expression in the Workplace and Educational Environment Policy). The packet did, though, also include OHSU’s “Complaints of Discrimination, Harassment and Retaliation Policy No. 03-05-050 (effective 6/9/2021)” and “Discrimination, Harassment, and Retaliation Policy No. 03-05-048 (effective 6/9/2021).”

Regarding the former policy, it provided that “All complaints of prohibited discrimination, harassment and retaliation will be processed in accord with complaint procedures adopted

²⁰ Hubbard subsequently provided Student 1 with an opportunity to comment in writing on his memorandum summarizing their conversation. In her response, Student 1 specifically described her initial interactions with Dr. Jacoby as follows: “I think Dr. Jacoby believed Dr. Marks’ secret photo-taking was wrong, and hoped the reason for it was innocent. A minor distinction but important for me to be clear that I don’t think Dr. Jacoby treated my concerns as unfounded or not valid.” She continued, “I do believe he did his best at the time and agreed that escalating to [Dr. Bumsted] was a good idea.”

and implemented by the AAEO Department.” Those procedures were not included in the policy packet but could “be found on the AAEO Department website (www.ohsu.edu/aaeo)” and were called the “OHSU Discrimination Claim **Investigation Protocol**.”

The OHSU Discrimination Claim Investigation Protocol is a six-page document “provided to OHSU personnel who, as part of their job descriptions or as assigned by OHSU, conduct investigations into claims of misconduct under OHSU's policies prohibiting protected status discrimination, specifically, AAEO discrimination, harassment, retaliation and Title IX claims.”

The firm found the following provisions notable:

- “The reporting party may have an adviser (including an attorney) of his or her choice present.” As discussed below, this was never made plain to Student 1; although, it was made plain to Dr. Marks.
- “If the person making the complaint is not the subject of the alleged discrimination, clarify that the complaint is made on behalf of another person. If so, the investigator, will communicate with the subject of the alleged discrimination, and inform him or her of the right to have the complaint investigated and of any other resources to address any concerns of the individual. If the reporting party does not want to pursue a complaint, the investigator will evaluate any obligations of OHSU.” As mentioned previously, this was also not done – no outreach was done to the students identified by Student 1 in her interview.
- “After interviewing the reporting party, the investigator will assess where information is located and develop a plan for obtaining it, including . . . Text and e-mail messages and other electronic information.” Significantly, this was also not done.

On January 13, 2023, Hubbard emailed Anderson, “had a chance to meet with [Student 1] this week. I have attached the available information. Students are the subject of the photos – the purpose is unknown at this time. Let me know your thoughts. My suggestion for next steps is to reach out to Jacoby about the nature of his discussions with Marks.” Included on page four of the “attached available information” was the “smoking gun” picture evidence of Dr. Marks. Anderson responded, “I think outreach to Jacoby makes sense. Let me know if you’d like to chat about any of this at any point.”

While reasonable approaches to investigations can take a variety of forms, the firm believes this was an investigative error. Again, at this point, AAEO had the concerning picture, which also happened to be taken on an OHSU-issued phone. According to OHSU's investigation protocol, "[a]fter interviewing the reporting party, the investigator will assess where information is located and develop a plan for obtaining it . . ." Here, there was not even a discussion of the photo, much less the development of a plan to obtain it (that would happen only approximately five months later). Less significantly, it is hard to understand why "outreach to Jacoby," as opposed to an investigative interview with Dr. Marks, made sense as the next step.

In any event, Hubbard interviewed Dr. Jacoby next and summarized the following "highlights" from his discussion:

- "Jacoby does not know why Marks was taking pictures during the club meetings."
- "Could not think of a practical reason to use a cell phone's camera app during the club meetings. Can see snapping a picture of the presentation area but not students as discussed and provided."

On January 17, 2023, Hubbard sent a summary and follow-up email to Anderson, Hennard and Human Resources representative Kendra Seits. Inexplicably, he included reporter Dr. Bumsted in the email exchange. He did not include Student 1. Significantly, in his email, he again included the picture as an attachment.

Hubbard noted, "As it stands, only Jacoby has spoken with Marks about the concern and Marks did not confirm or deny taking pictures nor offer any possible explanation." He indicated, "I would like to meet with Marks to learn more but I wanted to touch base before speaking with him in the absence of noticing him as a respondent etc. Thoughts? Concerns?" The firm was unable to locate any substantive written response to Hubbard's email.²¹

On January 27, 2023, Hubbard then reached out via email to Dr. Marks: "I have been made aware of a concern involving your potential photographing of students that I understand you are currently aware of. I would like to set up a time for us to meet via WebEx to learn more and discuss any relevant conduct you are aware of or have been involved in."

²¹ One of the practical challenges of this review was the year-plus gap in time between AAEO's initial processing of Student 1's report and interviews for purposes of this review. Recollections about what happened were understandably imprecise, especially given the significant volume of matters handled while AAEO personnel worked for OHSU. There is, though, contemporary documentation and this review relies significantly on that documentation as the most reliable evidence of what happened and why.

Hubbard specifically informed Marks, “You’re welcome to have an advisor of your choice attend our meeting with you as a support person if that would make you more comfortable. . .” As noted previously, he did not make a similar disclosure to Student 1.

In a two-page memorandum memorializing his virtual call with Marks on January 30, 2023, again, Hubbard indicated he informed Dr. Marks that the “**investigation** is not a ‘legal’ process and **the investigator** is a neutral party who reviews information in relation to OHSU policy.” The memorandum also included the following:

- “Marks recalls Jacoby bringing the issue to his attention several weeks prior. He is aware that someone took a picture of him during the journal club holding his phone with the camera app open. He explained he was shocked and dismayed to learn of the concern. Marks explained that he has been an educator for ~30 years with no issues anything like the present. He remembers telling Jacoby when they spoke that he was not taking photos, had no taken photos at that meeting, that there would be no reason to do so, and Jacoby discussing OHSU policies on photography.”
- “Marks said that he understood after speaking with Jacoby that he had made someone uncomfortable (unintentionally) and determined that his continued presence in the weekly meeting could be a distraction to that individual. Marks said that he decided to no longer attend the meeting in person and has been attending virtually since learning of the concern.”
- “Marks said he has never photographed students during the MD/PHD journal club. He does not understand why he would do so . . . Explained there is no reason to photograph students at the journal club. Marks said he has never photographed students surreptitiously or without their knowledge but there are instances during his career where he has taken photos of students, always with their awareness and agreement (e.g. photos of activities in the lab).”
- “I asked if Marks’ would ever use his phone under the desk where he could see it and others could not. He said he was sure there were times that he used his phone in that fashion at times to be courteous to a speaker but only in ways where the screen remained visible to him. Marks did not recall ever holding his phone in such a way where he covered the phone’s screen with his hand and an observer would not be able to see the screen and using the phone in that way. At the journal club or otherwise.”

- “Regarding possible outcomes. I informed Marks that there was **not a formal investigation at this point.**”²²

Remarkably, at no point did Hubbard present Dr. Marks with the significant piece of evidence Student 1 provided him several weeks earlier, the picture of Marks holding his phone under the table with the camera application on and seemingly directed at Students 2 and 3. This was an error.²³

He also took no steps to develop a plan to obtain Dr. Marks’ phone, which was owned by OHSU and included potentially highly relevant evidence. This was also an error.

That day, Hubbard emailed Hennard:

I met with Marks about this concern today after we discussed it (note attached). Marks has no recollection of taking photos in the journal club and said he has never done so. I would like to set a meeting with [Deputy General Counsel] Emily [Shults]²⁴ on this for awareness and to discuss next steps (for Marks, the club, and Jacoby re: the reporting oddities) – what do you think? Initially reported as TIX so happy to include Kim if you feel that would be more appropriate. I know you are traveling today but let me know if you get a chance.

Significantly, Hennard responded via email on January 31, 2023: “Thanks for sharing. **I am comfortable considering the issues involving Dr. Marks to be closed.** You shared with him the concerns were reported and that it made others uncomfortable and he is taking steps to prevent that in the future.”

For many reasons, this was an error. In addition to Hubbard’s investigation being entirely inadequate, most notably, no one conferred with Student 1 regarding whether she was comfortable with this resolution, and it should have been clear she would not be. Indeed, one of the reasons she elevated this to AAEO was because Dr. Jacoby’s “sharing of

²² The firm does not know what to make of this comment other than it underscores the confusion which permeated AAEO’s process. The firm does not understand what the difference between an “informal investigation” and “formal investigation” was here, and to the extent it was a distinction of significance, it was incumbent upon AAEO to clearly explain this to Student 1 (which was never done). Again, the communications with Student 1 repeatedly created the reasonable impression for her that AAEO was investigating her report.

²³ In addition to not exploring a highly relevant issue, one could make the argument that this was not even fair to Dr. Marks because he may have had a legitimate explanation at that time for the picture.

²⁴ The firm was unable to find any evidence that this meeting with Shults, in fact, took place.

concerns” with Dr. Marks and Marks agreeing to take steps to prevent making students uncomfortable was insufficient.

On February 3, 2023, Hubbard sent an email to Dr. Marks:

Thank you for talking with me this afternoon and on January 30, 2023. While your recollection of the concerns we discussed differed substantially from the report AAEO had been made aware of²⁵, I am glad we were able to talk about what constitutes appropriate behavior in the workplace, the requirements of the OHSU Code of Conduct, Harassment and Discrimination Policies, and the behavior expectations for OHSU members. We discussed how consistently treating students with respect, protecting student privacy and ensuring a safe and equitable learning environment, free from discrimination, harassment and retaliation, where students can express opinions and ask questions, is necessary at OHSU, a requirement of the Code of Conduct, and a personal priority for yourself.

We talked about a concern where it had been reported that you had been photographing students with your cell phone during the MD/PHD Journal Club in July 2022.²⁶ I understand that you recall David Jacoby (Dean, School of Medicine) bringing the concern to your awareness several weeks before we spoke. You told me you had not been photographing students as reported, that you have never taken photographs during the Journal Club or intentionally attempted to use your phone to do so, and that you would never take photographs of students without their knowledge or consent.

You explained that you did sometimes have your phone in your hand during the Journal Club and have used it during meetings to check email and for other work-related tasks. You explained to me that becoming aware of the situation had caused you to realize that you had “gotten sloppy” with your meeting etiquette regarding the use of your phone, and that you understood how any kind of phone use could cause a distraction for students in attendance.

In our discussion of how to best support the students of the Journal Club going forward you volunteered to no longer attend the MD/PHD Journal

²⁵ It was AAEO’s responsibility to determine which of the “substantially” different accounts was more likely.

²⁶ This was a sanitized version of the reported concern.

Club from this date forward as a way to provide students a learning environment where they feel most comfortable.²⁷ Further, you let me know that you will not be using electronic devices during meetings generally. These are both excellent strategies for avoiding potential concerns involving phone use going forward.

Should you have any questions, or have noted anything I have misunderstood, please let me know.

On February 3, 2023, AAEO closed the Marks matter with a notation of “no substantiated violations; coaching.” There was no follow-up with Dr. Jacoby about how the matter was resolved and/or who would be responsible for ensuring that Dr. Marks would “no longer attend the MD/PHD Journal Club” or “not use electronic devices during meetings.”

Remarkably, in addition to failing to confer with Student 1 about the adequacy of AAEO’s resolution, **AAEO also did not even follow up with Student 1 to inform her of what happened.** Instead, on February 13, 2023, Student 1 was again forced to prompt Hubbard via email: “Hi Lars, I was expecting an email from you with an update post-your conversation with Dr. Marks after we last spoke. Apologies if I am misremembering! If possible I would like to have a better understanding of Dr. Marks’ changing role in the program going forward.” Hubbard responded, “Apologies for the confusion and hope you are well. Marks will no longer be attending Journal Club. Further, it is my understanding that he will be stepping down from his role with the program at the end of the current term.”

VIII. Analysis 1: November 2022 to February 2023

Part of the firm’s mandate is to opine on how “OHSU’s system and leadership’s responses to reports of discriminatory misconduct align or not align with our policies and processes.” The following provides the firm’s assessment of the handling of Student 1’s report from October 20, 2022, until February 13, 2023.

During the pendency of Student 1’s report, OHSU had two anti-discrimination policy documents: “Policy Number 03-05-048, DISCRIMINATION, HARASSMENT AND RETALIATION, Effective Date: June 9, 2021” (the DHR Policy) and “Policy Number 03-05-050, COMPLAINTS OF DISCRIMINATION, HARASSMENT AND RETALIATION,

²⁷ Dr. Marks’ interactions with students, though, were not limited to the Journal Club. Additionally, Student 1 specifically told Hubbard she did not “want Marks to have a continued role in her program,” did not “want to interact with him,” and did “not want to see him again.” It is hard to understand how AAEO could conclude this would be a satisfactory resolution, and it was not.

Effective Date: June 9, 2021” (the Complaints of DHR Policy). The former primarily provided definitions of what constituted “prohibited discrimination, harassment and retaliation,” and the latter provided procedures “applicable to OHSU Members who complain about prohibited discrimination, harassment and/or retaliation.”

A. Mandatory Reporting Issue

One of the issues this review was tasked to address is whether Dr. Jacoby failed to comply with OHSU’s mandatory reporting requirement when he did not forward Student 1’s report to AAEO in October and November 2022. This issue is discussed below, but the firm does not want to lose the forest for the trees: the reality is that Student 1’s report was appropriately elevated out of the School of Medicine to AAEO for handling. Indeed, as mentioned below, multiple personnel within the School of Medicine and elsewhere ended up reporting this matter to AAEO and OCIC.

There is also no evidence that Dr. Jacoby failed to report to AAEO because he was attempting to cover up misconduct involving one of the leaders in his school. With misgivings²⁸, the firm finds Jacoby’s position that, when the report was made to him, he did not connect that the report was about sex-based discrimination to be largely credible. While we now have the benefit of hindsight, in support of his position, it is enough to point out that he was not alone in this assessment at the time. Indeed, the initial report to AAEO noted, “I cannot say that the incident was sexual/discriminatory in nature.” Additionally, AAEO, which had the benefits of expertise in what constituted sex discrimination and a more fulsome record, noted as late as March 2023 that they “lacked sufficient information to conclude that the issue involved sex or gender-based conduct.”

Turning to the policy question, at the time Student 1 reported Dr. Marks to Dr. Jacoby, OHSU had the following obligations regarding reporting: “Supervisors, managers, faculty, executives and leaders are expected to take an active role by . . . Reporting such conduct according to” the Complaints of DHR Policy. The Complaints of DHR Policy provided that “non-Title IX matters” can be reported to, among others, “any supervisor, manager, department head, faculty, executive or administrator most directly involved . . .” “Any person or department listed above who receives a complaint shall promptly notify the AAEO Department, Title IX Coordinator or Human Resources of the complaint. AAEO or its designee will provide a copy of this policy to students, trainees, patients, applicants for academic programs, volunteers and others who reported such concerns. Human Resources

²⁸ The firm notes Dr. Jacoby’s comments about Dr. Marks likely having an “innocent explanation” for the photos and his counsel to Dr. Marks that Marks was making “women” uncomfortable to be evidence that he viewed Student 1’s report as involving sex-based misconduct (especially when coupled with the photo evidence Student 1 provided him).

will provide a copy of this policy to employees and employment applicants upon receipt of the complaint.”

The firm shares the same concerns about this reporting requirement that were shared with OHSU when these policies were reviewed in the Covington Report, namely, the policies in place at the time Student 1 reported to Dr. Jacoby were “unclear,” “confusing,” and did not define key terms. In general, mandatory reporting obligations should be clear on three points: (1) who is a mandatory reporter, (2) what triggers a mandatory report, and (3) where a mandatory report must go. Again, the policies in place in October/November 2022 were unclear on the first two points. Fortunately, this changed in May 2023 with a revised, and much clearer, mandatory reporting policy. With that said, even that policy only requires mandatory reporting when there is “discriminatory misconduct,” something Dr. Jacoby (and several others, including AAEO staff) were at least unclear about at that time.

Setting aside the policy issue, without question, though, it would have been prudent for Dr. Jacoby to report Student 1’s concerns to AAEO upon receipt of Student 1’s report, especially given the findings of the Covington Report and the fact that he was aware enough to counsel Dr. Marks that Marks was making “making women in the program uncomfortable.” This bears emphasis for other managers: when in doubt, report.

The firm also believes Dr. Jacoby’s response to Student 1 was too passive. It is also worth at least pondering whether AAEO would have treated this report more seriously had it come directly from Dr. Jacoby. Also, at minimum, Student 1 should not have been put in the position of having to prompt Dr. Jacoby for updates on what was happening.

With all of that said, the firm would be remiss in not specifically commending Dr. Bumsted’s handling of the report. She took it seriously. Importantly, she validated Student 1 and told Student 1 her concerns were important. She immediately made time to meet with Student 1. She provided Student 1 with information about institutional resources, and she promptly reported the matter to AAEO. Her response, coupled with the reports of various other leaders within the School of Medicine, is a sign of post-Covington progress.

B. AAEO Errors

While Dr. Jacoby’s response to Student 1’s report warrants some criticism, it is ultimately the “AAEO Department and Title IX Coordinator” which “have primary responsibility for investigating and resolving reports of prohibited discrimination, harassment and retaliation lodged by applicants for academic programs, patients, students, volunteers and others.”

A critical point warrants emphasis: OHSU should not, on the one hand, ask employees to make reports of discrimination to AAEO/OCIC so that AAEO/OCIC can respond to those reports while at the same time attempt to attribute what are primarily AAEO/OCIC failures to the reporting party. As mentioned previously, once a matter is forwarded to AAEO/OCIC, it is the role of the mandatory reporter (and everyone else not connected directly with AAEO/OCIC) to get out of the way and allow AAEO/OCIC to do its work. A mandatory reporter should not be put in a position where, in addition to reporting out, they must monitor and second-guess how AAEO/OCIC handled a matter, especially since they are typically not privy to information AAEO/OCIC has. Instead, it is AAEO/OCIC's job to coordinate support services to the reporting party, consider appropriate interim action, conduct a thorough investigation, make determinations about culpability, etc.

Any suggestion that managers have failed when they do not intervene during or after AAEO/OCIC's handling of a matter is wrong from a policy perspective, counterproductive, and creates, among other things, perverse disincentives around mandatory reporting. If OHSU wants to create a culture of reporting, it needs to staff OCIC appropriately and hold it to high standards such that the University community has confidence in its work. The University should not blame others when AAEO/OCIC missteps.

In this case, it is the firm's opinion that the root cause of the issues which necessitated this review, caused a campus maelstrom, and, most importantly, negatively impacted students is that AAEO's handling of this matter from November 2022 – February 2023 was replete with fundamental errors.²⁹

AAEO's errors include the following:

1. AAEO provided no response to the initial report for a full month, and only responded at all to Student 1 because she reached back out to check on the status of her report. This cannot happen. As discussed below, though, this pattern repeated itself to a lesser extent several months later as other impacted students had to subsequently insist that AAEO/OCIC investigate this matter. There are many impediments to graduate students reporting misconduct. Once a report is made, though, students cannot be put in the position of having to prod the institution to respond, much less investigate.

²⁹ The firm wants to be clear, though, that the understaffed personnel at AAEO faced a difficult situation. Several AAEO representatives employed during this time described crushing and emotionally charged workloads. In fairness, the role of the firm is far easier than the AAEO employees who were in the trenches and did not have the benefits of hindsight or the ability to give their full attention to this matter. Hopefully, this report will enable the OHSU community to develop a thorough understanding of how difficult it is to do this important work well and provide appropriate resources.

2. The fact that this report fell completely through the cracks is significant. That is a serious gap which should have warranted an internal review to assess what had happened, whether the gap had been fixed, and whether the problem impacted other reports. There is no documentation suggesting that AAEO conducted a fulsome review or identified the cause of the problem.
3. When she met with AAEO, Student 1 specifically told AAEO that she did not “want Marks to have a continued role in her program,” did not “want to interact with him,” and did “not want to see him again.” Again, there have been statements suggesting that Student 1 wanted an informal resolution of this matter and/or not a full-blown investigation. That is incorrect. Even if true, and such an informal option would have been appropriate given the significant power differential between Student 1 and Dr. Marks, Student 1’s proposed remedy should have been a red flag that there was no informal path to resolution. While something akin to supportive measures was provided at the tail end of AAEO’s initial investigation, they were inadequate, relied entirely on Dr. Marks’ voluntary agreement to comply with them, nothing was done to confirm he was agreeing to them, and most importantly, nothing was done to confirm with Student 1 that the steps agreed to sufficiently addressed her concerns and allowed her to continue in her educational program unencumbered.
4. When this matter went public in the media, concerns were expressed about Dr. Marks not being placed on administrative leave. For clarity, this is a process for AAEO to consider and initiate (and there are complicated legal considerations around this which AAEO must assess). Whether administrative leave was appropriate or not, it is notable that AAEO did not consider it during their process.
5. As noted above, AAEO informed the reporters in writing that “our standard practice is to reach out to any potential complainants (or any named individuals who may have experienced harm), to provide them with information about resources (including confidential services) and response options (including the option to speak with us, or not).” Again, that was not done here. Instead, potential complainants and other students who experienced harm learned about the preliminary investigation from a fellow student.
6. The initial intake/assessment of a report is essential in guiding subsequent steps. Civil rights professionals need to ascertain whether the alleged misconduct is

purportedly motivated by a protected characteristic. If not, the matter might be appropriately referred to another department. In cases of alleged sex discrimination, depending on the specific allegations, federal law may also require certain process steps that are not required in other cases of sex discrimination.

Here, AAEO had an initial discussion regarding conducting such a preliminary review, but AAEO ultimately landed on a confusing place. On the one hand, there are file materials suggesting AAEO was unable to connect the report to sex discrimination. If that were the case, they should have refrained from investigating and referred the matter to human resources or elsewhere. There are other materials suggesting sex was implicated by the report. If that were the case, AAEO should have conducted a fulsome investigation and decided whether Dr. Marks violated the anti-discrimination policy (as it ultimately did approximately seven months later).

Again, OHSU's subsequent assertion that AAEO "understood" that "the student had not filed a formal complaint or requested an investigation and that Respondent agreed to preventative measures" glosses over AAEO's remarkably poor handling of this matter. More charitably, if AAEO "understood" that, then it misunderstood. Student 1 did file a complaint on November 18, 2022 (or at the very least was certainly under the impression she did).³⁰ She was also specifically told by the investigator more than once that he was investigating. Because AAEO failed to gather relevant evidence and/or conduct a fulsome investigation, its conclusion that there were "no substantiated violations"³¹ was fundamentally wrong.

7. AAEO informed Dr. Marks that he was "welcome to have an advisor of your choice attend our meeting with you as a support person if that would make you more comfortable." A similar offer was not made to the graduate student who was complaining about the behavior of a leader in her program. The University correctly

³⁰ While the report had both Title VII and Title IX implications, under the Title IX regulations, "formal complaint" is a term of art which "means a document filed by a complainant . . . sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment . . . As used in this paragraph, the phrase 'document filed by a complainant' means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint." Student 1 submitted her report through OHSU's online portal. She was told repeatedly the report was being investigated. If there was some more formal documentation which was necessary for OHSU to initiate an investigation, there is no evidence Student 1 was informed of that or that such was required by OHSU policy.

³¹ Under AAEO's "Investigation Protocol," findings about whether reports are substantiated or not are only made "[a]t the conclusion of the investigation. . ."

aspires to be “trauma informed.” Not only was this not “trauma informed,” it was inequitable to a student OHSU subsequently determined was a victim of discrimination.

8. Investigating complaints of discrimination is difficult work, and the reviewer is loath to second-guess the steps an investigator takes. With that said, again, there was no meaningful attempt to gather relevant evidence (most notably, Dr. Marks’ OHSU-issued phone), nor was there even an attempt to confront Dr. Marks with the evidence AAEO had. The latter is especially troubling since Dr. Marks denied ever photographing students without their knowledge. These are significant errors. They also should have been identified and corrected by Hubbard’s supervisors before Student 1’s report was closed.
9. Not only did Student 1 have to prompt AAEO to acknowledge her report (which they lost), she was required to ask them what happened with their investigation when it was completed because no one at AAEO (or elsewhere) informed her of what they determined, much less sought her input on whether their proposed remedy was sufficient. It is also unclear who was responsible for ensuring Dr. Marks, in fact, would honor his agreement to no longer attend the MD/PHD Journal Club, as AAEO also failed to notify Dr. Jacoby of this.
10. Finally, AAEO clearly should have notified the other impacted students of its investigation and, at minimum, provided them with supportive measures. The failure to do was rightfully criticized by OHSU’s Confidential Advocacy Program about six weeks later.

IX. March 2023: Back to AAEO/OCIC

In early March 2023, because AAEO failed to do it, Student 1 was left with the task of having to inform Student 2 of what happened both in the classroom and with AAEO. She also provided Student 2 with the picture. Student 2 was remarkably upset with the disclosure and proceeded to immediately attempt to contact, among others, AAEO. AAEO purportedly did not answer the phone. Fortunately, Student 2 was then directed by a graduate-student peer to OHSU’s Confidential Advocacy Program (CAP).

CAP and the work of Kelsey Arias and Yasmeen Khellah are worthy of praise.³² Under the best of circumstances, reporting discrimination and navigating institutional investigation processes is stressful for students and employees. Highly skilled and empathetic confidential advocates are critical in providing support, advice, and at times internal advocacy on behalf of reporting parties. This was not the “best of circumstances,” and OHSU owes a debt of gratitude to CAP for their support of students throughout this process.³³

On March 8, 2023, CAP Advocate Khellah (who unfortunately no longer works for OHSU) emailed AAEO advocating on behalf of two of her clients, Students 2 and 3. In the email, she noted that Students 2 and 3 “recently found out that there was an AAEO investigation of a sexual harassment case in which an individual in their classroom was taking unsolicited pictures of women in skirts underneath a desk.”

Khellah correctly noted: “[m]y understanding is that the investigation is closed, and no action was taken against the respondent. However, it has come to my attention that in the picture evidence that was provided in the investigation, [Students 2 and 3] are indeed subjects of the photo. However, they were not notified of this investigation, the people involved, or the outcome.” Khellah continued that both students “feel as if they should have been notified. Had they been notified, they would have taken steps to protect themselves and safely receive access to education without any threat or suspicion of harm.

Among other things, Khellah requested “supportive measures”³⁴ on behalf of both students noting that they both “feel uncomfortable attending the class where this situation has occurred” and that “[t]his is a mandatory class within the MD/PhD program, and physical attendance is highly preferred.”³⁵

³² In an interview as part of this review, one administrator criticized the work of CAP suggesting, in essence, that CAP did little to calm the waters when this matter went public and made a difficult situation more difficult. CAP’s role, though, is not to make life easy for administrators, it is to advocate for its clients, especially in a situation like this. Such advocacy is a healthy part of any robust anti-discrimination infrastructure. Put simply, the firm found the limited criticism of CAP to be off base and inappropriate, especially given the number of institutional missteps connected to this matter.

³³ Important recommendations about how OHSU can better support the CAP program are discussed below.

³⁴ For clarity, supportive measures are services provided to reporters of discrimination which can be offered while an investigation is pending and irrespective of whether there is sufficient evidence to determine discrimination occurred. Like confidential advocates, the effective provision of supportive measures can make an enormous difference in the way in which reporters experience an institution’s investigation process.

³⁵ Khellah made a similar request to Dr. Jacoby and Kelsi Nagle-Rowe, and after prompting, the medical school ultimately granted the request which allowed Students 2 and 3 to attend the journal club remotely.

The following day, Hennard sent an email to Anderson:

Lars was working on this matter. I'm somewhat familiar with this situation. There is a lot about Yasmeen's email that is inaccurate. Lars met with the student who reported Dr. Marks and if I remember correctly the student did not file a formal complaint or request an investigation. There were also some issues with the department, specifically Dr. Jacoby, gathering information and addressing this with Dr. Marks before AAEO was involved.

I also believe this occurred during a journal club and not a mandatory class, so there might be other instances of similar conduct that were not reported. Dr. Marks participated in the journal club remotely after the report and I believe resigned from that particular aspect of his position. The reporting student also requested that Dr. Marks not evaluate her final project and the department removed him from doing so.

I don't believe Lars was aware of the names of any other students who had concerns. There isn't a file on the x drive so I'm hoping Lars saved everything to STARS.³⁶

In fact, though, Khellah's email was accurate and the bulk of Hennard's understanding was incorrect. Most notably, the Journal Club was mandatory for MD/PhD students and Hubbard was provided with information about many other students impacted by the report, including the identities of Students 2 and 3.

Anderson did not immediately respond to Khellah, and on March 20, 2023, CAP Director Arias emailed AAEO requesting an update.

On March 21, 2023, Anderson responded to Khellah, "While I am unable to provide specifics about any individual investigations, I would be happy to speak with [Students 2 and 3] about their specific concerns and discuss response options with them, which could include an investigation into alleged misconduct."

Anderson also provided the following "regarding process for informing involved parties":

Generally, in the context of an investigation, **were we to receive names of any individuals who may have been impacted by, or have knowledge of,**

³⁶ At this point, Hubbard had resigned. One of the odd aspects of this review is the disconnect between what was in Hubbard's correspondence and investigation file and what others incorrectly understood about Hubbard's investigation. This is aptly illustrated in this email from Hennard and a March 27 email from Anderson that is mentioned below. The firm speculates this disconnect is a product of not being able to provide complete attention to the matter because of AAEO's significant caseload.

relevant misconduct, we would reach out to them as potential complainants or witnesses. We would provide them with information regarding the process and how the information they might provide would be shared with the parties (while we protect individual privacy to the extent possible, the parties, and particularly the respondent, would be entitled to learn about and respond to the evidence against them before the institution could enact any discipline).

Students 2 and 3 were understandably frustrated by this response since Student 1 specifically identified both of them to Hubbard during AAEO's initial investigation.

Given AAEO's initial inaction to Student 1's report and the delays in responding to Khellah's email, Students 2 and 3 felt forced to share the incident with various other institutional personnel with the hope that those reports might prod AAEO to meaningfully address their concerns. This was an unfortunate strategy, but it appeared to work.

On March 24, 2023, Professor Kevin Wright submitted a report to AAEO which said that Student 3 informed him that, "a senior faculty member was observed using their cell phone to surreptitiously take inappropriate photos of [Student 3] and another female student (student #2) under the table that they were sitting at." Wright noted he was "extremely concerned about the seriousness of this situation and want to ensure that this matter is fully investigated."

In response to the professor's report, that same day, Anderson reached out to an AAEO administrative assistant to search "our files and specifically any that Lars created to see if [Student 2's] name, shows up anywhere."³⁷ Anderson said, "we're under the impression that we did not receive any student names related to the previous report, but want to double check that." Anderson closed, "I will respond to the faculty member and reach out to the student."

Notably, the administrative assistant responded to Anderson, "Please review the attached interview memo. [Student 2's] name is mentioned on page 2 and 3. There are many other student names mentioned as well, including [Student 3]."

³⁷ This prompts the hypothetical question of whether AAEO's initial handling of this matter may have been different if Dr. Jacoby was the person who reported to AAEO that he was "extremely concerned about the seriousness of this situation and want[ed] to ensure that this matter is fully investigated." Ultimately, though, it is AAEO's responsibility to properly assess the seriousness of a report regardless of the report's source.

The following day, Alexis Young (the Program Administrator for the Office of Provost, Graduate Researchers) sent an email to Alix Bach in OHSU Human Resources titled “Report of sexual misconduct.” In it, Young noted:

An instance of sexual misconduct was brought to my attention yesterday. An AAEO report has already been submitted by one individual (the witness) last summer, but that case was closed without notifying the victims. As I remember, the AAEO office was outsourced last year and this may have been an instance of a case not being handled appropriately, but I certainly do not have all of the information. I spoke with the victims yesterday who may submit a follow up report.³⁸ They were not contacted by anyone except for the witness and weren’t sure if [a Human Resources Business Partner] was ever involved in the situation before the case was closed. They are already in discussions with CAP. I walked them through all of their options of reporting or speaking with a confidential advocate from memory, but will be sending them a template email I received . . . to give them all options as well. I told them that I was a mandatory reporter and would have to report this.

On March 27, 2023, Bach sent an email to Chief Integrity Officer Tim Marshall, Seits, and OHSU human resources representative Rakhi Desai:

I just spoke with Alexis Young (cc’d here) of Academic Affairs via phone, and she shared with me the following information regarding concerns of sexual misconduct involving a SM Peds Pape Research faculty member.

Last summer there was an instance where a third-party witness observed one of the School of Medicine faculty members taking a photo of two of the female graduate researchers that would have shown the view up their skirts. The third-party witness took a photo of the faculty member which Alexis will be requesting permission to share. The witness who took the photo made a report with AAEO last summer about the situation, and the case was allegedly closed without outreach being done to two victims in the photo.

Marshall then forwarded the email to Anderson. Anderson responded on March 27, 2023, as follows:

³⁸ Again, student reporters are being forced to go to remarkable lengths to get OHSU to do something about their concerns.

I am aware of this matter, (Lars had generally read me in back in January when responding to the initial report) and I reached out to both students last week after learning that they were concerned that they had been the subject of the previously referenced photos, as well as additional photos recently (this detail is unclear). We are planning to meet next week (one student is out of town this week, and the other is managing a family emergency).

Jackie and I both had a different impression of the matter than what is described below: Lars conducted a review of this matter in December/January– but the student had only reported the concern to us after Dr. Jacoby had already spoken with Marks (the faculty member) about the issue. We also understood that as a result of that conversation, Marks was no longer attending the club meetings where the incident was reported to have occurred... We were also under the impression that the other student names had not been shared and that the student who reported did not wish to be named as a complainant. We also understood that we otherwise lacked sufficient information to conclude that the issue involved sex or gender-based conduct... Upon further review it appears the names were shared, but as witnesses/the potential the subjects of the photos (who were not aware of the photo at the time...).

Lars and I talked briefly before his meeting with Dr. Jacoby to determine what had been done to address the concern, and also to determine why Dr. Jacoby had not reported it to AAEO at the time.³⁹ He sent a follow-up email to me, Kendra, Jackie, Tracy Bumsted, and Emily Shults. I was under the impression that Lars and Kendra were going to meet with Marks⁴⁰, and that the student was on board with this as a resolution to the matter.

I plan to meet with the students referenced below (hopefully along with an investigator) to learn more about their concern (if something else has happened, or if they would like to file complaints- which I think they do) and to discuss supportive measures– I will likely then hand this it off for investigation.

³⁹ This warrants a mention. First, AAEO had considerably more information than Dr. Jacoby about the substance of Student 1's report. Additionally, within the text of Anderson's own email she noted that AAEO "lacked sufficient information to conclude that the issue involved sex or gender-based conduct." If the underlying report did not implicate discrimination, it did not trigger a mandatory report from Jacoby. Additionally, if AAEO thought Dr. Jacoby failed to comply with his mandatory reporting obligations, it was AAEO's role to investigate that and make a determination.

⁴⁰ This was another incorrect impression. Seits did not meet with Dr. Marks.

On March 31, 2023, Professor Michael Hutchens made a mandatory report to AAEO noting that “a senior faculty member in a position of leadership for a graduate school program was using a phone or other electronic equipment to photograph underneath student’s clothing (specifically, a woman, or women’s skirts) during class.”

This was followed on April 5, 2023, when Interim Chair of the Department of Medicine Susan Gurley submitted a mandatory report to AAEO:

3 graduate students enrolled in the OHSU MD/PhD program came to my office to report a concerning event that happened last summer. In a classroom setting, a faculty member/leader for the program was seen taking a photo using his phone camera, from an angle under a desk to capture at least 2 female students’ legs/bodies without apparent cause or explanation. These 2 students in the photo were 2 of the 3 who disclosed this to me and described feeling at risk to be in that setting again... This incident was actually captured in a photograph taken by another student (not in photo, not in meeting) who separately reported this to AAEO. In addition to the incident itself, there is also concern about whether there was an investigation into the incident and what the findings were and follow-up will be. I believe subsequent reports of this have been filed with your offices reflecting growing frustration and concern.

That same day, Assistant Dean of Graduate Student Affairs Monica Hinds also made a mandatory report to AAEO: “I received a mistreatment report from 2 MD/PhD students about an incident on 7/28/23, in which they state that Dan Marks took unsolicited pictures of women in skirts underneath a desk.” Hinds was one of many OHSU employees who received praise for the (sometimes small) shows of support she provided to students throughout this time. As one student put it, Hinds “did little things -- like take me to get coffee -- which showed to me she cared.” And this bears emphasis for the broader OHSU community, these small shows of support and concern make an enormous difference to the people caught up in these difficult processes, especially in processes that drag on for as long as this one unfortunately did.

While some of these reports were delayed, as noted previously, there is no basis to meaningfully contend that the underlying problems of this case were caused by a failure to elevate the matter to AAEO. More importantly, again, these reports are also indicative of the remarkable efforts the impacted students were forced to go through to get the attention of OHSU to do anything meaningful about their concerns. It should never have been this difficult for the students.

On April 21, 2023 (which was over six weeks after Khellah notified AAEO it had mishandled the previous report), Anderson met with Students 2 and 3. Her notes summarizing that conversation include the following:

- Both students expressed that they were “really unclear about whether [an investigation into Student 1’s initial report] happened/is closed/....” Anderson responded: “limited sharing based on privacy – sounds like confusion about wishes...]”
- Both students made plain that they wanted “to open this again and file this formally.”
- The students then discussed the number of interactions they would be compelled to have with Marks (outside of the journal club) because of his ongoing role in the MD/PhD program and how that was negatively impacting their education.

At that point, the investigation should have moved forward. Both students expressed an interest in a full-blown investigation. If the word “formal” was required to move forward (and it was not), it was uttered. Both students were also clear that this was negatively impacting their education.

Instead, ten days later, on May 1, 2023, Anderson sent a request to Student 1 for a conversation. Among other things, Student 1 understandably pointed out to Anderson that there have been two bad experiences now: witnessing Dr. Marks’ behavior and the ineffective response to her report. She noted that she was distressed and losing sleep because of both, and that AAEO failed to acknowledge it was a distressing situation, failed to provide updates, and provided no guidance on what would happen next.

Three days later, on May 4, 2023, Anderson asked an administrative assistant “to prioritize downloading Hubbard’s [Student 1]/Marks file.” Additionally, in coordination with the Office of General Counsel, AAEO finally took steps to secure Marks’ OHSU-issued phone (this was ultimately done on May 16, 2023). The following day, Anderson emailed Student 1: “At this point I have collected the information necessary to issue notice of investigation and have a plan to reduce the potential of your having future encounters with this faculty member . . .” As pointed out by a witness in this review, it took almost six months for AAEO to provide Student 1 with supportive measures.

On May 10, 2023, Anderson reached out to OHSU Grand River Solutions investigator Collin Baer to request his assistance in “**completing the investigation** of a matter previously assigned to Lars . . .” Again, for perspective, this was almost six months after

Student 1 made her initial report with AAEO and over two months after Khellah notified AAEO that the previous investigation had not been handled appropriately.

An OHSU “Notice of Investigation” was provided to Dr. Marks in writing. Among other things, that correspondence noted that OCIC was implementing the following “interim actions”:

- “The individuals referenced in the allegations above do not wish for contact from you while the investigation is ongoing; attempting to initiate unwanted contact with any individual you should reasonably conclude has been referenced in this document may constitute interference with this investigation or retaliation in violation of the DHR Policy - a finding of which would result in disciplinary action.”
- “For the sake of clarity and precaution; please refrain from contacting (directly or through a third party) any students who have been enrolled in or who have otherwise attended the MD/PHD Journal Club since May 2022.”
- “I understand that you have not been attending the MD/PHD Journal Club since this matter was discussed with you previously. Please continue to not attend. Please also refrain from attending any events where MD/PHD Journal Club students may be present during the pendency of this investigation.”
- “You are directed not to discuss any of the MD/PHD Journal Club with colleagues internal or external to OHSU. You should not make any direct or indirect attempt to influence the academic or career opportunities of any of these individuals.”
- “Should you receive any requests for information or requests for professional references regarding these individuals, you should notify me/OCIC right away, and before offering any response.”

While OCIC had the authority to place Dr. Marks on administrative leave, it elected not to.

Upon being tabbed as the investigator, Baer immediately began scheduling interviews with the various witnesses in the case and concluded his preliminary round of interviews in late June. In total, Baer would interview 12 witnesses, including the three reporting students and Marks. In the firm’s opinion, his investigation was thorough and appropriate.

On July 13, 2023, Student 1 asked for an update on the investigation, and Baer noted that he had completed his interviews and was working on his investigative report. He also

noted, though, that his report “has been delayed by other reports, but my hope is to have closure in the next few weeks.”

The following week, Students 2 and 3 asked for an update as well. In their email to Baer, they noted that they “were recently informed that there was a hearing that took place a few weeks back regarding this investigation” and that “this news was a surprise to us.” After Baer provided a short status update, an advocate for Students 2 and 3 responded,

There seems to be a lot of confusion and several people have mentioned multiple conflicting things. According to one student, a hearing took place in which photos were shown, but we do not know what the outcome of that hearing was, who specifically was at the hearing, or when it took place exactly (sometime 3-4 weeks ago?). While we don’t know the outcome of the hearing or when it took place specifically, Dr. Marks afterwards apparently told students in his lab that he is planning to leave OHSU within next year. This leads me to believe that there was some outcome or decision that is prompting Dr. Marks to close his lab (in lieu of disciplinary action at the university?). Any transparency you can share about this process would be very helpful. **I am concerned that we are not centering harm reduction and the interests of [Students 2 and 3] (and potentially other victims) while this investigation is ongoing . . . Hearing multiple different accounts of what may or may not have actually happened is extremely confusing, and from our side of the issue it feels like there are maybe multiple avenues in which this is being investigated without communication between different departments.** Do you have a rough timeline or anticipated timeline for when the investigation will be closed? Is it possible to learn about some of the initial findings of your investigation?

On July 24, 2023, Baer requested a follow-up meeting with Dr. Marks. Dr. Marks responded that he had been “advised that I should have legal counsel present at these meetings going forward.” Because he requested to have his attorney present, an attorney from OHSU was also required to attend Baer’s meeting with Dr. Marks, further slowing things down.

In internal correspondence clarifying there had been no hearing involving Marks, newly hired Associate Vice President of the Office of Civil Rights Investigation and Compliance Angela Fleischer stressed that “students who are actual complaining parties deserve regular process updates.”

On August 9, 2023, Khellah emailed Baer:

I wanted to reach out and kindly request an update regarding the closure of the Dan Marks case/investigation. During our last meeting, you mentioned that the case was nearing its resolution, and I believe it's crucial to provide [Students 2 and 3] as well as the entire program with any available information to address the growing concerns and uncertainties that have arisen since then. The news about the case has spread throughout the department; therefore, there is a prevailing sense of unease among faculty and students. **The lack of information has led to a general feeling of fear and anxiety, as many are left in the dark about the current status and proceedings. In this light, I kindly request that you provide us with any updates you can share at this time. Even if the information is limited, I believe that any level of transparency would go a long way in alleviating the concerns that have been circulating. Similarly, some students who work closely with the respondent have shared some of the concerns and queries that have arisen among the students and affiliates of his lab since news of the investigation has spread. Many individuals who work closely with the respondent have expressed apprehension about how this case will impact their academic careers. I believe addressing these issues would greatly alleviate anxieties and foster a more informed and supportive environment.**⁴¹

Baer responded the following day that he was “preparing a preliminary report for the Respondent’s review and response, after which I will be able to create my final report which will include findings and recommendations.” He also immediately followed up with Students 2 and 3.

On August 17, 2023, Baer shared his preliminary investigation report with Dr. Marks and Marks’ counsel. The report was provided to allow Dr. Marks “an opportunity to review the evidence and provide a written response, if you wish to do so.” Baer noted he would make no final determination until he considered Dr. Marks’ response.

This process issue which further delayed resolution warrants mention. Specifically, OCIC did not provide a similar opportunity to the reporting students, and if OCIC is going to engage in such a practice, it should be applied equitably. In any event, Dr. Marks submitted his response on August 22, 2023.

⁴¹ When confidential processes take too long, the information vacuum typically gets filled with incorrect information which needlessly exacerbates anxiety and creates its own set of problems. In this case, there were many students and personnel aware of the underlying investigation and worried about how it would impact them and feeling like they had no one they could discuss this with.

Baer submitted a thoughtful and thorough 27-page closure report on September 1, 2023. The reviewer found the following passages especially significant:

The evidence was sufficient to show that it was more likely than not that Respondent used his OSHU-issued phone to surreptitiously photograph female students in Journal Club on multiple occasions without the students' consent.

Complainant #1, Witness #1, Witness #3, Witness #4, and Witness #5 all stated that they observed Respondent holding his phone in ways that suggested he was recording or taking pictures with the phone's camera app, with the back of the phone facing outward, often underneath the table. Complainant #1, Witness #1, Witness #4, and Witness #5 stated that they observed Respondent engaging in this behavior multiple times. Complainant #1 and Witness #3 described Respondent holding his phone and using his fingers in a manner that suggested he had intentionally taken photos with the camera app. Complainant #1 provided a photograph of Respondent holding his phone under the table, with the back of the phone facing directly away from him and the camera app on, with the phone's camera pointed at female students across the room.

Respondent denied that he had taken photos of students in Journal Club, although his response to the Preliminary Investigation Report said he "did not intend to take photos in those meetings," and instead stated that he "was exhibiting poor meeting hygiene" by using his phone in class "all the time" to "look up facts about the material" being presented and to check texts and emails. However, when Respondent was told that his behavior made students uncomfortable, he immediately: (1) took the remarkable actions of stepping down as Associate Director of a program he had been a part of for 25 years, (2) decided to no longer attend Journal Club meetings, and (3) admittedly deleted all of the photos from his phone. Respondent nevertheless denied that his phone contained any photos of students in Journal Club and stated that his phone usage was innocent, other than admittedly poor etiquette. **Additionally, after the phone was collected when this investigation was initiated, a "wipe command," presumably sent by Respondent or his wife by logging into their shared Apple account, deleted all data from the phone before OHSU could review the contents of the device for**

additional evidence.⁴² While these circumstances did not directly prove the allegations, these behaviors were extraordinary and seemingly unnecessary for someone whose phone usage was completely innocuous, as Respondent claimed.

In assessing whether Respondent's conduct can be considered "sexual in nature," the analysis turns to Respondent's motivation for taking the photos. The allegations stated that "several students have concluded and alleged that this conduct was inappropriate and sexual in nature" based on Complainant #1's report that Respondent's camera had been focused on women who were "wearing skirts" and "a tank top."

Because the evidence was sufficient to show that Respondent secretly took photos of female students without their consent, with at least one of these occasions including female students wearing short dresses or skirts while taking the photo under the table and because Respondent did not provide an alternative reason for taking the photos, the totality of the evidence suggested that it was more likely than not that Respondent's conduct was sexual in nature.

After learning about the aforementioned conduct, at least four students either began attending the course virtually or otherwise changed their behavior and/or participation in educational activities to avoid interactions with [Respondent].

The evidence in this case was sufficient to show that it was more likely than not that Respondent's conduct unreasonably interfered with the students'

⁴² Regarding this, the report contended Dr. Marks "stated that he did not know how the wipe command was sent to the phone." He also "stated that there was no intent to delete photos of students from the phone, and he stated that he did not have any photos of students on the phone at that time anyway." According to the report, Dr. Marks and his wife had considerable sensitive information on the phone, including his banking account and home security login information. From reviewing email correspondence, it appears Dr. Marks had concerns that his phone had been mishandled by OHSU and that his security had been compromised.

academic activities and that Respondent's conduct created an offensive learning environment.

Dr. Marks was ultimately found responsible for engaging in sex harassment, violating OHSU's Code of Conduct, as well as the University's Filming or Recording on Campus and Acceptable Use of Computing and Telecommunications Resources policies. Given the seriousness of the findings, OCIC recommended Dr. Marks' termination. OCIC, however, did not recommend placing Dr. Marks on administrative leave while the University considered what sanctions to apply primarily because no one in OCIC anticipated that the process would take as long as it ultimately did.

OHSU provided the reporting students a truncated version of Baer's closing report which did not include the information about the deleted phone data. That correspondence noted, "As per OHSU policy, we ask that you keep this matter confidential and to refrain from discussing it with those who do not have an authorized need to know."

Several students interviewed as part of this review indicated that they wanted to speak at various points about the institutional missteps in this case but were concerned that providing such information would be viewed as a breach of confidentiality and result in disciplinary action being brought against them. They also wanted to share information with other impacted students who did not participate as reporting parties but erred on the side of caution for fear of violating the confidentiality order. The policy in place at the time of this matter provided, in relevant part, "All individuals who participate in an investigation should maintain confidentiality of the matters discussed except as needed to gather evidence or respond to allegations."

It is the firm's view that students should be allowed to criticize an institutional response to a report of discrimination. In addition to providing potentially helpful feedback which can help improve process or identify process gaps, such speech (depending on context) may be Constitutionally protected. Part of the corresponding anger regarding this matter was a product of the University providing incomplete and, at times, inaccurate information about what happened and students feeling they would be disciplined for setting the record straight and/or sharing honest information with their impacted peers. In sum, confidentiality is an institutional requirement which is designed to protect community members. It should not be used as a sword to stymie criticism, especially from students.

OCIC's second handling of this matter was obviously better than the first, and the firm believes OCIC's conclusions are reasonable and supported by the evidence. Where criticism was warranted, it was mentioned above. However, the firm believes that the approximately six months it took from when Khellah raised Student 2 and 3's concerns to

conclusion was too long, especially for such a straightforward case. The firm also believes the report-writing stage took too long.

The delay was anxiety-inducing for students and, as discussed in the next section, it unintentionally played a role in an operational challenge which understandably stirred anger in the University community — OHSU’s providing Dr. Marks with a substantial payment upon his departure.

X. Resignation and Presidential Excellence Award

On January 19, 2024, President Danny Jacobs sent a campus-wide email which, among other things, noted, “I have asked for more information from leaders involved [in the Marks matter] about reporting timeliness and actions taken in response, including the decision to approve the presidential recognition award for Dr. Marks. The information I have received at this point is insufficient.” As discussed below, the decision to provide Dr. Marks the Presidential Recognition Award is perhaps the most straightforward issue assessed by this review.

On September 19, 2023, Kendra Seits sent an email to OHSU Vice President and Chief People Officer Qiana Williams which included a “summary report of substantiated allegations and mitigating and escalating factors” connected to OCIC’s investigation of Dr. Marks. Initially, OCIC incorrectly understood that Williams was responsible for determining Dr. Marks’ discipline. Seits’ correspondence noted that “OCIC is recommending termination.” It also noted that Dr. Jacoby identified the following mitigating factors:

1. Dr. Marks is an excellent physician scientist who has mentored 8-9 MD-PhD students who have thrived in his lab and have gone on to have highly successful careers.

2. He is currently mentoring two successful MD-PhD students in his lab . . . who would be negatively impacted if he were no longer available to do this.

3. Along with Dr. Jacoby, he has built and grown the MD-PhD program in the last 15 years. Including advocating for MD-PhD students to be eligible for graduate level scholarships (ARCS Foundation scholarships, which had previously been restricted to straight graduate students). He is highly committed to the students in this program.

4. Strong advocate for the MD-PhD program with the OHSU foundation.

5. As the Senior Associate Dean for Research for many years, he has been very effective in his role. He built strong partnerships with outside research groups, notably with the Pacific Northwest National Labs, University of Oregon, Oregon State, and Portland State.

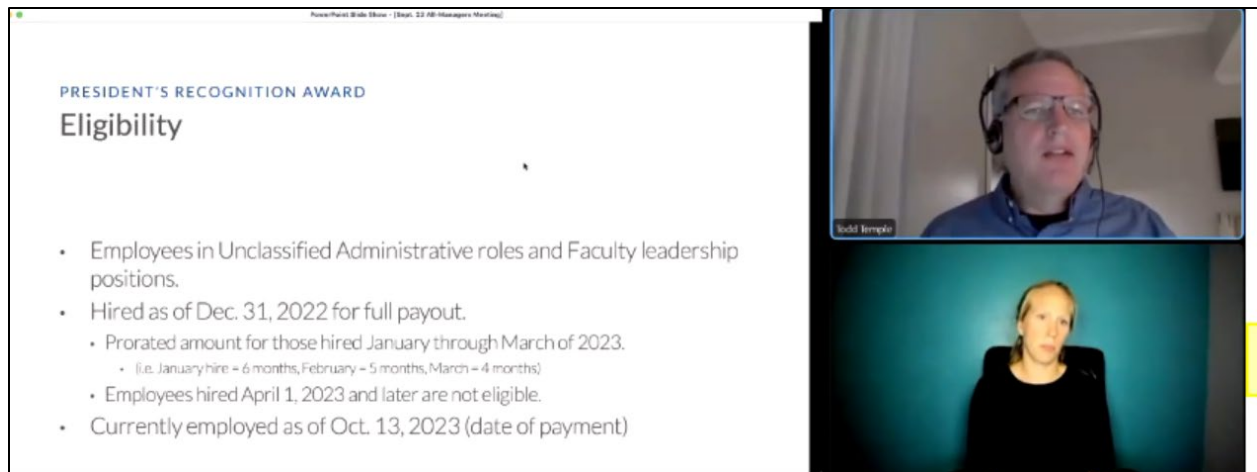
6. As Senior Associate Dean, he has tremendous credibility with the Basic Science chairs, this being the result of his leadership and also his great success as a scientist.

7. Dr. Marks has also been central to the development, refinement, and administration of the research compensation plan.

8. Based on Dr. Marks's research there is a new drug that has the potential to reverse weight loss in patients with cancer (cachexia). This drug, a melanocortin-4 receptor agonist, has gone through phase 1 clinical trials. The impact of a drug that prevents muscle wasting in cancer patients would be huge – first because it would eliminate one of the most severe complications of cancer, and also because it would leave the patients strong enough to undergo additional treatment for the cancer. Cancer patients often become too weak to undergo treatment.

I wish to emphasize that none of this excuses what he did, or in many ways is even related to that. However, in considering mitigating circumstances going forward, these are all examples of his high value as a faculty member, both to students and to OHSU in general.

The Presidential Recognition Award was announced via video conference three days later (on September 22, 2023). The eligibility requirements for who would be entitled to the award were clearly laid out:



Whereas previous bonus plans had explicit exceptions for “participants on a documented performance improvement plan” and/or other performance-related concerns, this Presidential Recognition Award had no such exceptions.⁴³ A headline from Willamette Week summarizing the award program aptly described it, “OHSU Gives Upper Management, Administrators \$12.5 Million in Bonuses **Untethered to Performance.**”

For what it is worth, the firm was provided with evidence from an anonymous witness where Human Resources was specifically asked whether otherwise eligible employees could be excluded from the award if they were on a performance improvement plan, and the answer was “no.” The authenticity of that document was subsequently verified by Seits.

The “next steps” regarding administration of the bonus were also laid out in two slides:

⁴³ As part of this review, Ms. Williams was specifically asked in writing, “Can you direct me to any evidence showing that this language was included in the terms of the Presidential Recognition Award announced on September 22, 2023.” Rather than simply answer “no,” she responded: “As I shared in my email below, I sent this to you to underscore why I was surprised by the statement that someone from my team had said we didn't have a process to deal with ‘performance issues’ and why I suggested to [Shults] and Dr. Jacoby that I believed we had reason to not payout Dan Marks bonus.”

PRESIDENT'S RECOGNITION AWARD

Next steps

- On Monday, Sept. 25, managers will receive an email from HR with a report of their eligible employees, listing:
 - Payment amount.
 - Working title and assigned level payment is based on.
- If you believe an employee is incorrectly leveled or missing from the list, email hrcomp@ohsu.edu by Wednesday, Sept. 27.

PRESIDENT'S RECOGNITION AWARD

Next Steps

- Pay out date: Friday, Oct. 13, 2023
- No individual notices will be sent to employees.
- Leader action:
 - Review your list for accuracy in leveling.
 - Share information with your employees that are eligible and were not able to attend this meeting.

In sum, Human Resources created a report which included the employees eligible for the award based on the criteria set by Human Resources. It also included an amount owed to each eligible employee based on the employee's role. Managers were supposed to review that report and notify Human Resources if "an employee is incorrectly leveled or missing from the list."

The webinar concluded with a bevy of questions about whether specific roles were included or not included in Human Resources' definition of "Employees in Unclassified Administrative roles and Faculty leadership positions." Human Resources elected not to address those questions during the webinar. More than one Human Resources-connected witness as part of this review noted that the award was rolled out too fast and that Human Resources failed to anticipate various issues and contingencies.

On September 25, 2023, an email from "HR Compensation" described the award:

Last Friday afternoon at a special all-managers meeting, Dr. Jacobs announced a “President's Recognition Award” in the form of a one-time payment to eligible faculty leaders and UA employees. This award is to recognize and celebrate you and your teams' outstanding work, and represents a \$12.5 million investment in our leadership and UA workforce.

If you were unable to attend the meeting, you can view the recording.

The attached spreadsheet lists the eligible employees who report directly to you, along with their President's Recognition Award payment amount. The payment amount is tied to their salary, FTE, current hire date, job, position and leadership level in Oracle as of Sept. 11, 2023. Leadership level for UA roles is based on job classification and for faculty roles is based on position working title. All criteria and calculations are applied at the assignment level.

If you believe one of your employees is incorrectly leveled or missing from the attached list, please email hrcomp@ohsu.edu as soon as possible and no later than Wednesday, Sept. 27.

Please note that no individual notices about this award are being sent to recipients. You are encouraged to share information about the award and your thanks directly with your employees.

Additional information is available in this FAQ.

That “Frequently Asked Questions” document for the bonus again described the sole eligibility requirements:

Employees in Unclassified Administrative roles and designated faculty leadership roles who:

- Were hired by March 31, 2023; and
- Were in an eligible UA/faculty role as of Sept. 11, 2023; and
- Are a current OHSU employee as of Oct. 13, 2023.

The bonus payments were to be included in eligible employees' October 13, 2023 pay.

On September 22, 2023 (which coincidentally was the day the Presidential Recognition Award was announced to OHSU managers), following a meeting she had with Dr. Jacoby, Williams informed Fleischer and Seits that she was “in agreement with the decision to terminate” Dr. Marks. Although he was not a decisionmaker, Dr. Jacoby, too, informed Williams that he agreed with the decision to terminate.

However, there was a curveball. Pursuant to OHSU's Procedures for Sanctions of Pay Reduction, Suspension or Termination of Unclassified Employees, President Jacobs needed to determine whether cause existed for termination because Dr. Marks had tenure. Those Procedures also provided:

If the President determines that there is cause to impose a sanction or sanctions of reduction of pay, suspension or termination on a staff member, the President shall attempt to reach a satisfactory resolution of the matter. If no satisfactory resolution is reached within a reasonable time, the President shall request OHSU Legal Department to assess whether legal grounds exist for the sanction and, if so, shall authorize the Legal Department to prepare formal charges.

The charges or a notice accompanying the charges shall inform the staff member of the right to a formal hearing on the charges and of the staff member's duty to notify the President within ten days after the charges have been delivered or sent whether such hearing is desired.

After President Jacobs concluded such cause existed "the week of September 25th, 2023," in an "attempt to reach a satisfactory resolution of the matter," on October 5, 2023, Deputy General Counsel Emily Shults notified Williams that she "had several calls with Dr. Marks attorney, and [Marks] is inclined to resign (with an effective date of 11/3)." ⁴⁴ She also forwarded a "short agreement" she was going to provide Dr. Marks' counsel. No concerns were expressed about the agreement.

No evidence has been provided suggesting Dr. Jacoby was aware of these ongoing discussions between OHSU counsel and counsel for Dr. Marks or knew the status of the matter following his September 22, 2023, meeting with Williams. Dr. Jacoby credibly denied having any knowledge about these discussions and was not included in the various email exchanges documenting these resolution discussions.

On October 6, 2023, rather than contest termination proceedings in a hearing, ⁴⁵ Dr. Marks submitted his resignation letter, effective November 3, 2023, in an email from his counsel

⁴⁴ Pursuant to Section 7 of the Procedures: "If the appointment of a staff member is to be terminated for cause, the appointment shall neither be terminated earlier than one month nor later than one year from the date of the written notice of the President's decision. . ."

⁴⁵ Again, the firm offers no opinion on the likelihood of success for Dr. Marks' contesting termination proceedings. In a detailed response to the University's investigation report, Dr. Marks noted:

Now that I have seen the factual basis of the entire investigation, I want to make one further statement. I have spent the last 25 years at OHSU focused on mentorship and service to learners at

to OHSU counsel. The cover email correspondence noted that the resignation letter was being sent “in anticipation of getting this matter resolved.”

During the two-plus months between when OCIC finalized its report and the effective date of Dr. Marks’ resignation, no one from OHSU placed him on administrative leave. Typically, such administrative leaves are initiated by OCIC, but the firm is surprised that none of the leaders involved in the lengthy post-report handling of this matter took steps to place Dr. Marks on paid leave. This is a process gap that needs to be addressed (and is in the recommendations below).

In fact, multiple witnesses noted that Dr. Marks chaired a student’s dissertation defense as late as October 27, 2023. One witness noted that the student was placed in “the extremely uncomfortable position of hearing rumors about Dan Marks and expecting action from [the Graduate Studies Office] to remove him from the committee.” The Graduate Studies Office, though, was not privy to the information regarding Dr. Marks at that point and blame does not lie with that office for this mistake. This lack of clarity regarding institutional roles, among other things, sowed seeds of confusion and needless finger-pointing, and must be addressed (and is also in the recommendations below).

Significantly, on October 9, 2023 (four days before the Presidential Recognition Award was to be provided employees), Williams emailed Shults, “Hi, Emily- I noticed [Marks] was on the list to receive a payout of the President's Recognition Award. **I'm assuming that is something we are bound to based on the SCA?**”

Shults responded, “I am not sure what the SCA is (do you mean separation agreement?). **I think we are bound because he will be employed (even if we terminate now), and there weren't other prerequisites. His attorney has also confirmed that we won't be**

all levels. I have always endeavored to put the education and career development of others as my first priority, and I am proud of my record of successful mentorship and service. This includes more than two decades of service to the combined degree program without any issues or concerns. This is a primary reason why I find the current allegations and the associated distress I have caused these students to be so dismaying, and why I may have, at times, appeared upset or defensive. That was not my intent, but is a reaction to the distressing allegations made against me. I am deeply sorry for any distress that I caused to these students, to anyone they have discussed this with, and to the program itself. As I was notified of concerns, I did my best to respond completely and immediately in the best way that I could. My only goal was to do everything I could think of to ensure that the students would not be further distressed by my presence, and to reassure them that I would no longer have any role in the program going forward. Everything that I did was a direct attempt to address the students’ concerns. I acknowledge, understand, and apologize for the students’ concerns based on the photograph presented. I cannot explain why the camera app was open at that time, but can state that did not intend to take photos in those meetings, surreptitiously or otherwise. I have never maintained or transferred a photo or video of a student on my phone or any other device without their express consent, and will certainly never do so in the future. I will no longer engage in any meetings associated with this program, or any other student meetings that are not an absolute requirement of my job duties. I will continue to treat all members of OHSU with the highest respect, and will endeavor to continue to be a reliable and effective mentor and colleague.

contesting his eligibility (which I don't think we could), and I have said that we are not."

Williams responded, "Yes. (Salary Continuation Agreement). **I figured as much.⁴⁶ Just wanted to check."**

Williams formally executed a Separation Agreement and General Release on behalf of OHSU with Marks on October 24, 2023.

Put simply, Marks was paid the Presidential Recognition Award because he was entitled to it under the terms of the plan's rushed eligibility criteria and because counsel committed to not contesting his eligibility in conversations with Dr. Marks' counsel. Subsequent efforts to avoid acknowledging this and/or implying that this was a decision made by Dr. Jacoby are discussed below.⁴⁷

To that end, as part of this review, Williams was specifically asked about the negotiations with Dr. Marks' attorney regarding the bonus. In response, Williams said:

So I had asked Emily [Shults via email] first I said, "Hey, can we not pay him out the bonus."⁴⁸ And [Shults] seemed gray on it . . . she seemed to be leaning towards we had to pay it out. But she seemed to be gray on it and which led me to believe that if Dr. Jacoby was on board, then we could make a case for him not getting it. So that's why I asked Dr. Jacoby in our one-on-one I said . . . I feel pretty strongly that we shouldn't pay Dan out the bonus.

⁴⁶ Despite this, during her interview as part of this review, Williams contended she elevated the award issue to Dr. Jacoby for him to decide because it "was my feeling that we could walk away from not paying it." According to Williams, based on Shults' email, "it felt like there was an opening [to not pay Marks the award] If I could get alignment with [Jacoby]."

Additionally, Williams did not provide her, "I figured as much" response to the firm. That email was found while the firm was reviewing thousands of emails in her OHSU account.

⁴⁷ During her interview, Williams said:

[Jacoby] made some very intentional steps to send letters to the media, so on and so forth, to try to put all of this at the feet of HR and Dr. Jacobs. So what I feel like I'm doing is creating a balanced narrative. The balanced narrative is [Jacoby] did have the decision making around who was in and [Jacoby] did sign off on the things. [Jacoby] and I did have a conversation. That's the balance, because then the letter that he sent to Willamette Weekly the letter that the faculty sent to Willamette Weekly said, none of those things, so you had all of those things, and that's what I'm doing. So I have no desire to . . . point the finger in one direction, for sure. Everybody had a part in building this President's Award. But what I'm not going to allow the investigation, [Jacoby] or anyone to act like all of these decisions were made by me, and signed off by Dr. Jacobs. And that is what you hear me creating balance to the narrative.

⁴⁸ In fact, Williams' prompt to Shults was, "I'm assuming that is something we are bound to based on the SCA?"

Dr. Jacoby felt different. He said that he felt like our rule said, you know that, you know, the people have earned it so on and so forth. I said at that point in time, you know, I think that sends the wrong message. You know, we'd really like you to reconsider. You know, whether or not we're paying him out the bonus. So those were the two conversations that I had one via email [with Shults] one during a one on one [with Dr. Jacoby].

In a follow-up email to the firm, Williams said this alleged meeting with Dr. Jacoby to get him “on board” to not pay Dr. Marks the award took place on October 11, 2023. Dr. Jacoby adamantly denied that any conversation with Williams regarding OHSU paying Dr. Marks the award took place, describing it as a “complete fabrication.” While reluctant to wade into this, especially since the October 9, 2023, correspondence made clear why Dr. Marks was provided the award, the firm believes this is a disputed material issue that warrants discussion. For the reasons discussed below, the firm believes that the preponderance of evidence supports Dr. Jacoby’s account.

First, in her interview, the firm believes Williams mischaracterized the email exchange with Shults. Shults was not “gray.” Shults thought OSHU was “bound” because Dr. Marks met the eligibility criteria. In any event, Shults also confirmed with Dr. Marks’ attorney that OHSU was not “contesting [Marks’] eligibility.” Williams’ response to Shults was, “I figured as much. Just wanted to check.” Put simply, there was seemingly no reason to have a subsequent meeting with Dr. Jacoby to discuss this matter – it had been resolved via email on October 9.

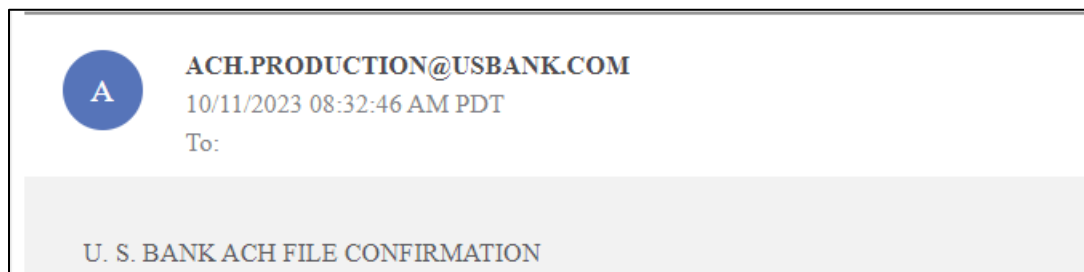
Second, there is scant evidence (outside of Williams’ assertion) that such a meeting between Williams and Dr. Jacoby about the award took place. There is no email discussing this purported meeting about the award with Dr. Jacoby or contemporary calendar invite for the meeting. The pair had a recurring meeting which occurred on the second Wednesday of every month, and on October 11, 2023, the best documentary evidence the firm has is that their meeting lasted approximately less than three minutes.

From: Qiana Williams <williamq@ohsu.edu>
Sent time: 10/11/2023 11:56:32 PM
To: Qiana Williams; David Jacoby
Subject: Meeting (RecurringMeeting)/Thread Id:
19:meeting_YjZjZDEzM2MtZDU3NS00YjA1LTlIZDAtMGEwMDE1NjJhODly@thread.v2/Communication Id:
c49b39af-d7b0-425e-93e6-1b4cadcf7377/Qiana Williams,David Jacoby

Start Time (UTC): 10/11/2023 8:30:22 PM
End Time (UTC): 10/11/2023 8:33:31 PM
Duration: 00:03:08.8085210

[10/11/2023 8:30:52 PM (UTC)] williamq@ohsu.edu joined.
[10/11/2023 8:33:31 PM (UTC)] williamq@ohsu.edu left.
[10/11/2023 8:30:22 PM (UTC)] jacobyd@ohsu.edu joined.
[10/11/2023 8:33:31 PM (UTC)] jacobyd@ohsu.edu left.

Further undermining Williams' assertion that she spoke with Dr. Jacoby during that three-minute October 11, 2023, meeting is the fact the payment file that included Dr. Marks' President's Recognition Award was produced by Human Resources on October 10, 2023 (the day before Williams purportedly met with Dr. Jacoby), and Dr. Marks' Presidential Recognition Award payment was sent to OHSU's bank the morning of October 11, 2023. OHSU subsequently received its bank's confirmation for the file being transmitted October 11, 2023 at 08:32:46 AM PDT.



Finally, in the firm's opinion, Williams' account is implausible. If Williams had ongoing concerns about paying Dr. Marks the award following her October 9 exchange with Shults, it is hard to understand why she would go to Dr. Jacoby about those concerns and not her direct supervisor, the President. At that point, the President was aware of what was going on with Dr. Marks – he was the decisionmaker on whether to pursue termination. During an interview as part of this review, Williams acknowledged she did not escalate this to President Jacobs because she “didn’t feel like there was a reason to.”⁴⁹ The award, though,

⁴⁹ She also noted during her interview, “I didn't feel like there was a reason to escalate to Dr. Jacobs at that point in time, because it didn't seem like we had a legal leg to stand on.”

was not the Dean of the School of Medicine Recognition Award, it was the Presidential Recognition Award.

Despite the October 9, 2023, email exchange, when Williams was asked, “Do you know whose decision it [was] to give [Dr. Marks] the bonus,” Williams replied: “It was ultimately Dr. Jacoby’s decision.” She then mentioned a process where Human Resources sent each institutional executive vice president a list to review for award eligibility and that Dr. Jacoby included Dr. Marks on his list. Because more than one interviewee mentioned this issue, the firm feels compelled to address it.

On September 25, 2023, Director of Compensation Abby Clifton sent an email with the Subject “President’s Award EVP role (sic) up” to Dr. Jacoby and School of Medicine Chief Financial Officer Elaine King. The spreadsheet included **448** School of Medicine personnel, including Dan Marks.⁵⁰ The email’s text was: “Hi Dr. Jacoby and Elaine, Attached is the roll up for your groups. Please let me know if you need anything else.”

Two days later, on September 27, 2023, King responded to Nilda Bonet, Ilona Cox, HR Compensation, and Nicole Lockart:

Attached is a list of corrections for the SoM. Unfortunately, with the time constraints, I could not go through each individual. I am still seeing lots of individuals with “Director” in their title, but are showing up as Managers for example. Nicole and I have reviewed all of our faculty “leaders”, all department / institute administrators, and staff in the Dean’s office. I have also tried to identify all of our division administrators as best as I can off of the top of my head.

Pending items:

- 1) I would like to make sure that all interim positions are included
- 2) It looks like “Chiefs” are being treated as SVPs, but we would classify them as VPs. I am not sure how to handle this.
- 3) Other Faculty leader positions pending confirmation from Qiana

Her concerns echoed some of the same concerns which were being brought up during the award webinar, attempting to match up personnel’s actual job titles with the titles established in the award criteria. Regardless, Dr. Marks remained on that list.

The firm then reviewed close to 400 pages of emails where the School of Medicine goes back and forth with Human Resources attempting to match up School of Medicine job titles

⁵⁰ The spreadsheet columns largely tracked the criteria for the award. There was no column for performance-related issues.

with the titles outlined in the award eligibility criteria. In those emails, the firm was unable to find a single instance where the School of Medicine took someone off the list who did not meet the eligibility criteria. In the hundreds of pages of emails regarding the award that the firm reviewed, the firm has been unable to find any email so much as suggesting that senior leaders had the discretion to deny employees under their purview the award if they otherwise met the eligibility criteria. Put simply, if they had such discretion, it was seemingly never communicated to them.

On October 7, 2023, Williams sent an email to Dr. Jacoby. President Jacobs was also copied. The list included **482** School of Medicine personnel, including Dr. Marks. As noted above, the original list approximately two weeks earlier had 448 personnel. The difference between the two is that the School of Medicine did what Human Resources asked it to do – checked to see who was “missing from the [first] list” – and noted 35 people who met the eligibility criteria but were not on the initial list.⁵¹ One person was removed from the list because he left the University at the beginning of October, and consequently, did not meet the award’s eligibility criteria.

The text of the October 7, 2023 email read:

David,

Please see the attached. As discussed, please confirm your list is accurate and send any updates to your list to Sandy. Please copy Rob.

Please make changes directly on the attached spreadsheet.

Thank you,
Qiana

Two days later, Williams had the email exchange with Shults where she “noticed [Marks] was on the list to receive a payout of the President's Recognition Award” and assumed it was something OHSU was “bound to.” Shults confirmed Williams’ assumption. The firm believes it is more likely than not that this was the end of the conversation about Dr. Marks’

⁵¹ According to Williams, the School of Medicine had the authority to provide people the award who, in fact, did not meet the eligibility criteria. In her words, Human Resources “set an initial standard . . . what then happened was that the School of Medicine said, ‘Well, we believe these people should be included that didn’t meet the original standard that we had established.’” That, though, is not what appears to have happened, and all the School of Medicine did was add people to the list who qualified for the award under its terms but were not initially on Human Resources’ first list. And that was what Human Resources asked them to do when they rolled out the plan in September (*i.e.*, “if you believe an employee is incorrectly leveled or missing from list, email hrcomp@ohsu.edu”).

entitlement to the award and that subsequent attempts to blame Dr. Jacoby for this are, at best, misleading.

For clarity, Williams should be credited for at least flagging the issue. Should Dr. Jacoby or President Jacobs have also flagged this issue? Perhaps. In Dr. Jacoby's case, he reasonably believed the School of Medicine's review was limited to assessing whether employees met the eligible criteria and was also under the impression that Dr. Marks was entitled to the award under its terms (the latter was subsequently confirmed multiple times by the University's Deputy General Counsel).

Any suggestion that the University was obligated to pay Dr. Marks solely because he was on a list approved by Dr. Jacoby, though, is inaccurate and misleading. Dr. Marks was on the list because he met the plan's eligibility criteria. If an employee met the criteria (which were established by Human Resources, not the School of Medicine), the employee was eligible for the award. In the words of OHSU's own Deputy General Counsel, again, OHSU was "bound" to pay the award because Dr. Marks was employed as of October 13, 2023, satisfied the other eligibility criteria, and "there weren't other prerequisites" to receiving the bonus. At the time, Williams did not protest Shults' clear guidance; rather, she responded to Shults, "I figured as much."⁵²

Instead of being transparent about this, it is the firm's opinion that misleading statements were made in OHSU's responses to media inquiries regarding this issue. Most egregiously, on January 29, 2024, reporter Noelle Crombie asked an OHSU communications professional the following question: "Dr. Jacoby says Dr. Jacobs determined eligibility and that he was not given discretion to withhold the bonus. Is that accurate?"

In a response crafted by Williams, and vetted by other senior OHSU leaders, no one discussed, much less mentioned the specific exchange regarding an agreement with Dr. Marks (which Dr. Jacoby had nothing to do with). Instead, the response was, "No. All leaders had discretion and were responsible for determining eligibility for their direct reports, which included adding or removing leaders as determined appropriate."

That was incorrect: Human Resources established the eligibility criteria (after consulting others), and "all leaders" only had discretion to remove people from a list provided by Human Resources if they did not meet the established criteria and were mistakenly

⁵² Even if an argument could be made that Dr. Marks was not entitled to the award under its plain terms, during their negotiation which led to a severance agreement, Dr. Marks' attorney specifically asked whether OHSU would "be contesting his eligibility," and Shults "said that we are not."

included. Further, in the firm's opinion, the clear implication that it was Dr. Jacoby who bore responsibility for Dr. Marks receiving the bonus was incorrect.

XI. Initial Communications About Marks and Reporting

On October 13, 2023, the School of Medicine forwarded a planned communication piece to announce Dr. Marks' departure to Hargens-Bradley. It was unduly laudatory. Williams, Fleischer, and Cuprill Comas correctly expressed concerns with the piece. The following modified message ultimately went out to the leadership of the School of Medicine:

I'm writing to share the news that Daniel Marks, M.D., Ph.D., senior associate dean for research and professor of pediatrics in the OHSU School of Medicine, is departing OHSU Friday, Nov. 3.

I have appointed Mary Heinricher, Ph.D., associate dean for research, as interim senior associate dean. We will soon have a job posting for a successor.

David Jacoby, M.D.
Dean, OHSU School of Medicine

Because Dr. Marks was the principal investigator on National Institutes of Health grants, the University was obligated to notify NIH because Dr. Marks had been removed from his NIH-funded position.⁵³ That notification was timely submitted by OHSU's Chief Research Officer Peter Barr-Gillespie:

Daniel Marks, M.D., Ph.D., has resigned from Oregon Health & Science University (OHSU) effective November 3, 2023. This resignation comes after the Office of Civil Rights Investigation and Compliance (OCIC) at OHSU concluded that on at least two occasions in July of 2022, he surreptitiously, and without consent, used the camera on his phone to photograph several students (most, if not all, of whom identify as women) during sessions of MD/PHD Journal Club. Dr. Marks was removed from his

⁵³ In addition to the NIH-reporting requirements, various interviewees as part of this review expressed their opinion that the incident with Dr. Marks triggered mandatory reporting obligations to the Oregon Medical Board. This issue is simply not within the scope of the firm's expertise, and the firm does not think it would appropriate to offer an opinion on this matter. It is the firm's understanding, though, that Dr. Marks had not been a practicing doctor for many years and that submissions to the Oregon Medical Board were ultimately made. On a go-forward basis, it is critical for OHSU to determine when/if OCIC reports and investigations trigger Medical Board mandatory reports and who is responsible for making the reports.

role with the Journal Club and interactions with the students during the pendency of the investigation. Ultimately, that investigation substantiated those factual allegations and concluded that Dr. Marks violated OHSU's Section 4.C of the Discrimination, Harassment, and Retaliation Policy (Sexual Harassment); Sections 1.1, 3.1, and 4.1 of the OHSU Code of Conduct; Section 14 of Policy 08-30-020 (Filming or Recording on Campus or of OHSU-Related Activities); and Section 2.D.6 of Policy 11-20-010 (Acceptable Use of Computing and Telecommunications Resources). Prior to charges of termination being issued, Dr. Marks submitted his resignation, effective November 3, 2023.

On November 20, 2023, NIH asked OHSU for additional details regarding the University's handling of the matter. Barr-Gillespie responded on December 15, 2023, which included a "Timeline." Included in that "Timeline" was the statement that:

[f]ollowing Hubbard's meeting with Dr. Marks, AAEO considered the matter to be closed, understanding that the student had not filed a formal complaint or requested an investigation and that Respondent agreed to preventative measures, including no longer attend Journal Club. Hubbard's meeting with Respondent was considered an educational conversation and not disciplinary.

For all the reasons previously discussed, this is incorrect and should be corrected.

Additionally, one of the questions many in the University asked regarding this matter was why OCIC did not place Marks on administrative leave. Barr-Gillespie explained the rationale (albeit in a slightly modified context):

No restrictions, prior to the end of Dr. Marks' employment, were put into place on Dr. Marks' NIH grant activities, which exclusively occurred in his laboratory and research groups. This was deemed appropriate for several reasons. First, there were no complaints or concerns from the employees or students in any other forum, including in his laboratory or research groups. Both the OCIC Investigator and the Assistant Dean of Student Affairs in the School of Medicine checked in with the three students in his laboratory on several occasions to ensure that they did not have any complaints about Dr. Marks and that they had a forum for raising any concerns.

Second, consistent with investigatory best practices, OHSU considers responding parties "not responsible" for violating a policy or policies, unless a preponderance of the evidence demonstrates that a violation of policy has

occurred.⁵⁴ Accordingly, any interim measures are calculated to “prevent the repetition of prohibited conduct, if occurring, and eliminate opportunities for retaliation against a reporting or impacted party, other specified persons, or ongoing disruption to OHSU,” see OHSU’s Discrimination, Harassment, and Retaliation Policy – Policy 03-05-48, Section 6B, while balancing the procedural rights of the responding party.

Finally, there is nothing in Dr. Marks’ personnel file regarding this matter, and Williams confirmed that the policy violations would not be provided by Human Resources to anyone who conducted an employment verification on Dr. Marks.

XII. Media Attention, Attendant Fallout, and Institutional Finger-Pointing

As part of this review, several long-term OHSU employees reached out to the firm to express genuinely held concerns that there was unprecedented dysfunction between the senior leadership of the University (and particularly President Jacobs) and the School of Medicine. Concerns were also expressed that individual employees had been previously scapegoated to effectively cover up broader institutional failures.

The firm does not view its role so expansively as to mediate what are clearly unresolved rifts within OHSU and/or to assess whether the blame for previous institutional failings has been unfairly pinned on other employees. With that said, to the extent these institutional culture issues impact the University’s ability to effectively serve students who have been victims of discrimination, the firm would be remiss in not mentioning this in this report. To that end, and as discussed below, distrust and corresponding finger-pointing clearly played a role in various subsequent institutional actions that poorly served impacted students.

The following provides an overview of the internal response when this matter began to garner media attention and broader community awareness. In late September 25, 2023, though, Fleischer presciently started trying to make the case that she “wanted to make sure we are having a strategic communication plan related to the delivery” of the investigation findings. She was particularly concerned about appropriate messaging to impacted students. Unfortunately, very little proactive communication with students impacted by this matter or the broader University community took place.

⁵⁴ That preponderance of evidence existed, though, when OCIC issued its September 1, 2023, closure report.

Instead, about a month later, on October 20, 2023, The Oregonian reporter Fedor Zarkhin⁵⁵ emailed OHSU Senior Director of Strategic Communications Tamara Hargens-Bradley with a subject line “Daniel Marks.”⁵⁶ He asked several questions:

Could you please let me know the following:

Has Dr. Daniel Marks been investigated for improper conduct?
If so, did OHSU’s investigation substantiate improper conduct?
When did the conduct occur and what was the nature of the conduct?
If OHSU’s investigation substantiated improper conduct, what disciplinary or personnel actions has or will OHSU take in response, and when?

The firm does not know how Zarkhin learned about this matter; although, several witnesses speculated that selective media leaks have been strategically used to undermine the competing OHSU factions.

OHSU provided the following response to Zarkhin:

OHSU’s employee confidentiality practices prevent us from commenting on personnel matters; however, we can share the following: Daniel Marks, M.D., Ph.D., is senior associate dean for research and a professor of pediatrics in the OHSU School of Medicine. He joined OHSU in 1998.

This was followed in mid-December by a records request by The Oregonian which indicated the paper was prepared to run a story on the situation. That story was published on January 3 and was titled, “A top OHSU doc resigns after internal investigation finds he secretly photographed women students.” It was primarily based on OHSU’s report to NIH.

It should go without saying that the story and ongoing media coverage were distressing to the various students involved in this matter.

The story also triggered considerable campus interest as well as requests for leadership of the University to be transparent about what happened. The interest and pressure to provide additional information intensified when, on January 6, 2024, The Oregonian posted a story that OHSU had provided Dr. Marks the Presidential Recognition Award as he was leaving the University.

⁵⁵ In November of 2023, multiple OHSU students expressed concerns that Zarkhin was contacting them and their family members regarding the Marks issues.

⁵⁶ On October 30, 2023, the School of Medicine held a “Wishing Dan Well” event in the “Dean’s Office Den” for “a fond farewell” for Marks. The distribution list curated by the Dean’s Office for this event was small; however, at least two witnesses expressed anger about the event in hindsight, noting they had no idea at the time what prompted Marks’ departure.

Prior to running the story, an Oregonian reporter asked Dr. Jacoby specifically, “Did you approve Dr. Marks' bonus? Why?” and “Do you plan to resign?” In response, Hargens-Bradley informed Dr. Jacoby that “the chronology in Peter’s NIH correspondence, which is a matter of public record, is all we can provide.”

On January 4, 2024, the same reporter asked Hargens-Bradley whether Dr. Marks had received the recognition award. Rather than decline to answer, OHSU provided a detailed response on January 5, 2024, which included general information about the award, and noted that Dr. Marks “received a President’s Recognition Award Oct. 13, 2023. The gross amount of the award was \$46,234.52.”

The reporter immediately followed up with additional questions:

The message to staff [which Hargens-Bradley included] said "leaders from across OHSU have reviewed and verified the award levels for each person in their area." Who specifically reviewed and verified Dr. Marks award? Why was Dr. Marks given an award given the investigation into his conduct?

No substantive response was provided. The article ran the same day, and one of the clear (and, again, incorrect) implications in the article was that Dr. Jacoby was responsible for providing Dr. Marks the award.

That article spurred additional institutional calls for transparency. For instance, on January 9, 2024, OHSU’s Gender Equity in Academic Health and Medicine Committee sent an email to President Jacobs, Williams, and Fleischer noting that, after stories regarding Dr. Marks were published, “many faculty have expressed distress over a perceived lack of progress after the Covington report.” Additionally, the Committee noted that the “lack of direct communication from OHSU leadership is of significant concern, as most individuals learned through outside news stories.”

Members of the faculty also began circulating a petition regarding the incident. Institutional department chairs and directors scheduled meetings where, among other things, they asked why Dr. Marks was not placed on administrative leave given the nature of the accusations and photographic evidence and why he received a substantial payment a week before his resignation.

Then, on January 12, 2024, The Oregonian reporter Noelle Crombie sent an email to Dr. Jacoby to ask him about “your handling of the Dan Marks allegations . . .” Dr. Jacoby was asked, “Why did you allow Dr. Marks to remain in a position where he had contact with students after learning of the allegations?” and “Why was Dr. Marks not placed on paid

leave in November when the initial allegation was made?”⁵⁷ She also asked Hargens-Bradley again, whether Dr. Jacoby approved the Marks’ bonus, and if he did not approve it, who did?

At that point, Dr. Jacoby was aligned with the administration and declined to comment, even though the handling of the allegations and the issuance of interim measures were primarily AAEO/OCIC’s responsibilities.

Later that afternoon, Hargens-Bradley informed senior leadership that President Jacobs was going to issue his first communication to the broader University community regarding the matter⁵⁸:

Our institutional culture is critically important to creating a safe and supportive environment where all members can thrive. Transparency and trauma-informed practices are values that help to shape our culture.

In the last few weeks, there has been ongoing media reporting regarding the departure from OHSU of Daniel Marks, M.D., Ph.D., former senior associate dean for research and professor of pediatrics in the School of Medicine. And, we are now aware of another follow-up story.

I have been asked why we have not communicated broadly about the news as reported. In our ongoing efforts to center the victim, in line with trauma-informed systems, and in accordance with OHSU employee and learner confidentiality practices and Title IX, details about personnel issues such as those reported by the press are not shared broadly with the OHSU community.

In response to the media reports, however, we can share that the behavior described is unacceptable, does not align with OHSU’s values and does not have a place at OHSU. We will always try to reiterate that, and I have personally reaffirmed many times over the last few years what our institution stands for: our people.

As part of our ongoing work to provide a safe place for learning, work and healing, we have made a number of changes to policies and procedures, with more on the way. I am proud to see the recent rollout of the training for the

⁵⁷ The firm decided that attempting to pin down the source of leaks to the media was likely impossible and certainly outside the scope of its engagement. As noted previously, witnesses speculated about sources and their possible motivations.

⁵⁸ One interviewee described the communication as “too little, too late.”

new Discrimination, Harassment and Retaliation policy along with the evolution of the Office of Civil Rights Investigations, to name just a few initiatives.

Perhaps even more importantly, however, continuous improvement and evaluation are key components of trauma-informed processes, and we as an organization will never stop evolving and learning with this as our foundation. We will continue to grow and improve, and I believe we will never stop centering our work in caring for our people and community.

Multiple witnesses in this review said that this message and specifically its reference to institutional values of “transparency and trauma-informed practices,” and “ongoing efforts to center the victim, in line with trauma-informed systems” was frustrating and retraumatizing for students who felt that the institution’s actions fell woefully short of these aspirations.

That same day, The Oregonian published another story, “OHSU silence on top doc’s secret photos of students draws faculty condemnation.” Correspondence from faculty to President Jacobs and Williams noted:

We are writing to convey our extreme disappointment regarding OHSU leadership’s handling of the Dr. Daniel Marks incident. We believe the response to this incident is inadequate and highlights ongoing, chronic institutional deficiencies that leave OHSU members vulnerable to harassment and bullying, and fearful of reporting incidents due to a demonstrated lack of support through the subsequent HR process. Substantive change is critically needed immediately to rectify this harmful issue and set OHSU back on the pathway to being a leader in clinical medicine, research, and education and scholarship.

On April 27, 2021, in response to the settlement of the Dr. Campbell case, the following statement was released: “OHSU recognizes the need to address systemic structures that allow inappropriate and damaging behavior to exist, and is committed to creating a safe and inclusive environment that is free of harassment and discrimination.” The incident involving Dr. Marks clearly reveals that despite this acknowledgement and the subsequent Covington Report, little has changed. The Dr. Marks incident, and more importantly the flawed response to it, have severely eroded confidence in OHSU leadership.

To begin repairing this relationship, we believe the following actions are necessary:

- 1) Direct communication from OHSU leadership to all employees involving the policy failures that allowed this incident to occur, whether recommendations from the Covington Report were implemented and, if so, why they did not prevent it.
- 2) An investigation into the failures within HR that led to significant delays in action following initial reporting of the Marks case, insufficient protections to those potentially affected and at risk, and the persistent, pervasive environment where employees are fearful of reporting due to ineffective HR responses and retaliation.
- 3) Specific details regarding the duration of time that Dr. Marks was allowed to continue in his academic roles and responsibilities after the university learned of complaints made against him.
- 4) An investigation into why and how Dr. Marks received a President's Recognition Award immediately prior to his resignation.

Multiple witnesses described a meeting around this time which included the leadership of the School of Medicine and members of OHSU's leadership team to attempt to discuss the incident. The meeting went especially poorly, and leaders from the School of Medicine purportedly berated members of the President's staff and Human Resources for their mishandling of the matter.

Multiple meetings with graduate students where few substantive details were shared also did little to quell concerns about OHSU's handling of the matter.

On January 16, 2024, the University's Faculty Senate then submitted correspondence to OHSU leadership with its own bevy of questions. Dr. Jacoby volunteered to respond to the questions but asked to "know the limits of what I'm allowed to discuss."

From Dr. Jacoby's standpoint, around this time, something significant happened which changed his willingness to go along with the administration's communications strategy (and added a new dimension to the media narrative). Specifically, Dr. Jacoby believed President Jacobs wanted to pin the blame for what was becoming a public-relations debacle solely on Dr. Jacoby and the School of Medicine.

Then, on January 17, 2024, while Dr. Jacoby was preparing responses to questions from Crombie, President Jacobs emailed Dr. Jacoby:

As you know, OHSU has been dedicated to improving our institutional culture so all members - including learners - feel a sense of safety and

belonging. After many conversations with some senior faculty members and others and reviewing the chronology of events relative to the events at hand, it is clear we have a crisis on hand related to your handling of the Marks' matter that must be addressed immediately. In preparation for potential litigation and so I am properly informed about the issues, counsel and I are meeting with you this afternoon. In advance of the meeting, I am sending you the attached timeline⁵⁹ which is based on the OCIC report and subsequent communications between our legal officers and Dr. Marks' counsel.

While many of President Jacobs' questions appropriately focused on Dr. Jacoby's initial interactions with Student 1⁶⁰, the correspondence then pivoted to the President's Recognition Award and suggested his deanship was at risk:

- Did you consider removing Dr. Marks from the Presidential Awards list?
- Do you feel you should resign?

Below I have outlined some major concerns and action plans to frame our discussion:

- Alice Cuprill-Comas and others were assailed at a meeting you attended in a highly unprofessional manner where you did not call out the inappropriate behavior.
- The perception or belief that culpability solely rested with HR, Legal, AAEO, OCIC, etc. is inaccurate and counterproductive at best.

⁵⁹ That timeline glossed over AAEO's mishandling of the first report noting that, "Investigator followed up with Student and understood that she did not want to file a formal complaint." In the firm's opinion, it also mischaracterized Anderson's notes about her May 2 meeting with Student 1: "In this interview complainant 1 says she doesn't remember saying she didn't want an investigation, but probably said something that led to that conclusion." This, though, is what Anderson's notes said: "I don't think that was from me. – I could have said something that made Lars draw that conclusion, but not sure what. I said I never want to see [Marks] again – not going to demand this – but I want you to decide."

⁶⁰ President Jacobs asked Dr. Jacoby the following:

- Did you feel you met your obligations to the student given the time gap before you got back to her?
- Was the content and nature of your conversation appropriate given the circumstances?
- Did you suggest to the student that the matter was not serious? If so, on what basis did you form that opinion?
- What did you say to the student that led her to feel dismissed?
- Was the content and nature of your conversation with Dr. Marks appropriate given the circumstances?

- There was a missed opportunity to act as a “mandatory reporter” and engage the appropriate parties when the first student voiced concerns to you on October 20th, 2022. Around this time, there was no formal investigation but rather a denial by Marks with him verbalizing that he would not attend future meetings or use his telephone. This is where I think you should acknowledge, in a series of university wide communications, where you could have done better.
- We need a coordinated approach for communicating the above and what we will be doing going forward relative to the lessons learned in all relevant areas that should include input from a crisis communicator. I think this should include university wide messages from you as mentioned earlier, meetings with PhD and MD/PhD students with Angela and possibly someone from CAP in attendance, perhaps meetings with all learners, follow-up meetings with the SOM leadership to set the record straight based on the actual chronology and related events in HR, etc., in concert with a summary communication from me reemphasizing the lessons and learned and what will be different going forward, discussion at an all-managers meeting and probably a town hall.
- These are all areas where the crisis communicator should provide input. The issue of why he received a president’s recognition award will need to be addressed where there was insufficient scrutiny of his eligibility. This is another opportunity to talk about systems that are or will be put in place to make sure this doesn’t happen again. Ms. Williams reports that she brought the issue of his eligibility to your attention.
- I also think that you should volunteer for some specific training and counseling related to the expectations of senior leaders including mandatory reporting.

Frankly, without the above, your continuing as Dean is at risk. Even the above may not be enough, but that is the question at hand. You will need to demonstrate to the OHSU community that you will do your job differently and show up in a way you have not done. It is an opportunity for you to show

the ownership and leadership that is needed, and support for the institutional culture we are trying to shape.

According to President Jacobs, he did not provide comparable communication to any other OSHU leader involved in the handling of the Marks matter. However, Cuprill Comas noted that during this time she was working directly with Fleischer to identify and address OCIC process gaps that were exposed in the poor handling of this matter.⁶¹

President Jacobs said he was prompted to send the correspondence to Dr. Jacoby because he “had several senior faculty members, with legal and HR raising concerns about Dr. Jacoby’s leadership, involvement and behaviors relative to the complainants including but not limited to allowing Dr. Marks to receive the recognition award.”

Regardless of the intent of that correspondence, Dr. Jacoby responded with what he thought the intent was:

I was preparing responses to the questions posed by the Oregonian when I received your note just now (see attached). I must say I found your communication truly jarring. **I now am very concerned about what appears to me to be a quite transparent effort to pin what are almost entirely the failings of the AAEO/OCIC department on me.** This is very inappropriate and unfair, in my judgment.

The most important thing we can do to restore confidence is to be truthful and transparent about how we (OSHU) responded to this student’s concern. I can take whatever criticism comes from a clear and accurate understanding of all the facts. What is truly inappropriate, however, is for OSHU to put forth a narrative that falsely makes it seem as if the 13-month delay between the initial report and Dr. Marks’s termination was somehow my doing. Or that anyone (you, me, or anyone in leadership) made some discretionary decision to award Dr. Marks a bonus when that clearly is not the case.

Your communication just now makes it appear to me like that is the plan that I am supposed to commit to.

While I’m not keen to point fingers, I think you know that the reality is that the major misstep here was on the part of Lars Hubbard and the AAEO/OCIC in not conducting a vigorous investigation initially and to instead come to the conclusion after interviewing Dr. Marks in January that no discipline was

⁶¹ None of the personnel involved with AAEO’s first handling of the matter were working with OHSU at that point.

warranted. That was obviously a significant misjudgment. I think the only credible path forward is for us as an institution to own that. By not doing so, the narrative ends up being one that casts me in a false light that is very negative, untrue, and disparaging.

As you know, I ensured that this complaint was reported to the AAEO within a very brief period (especially considering that I first learned of it hours before getting on a plane and being gone for two weeks). As I have indicated, it was not evident to me initially that this concern about Dr. Marks taking photographs in a classroom of students was a case of alleged sexual misconduct. And bear in mind that even after what purported to be a full investigation by AAEO/OCIC, the investigation determined that this was not even a disciplinary matter. They are the experts in this area. So the fact that I didn't immediately see the matter as being as grave as it turns out to have been, does not seem to be to be such a damning indictment of me, in my view.

I took the complaint seriously, I began acting on it quickly (even though it related to conduct that was reported to have occurred three months earlier), and I helped ensure that it was reported to AAEO/OCIC – all that happened within less than a month, in a period when I was gone for two weeks. I should not be vilified in an attempt to avoid AAEO/OCIC or OSHU generally taking responsibility for the mishandling of the matter.

Dr. Jacoby then retained counsel who engaged in detailed correspondence with President Jacobs and OHSU counsel regarding this matter. Dr. Jacoby's counsel wrote "to express concern about what appears to be an effort to intimidate Dr. Jacoby into taking the blame for OSHU's response to a student complaint regarding Dr. Daniel Marks." The letter (which was subsequently produced as a public record) went on to attribute the failings to AAEO/OCIC's handling of the matter:

As embarrassing as it may now be to admit, OHSU's Office of Civil Rights Investigations and Compliance's (OCIC) (which was at that time called the Affirmative Action and Equal Opportunity (AAEO) Department) initial investigation into the student complaint about Dr. Marks, which was conducted by investigator Lars Hubbard, closed without any disciplinary action whatsoever. That is the real outrage in this situation. And it is little wonder there is a desire to claim that this is "confidential." OSHU's initial failed investigation, followed by a much slower but more thorough second

investigation, is the reason that a period of thirteen months elapsed between the initial complaint and the termination of Dr Marks's employment.

In fact, according to OHSU's September 1, 2023 "Closure Memo," the AAEO/OCIC's investigation into the student complaint about Dr. Marks began in November 2022 and terminated in January 2023 following a simple "educational conversation" with Dr. Marks that was described as "not disciplinary." The explanation for this extremely mild response was that the complaint was deemed insufficiently "formal" and that the student purportedly had not "requested an investigation"

This conclusion is shocking on multiple levels. First, it is entirely unclear what it was that Mr. Hubbard perceived to be insufficiently formal about the student's complaint.

It is difficult to fathom what more would be needed to make this complaint more "formal." Moreover, as a matter of basic employment law it is beyond rudimentary that whether a complaint is "formal" or "informal" and whether an individual has "requested an investigation" are utterly irrelevant considerations when determining what remedial action an organization should take in response to concerns of sexually inappropriate conduct.

But now that this controversy has erupted, rather than owning up to the facts, OHSU seems intent on scapegoating Dr. Jacoby in a manner that serves to defame and damage him. Indeed, OHSU appears to be requiring as a term and condition of his continued employment as Dean that Dr. Jacoby actively participate in OSHU's defamatory effort to cast him in a false light as solely culpable for any missteps in the apparent hope that OHSU can avoid scrutiny for the AAEO's embarrassing mishandling of the complaint.

This effort extends to the "Presidential Bonus" as well, which Dr. Jacoby has been instructed is not a discretionary bonus, but rather an earned entitlement which Dr. Jacoby would have no basis to deny to Dr. Marks so long as Mr. Marks was still employed. Now, OSHU seems to want to accept The

Oregonian's suggestion that this was some kind of discretionary choice and to pin that purported choice on Dr. Jacoby, which is grossly improper.

While Dr. Jacoby is willing to work with a “crisis communicator” as you directed in your communication to him today, he is not willing to sacrifice the truth for the sake of a chosen narrative. Dr. Jacoby is prepared to work with you and any consultant in honestly laying out the full and accurate background and letting the chips fall where they may. As Dr. Jacoby has informed you, if people who are fully informed of the relevant facts are critical of how he responded to the complaining student in those initial weeks, he can accept that and learn from it.

He is not claiming to be perfect. But what he cannot accept is being scapegoated with a distorted narrative that seeks unfairly to shift blame from OHSU administration to him.

Somewhat ominously, you have instructed Dr. Jacoby that he is to meet with you this afternoon. Suffice to say that it would be extraordinarily sad, outrageous, and counterproductive if OSHU's desire to deflect attention from its missteps results in the termination of Dr. Jacoby's deanship, or worse, some effort to end the employment of an exceptionally able and highly regarded tenured physician and academic leader. A public shaming of this kind decidedly will not help OHSU create “the institutional culture we are trying to create,” as you put it in your letter yesterday. Instead, the result will be further damage to OSHU's reputation for dealing with concerns of discrimination and harassment, among other serious repercussions.

Around the same time, graduate students also publicly began blaming Dr. Jacoby for OHSU's mishandling of the Marks matter.

Feeling that confidentiality was being used as a weapon by the administration to unfairly place the blame on him for this matter, on January 29, 2024, Dr. Jacoby sent his “Statement from Dean Jacoby” which outlined his iteration of events. While many, including some students, applauded Dr. Jacoby for sending the statement, it bears emphasizing that it was poorly received by other students interviewed as part of this review primarily because they believed Dr. Jacoby was more concerned about protecting himself and his image than their wellbeing.

To that end, according to various witnesses, Dr. Jacoby did not reach out to any of the impacted MD/PhD students to discuss the underlying facts and make sure that they were comfortable with him broadcasting details of the investigation of their reports to the broader institutional community. Additionally, his opening that he recognized “that there are areas in which I could have improved my response” to Student 1 fell especially flat because he never communicated that directly to Student 1.

While the bulk of what Dr. Jacoby shared was accurate, students also pointed out that there were some assertions in the Statement that were inaccurate. For instance, in the Statement, Dr. Jacoby said, “I told [Marks] words to the effect that his conduct was making the **students** in the class uncomfortable.” However, Dr. Jacoby told Dr. Marks that he was making “**multiple female members of the class**” uncomfortable. Additionally, in the Statement, multiple witnesses took issue with Dr. Jacoby’s assertions that he understood Dr. Bumsted “would assist the student in filing a complaint with” AAEO.

In any event, the Statement garnered renewed media attention.

In addition to the Statement, Dr. Jacoby also participated in an alumni council meeting where he shared details of the underlying investigation that the reporting students were not even privy to with members of the alumni counsel. Specifically, this was the first time the reporting students found out about the clearing of the phone.

None of this is healthy. As noted previously, under the best of circumstances, it is not easy for students (and especially graduate students) to report discrimination involving powerful players in their programs. When these reports are made, they need to be handled with care, and concern for students needs to be paramount. The institutional climate which likely fueled media leaks, internal gamesmanship, and finger-pointing is disturbing and certainly incompatible with an organization aspiring to be trauma informed.

XIII. Analysis 2: March 2023 to January 2024

The following assesses OHSU’s handling of this matter from March 2023 until January 2024. The firm will reiterate, though, that OHSU’s failure to acknowledge obvious mistakes coupled with remarkable public finger-pointing which was, at times, unmoored to facts was jarring. Additionally, the failure to proactively communicate with impacted graduate students and attempt to remedy the effects of this matter is problematic and needs to be addressed.

AAEO’s first investigation was mishandled primarily because the office faced a particularly bleak staffing situation. The second investigation was better, and the staffing

situation has modestly improved. Dr. Marks received the award, in part, because the delayed investigation left him eligible for an award which had a rushed implementation. Without question, students could have been better served and supported when concerns were brought to Dr. Jacoby, throughout the lengthy investigation process, and in the aftermath. That is reality, and the entire OSHU community likely would have benefited from simply hearing it months ago.

Despite this, there are positives from March 2023 until January 2024:

- As noted previously, the work of CAP should be a source of institutional pride. CAP provided ongoing and essential support to impacted students and its advocacy provided the institution with a meaningful opportunity to correct an earlier mistake. On a go-forward basis, CAP should be viewed as an essential institutional stakeholder.
- A bevy of mandatory reports regarding this incident were made to OCIC. Additionally, based on interviews conducted as part of this review, many of those reporters provided ongoing and crucial support to the students impacted.
- Modest interim actions were eventually meted out by OCIC. Modest steps were also taken to provide some students with supportive measures.
- OCIC's second investigation was professional and thorough. The investigator treated the witnesses with respect. Fulsome due process was provided to the accused professor.
- The investigation findings were reasonable, and the proposed sanctions fit the offense. There was also a sensible consideration of mitigating factors.
- The University complied with institutional processes and policies related to termination. And while there has been some criticism of OHSU "allowing" Dr. Marks to resign, the negotiated resolution spared the reporting students the added stress of participating in a termination hearing.
- Because of the work of Cuprill Comas and Williams, communications about Dr. Marks' departure were appropriate and not unduly laudatory.

There were significant errors though (in addition to the items cited in the opening paragraphs of this section):

- The second investigation took too long to initiate.

- While reasonable interim actions were meted out by OCIC, they took too long to implement and were not reassessed when the investigation was completed (and a policy violation was identified). In particular, the firm believes Dr. Marks should have been placed on paid administrative leave no later than September 1, 2023, when OCIC submitted its closure report (and likely earlier).
- OCIC's process was inequitable because the faculty respondent was afforded the opportunity to have an attorney advisor and comment on an interim report while similar protections were not afforded the student reporters. Additionally, while several institutional stakeholders were afforded the opportunity to provide input on what the appropriate sanctions should be, such input was not solicited from the impacted students.
- The report-writing phase took too long, especially given the initial missteps and delays in processing the report.
- The delay between the issuance of the closing report and the initiation of discipline proceedings was unreasonably long and compounded by the University's failure to place Dr. Marks on administrative leave following OCIC's determination.
- For perspective, again, the initial report was filed with AAEO/OCIC on November 18, 2022 and Dr. Marks resigned November 3, 2023.
- President Jacobs' January 17, 2024, correspondence to Dr. Jacoby stating, among other things, "it is clear we have a crisis on hand related to your handling of the Marks' matter" was inappropriate and unfairly pinned too much of the blame for the institutional mishandling of this matter on Dr. Jacoby. Dr. Jacoby's corresponding public disclosure of details of the investigation without so much as checking in with impacted students prior to disclosure was inappropriate and precipitous.
- Perhaps most importantly, it is clear OHSU's mishandling of this matter had an ongoing negative impact on the educational environment of the reporting students and other students that the University failed to meaningfully address.

XIV. Recommendations

The firm makes the following specific recommendations. These recommendations are made in order of importance.

Recommendation One: OHSU must immediately prioritize appropriate staffing of OCIC

The mishandling of the first report is primarily attributable to inadequate staffing of OCIC/AAEO. While improvements have been made, OCIC remains remarkably understaffed and under-resourced, especially given its outsized caseload and OHSU's lofty aspirations.

For clarity, the day-to-day and difficult work of ensuring that OHSU creates an environment where people feel safe and free from discrimination rests largely on the staff of AAEO. It is also AAEO's role to ensure that those accused of misconduct and discrimination are afforded due process protections and are treated fairly, as well as comply with various complicated and evolving state and federal regulatory requirements.

The OCIC staff, though, has never had sufficient resources to adequately address the large volume of complaints it receives, much less achieve OHSU's aspirations of becoming a national leader in creating a culture where all feel welcome and safe. This remarkable lack of resources has been felt by the OHSU community. It has also been felt by the well-intentioned staff of AAEO/OCIC, which has suffered from considerable burnout and stress which, in turn, has led to the loss of talented professionals.

While the firm thinks the particulars should be left to Angela Fleischer, at minimum, the firm believes OCIC needs the following personnel as quickly as possible:

- At least one position solely responsible for handling intake and assessment of reports. For perspective, over the last two years, **OCIC received close to 550 reports of discrimination per year.** This is a remarkably large caseload. When a report comes in, there needs to be sufficient staff to assess the report, determine which institutional policies are implicated, coordinate initial communications with impacted parties, assign the case internally or externally for next steps, conduct preliminary assessments of supportive and interim measures, and otherwise handle the report with care.

- At least two positions solely dedicated to handling requests for supportive measures and related resources. For each of the 500+ reports OCIC receives per year, complainants and respondents may be entitled to institutional support during and after a subsequent investigation. Employees and students may also request supportive measures in lieu of an investigation. Additionally, as illustrated by this matter, an investigation may impact more than just the reporting party necessitating the extension of supporting measures to other members of the University community. This is labor intensive and challenging work and is not close to being appropriately staffed at this point.
- Reducing the incidence of discrimination at OHSU requires, among other things, an appropriate tone at the top and enforcement when community members violate OHSU's discrimination policies. Education and prevention programming play a role as well, and the firm recommends adding a position solely responsible for this work.

There is considerable research on what prevention programming works and what programming may prove counterproductive. At minimum, this position should be tasked with designing evidence-based programming which has been shown to improve work and education climate, including, but not limited to, a robust bystander intervention program. Additionally, many witnesses expressed confusion about basic institutional policies, including mandatory reporting requirements. This position would also be tasked with providing clear OHSU-focused training on these topics as well. Additionally, when there are concerns that department culture is contributing to a toxic work environment, the person in this position would be tasked with conducting department-specific training.

- Given the remarkable caseload, the firm also believes OCIC needs at least two additional investigators and/or a vetted group of contract investigators who can immediately assist when the caseload either leads to unreasonable delays or to hurried work that does not meet institutional quality expectations.
- One administrative assistant.

OCIC must also leverage technology which can assist in improving two of the community's primary criticisms of their work: insufficient communication and unreasonably long processes. At minimum, there are robust case-management platforms which, among other things, provide participants with updates on the status of investigations. There are also a

bevy of low-cost speech-to-text transcription applications which could considerably speed up OCIC's report writing while improving accuracy.

While the firm makes other recommendations below, providing appropriate resources and staffing to OCIC must be the paramount institutional concern.

Recommendation Two: CAP Provides Critical Support And Deserves Institutional Resources

The Confidential Advocacy Program has been exclusively funded by grants since it first started at OHSU in 2018. Those grant funds are due to run out at the end of the year.

CAP was a shining light throughout this matter and plays an indispensable role in supporting community members. It deserves to be directly funded by OHSU. This funding should be sufficient to include salaries for the CAP Director, CAP Manager, a Prevention and Education Manager, and at least two additional confidential advocates.

Recommendation Three: OHSU's Provision of Supportive Measures for Those Impacted by Discrimination Must Be Improved

The effective provision of supportive measures is crucial in responding to reports of discrimination by addressing the immediate needs of those affected, promoting a sense of safety and well-being, preventing further harm, encouraging reporting, and fostering a culture of inclusion.

As noted above, the firm recommended OHSU fund at least two positions solely dedicated to being responsible for the provision of supportive measures and related resources. At minimum, those supportive measures must include the following:

- Access to counseling.
- Extensions of deadlines and other course-related adjustments.
- Restrictions on contact applied to one or more parties.
- Leaves of absence; and
- Access to legal aid, including considering the feasibility of indemnifying students who have been threatened with litigation by employees or students who OHSU has determined violated institutional anti-discrimination policy.

Additionally, OHSU should provide a process for the timely opportunity to seek modification or reversal of the decision to provide, deny, modify, or terminate supportive measures applicable to a student or employee.

Recommendation Four: Develop Systems to Provide Ongoing Monitoring of OCIC's Performance

As noted throughout this report, OCIC plays an instrumental role in ensuring that OHSU creates an environment where people feel safe and free from discrimination. Unfortunately, this is now the second public-facing review which has flagged significant staffing and performance concerns, and the firm believes trust can only be rebuilt with transparent oversight and ongoing monitoring of OCIC's performance, which also protects the privacy of students and employees.

This is complicated, but the firm recommends at least the following:

- **Define Key Performance Indicators:** In coordination with various institutional stakeholders (including, most importantly, CAPS), OCIC should establish clear metrics to measure the office's effectiveness. These might include the number of discrimination complaints received, average resolution time, OCIC employee turnover, etc.
- **Regular Reporting:** Once appropriate KPIs are agreed to, OCIC should provide regular reports on their activities and outcomes to the University community. Pains should be taken to protect the privacy of complainants and respondents. This reporting should be done at least twice per year.
- **Case Management System:** A robust case management system should be implemented to track complaints from submission to resolution. This system should allow for internal analysis of trends, identification of bottlenecks, and evaluation of individual case handling.
- **Quality Assurance Reviews:** An outside consultant should be retained to conduct periodic reviews of a sample of redacted cases to ensure they are being handled effectively and in accordance with policies and procedures. Any identified concerns should be immediately reported to the Board.
- **Training and Development:** Ongoing training and development opportunities should be provided to staff to ensure they have the necessary skills and knowledge to handle cases effectively and sensitively.

- **Engagement with Stakeholders:** There should be regular engagement with stakeholders, including CAP, to gather feedback and ensure the office is meeting their needs. OCIC should be reasonably responsive to feedback.
- **Annual Climate Surveys:** An annual climate survey should be implemented which at minimum provides data to assess the effectiveness of institutional efforts to address discrimination and associated misconduct over time.

Recommendation Five: Clarify Roles

One of the remarkable facts of this review was the complete confusion regarding responsibilities attendant to reports of discrimination. There is no doubt that this lack of clarity sowed the seeds of chaos, created an institutional climate rife with indiscriminate and uninformed finger-point, and generally served the OHSU community poorly. This must change.

To that end, at minimum, the firm recommends OHSU memorialize the following in policy, process documents, and in OHSU-specific training:

- Reporters provide support and make reports. That is all they should do.
- OCIC considers reports and is responsible for making decisions about interim actions and supportive measures. Supportive measures should always be coordinated through OCIC. OCIC is also responsible for working with key campus stakeholders to effectuate interim actions and supportive measures.
- OCIC investigates and makes findings about whether policies within its purview have been violated while treating parties equitably and fairly.
- When there is a finding of a violation of policy, there must be clarity about who the final decisionmaker is and sanctions should be meted out consistently across the institution.

Recommendation Six: OCIC's Reporting Structure Should Change

Currently, OCIC reports to Chief Integrity Officer Tim Marshall. That is not consistent with best practices in this space where institutional civil rights officers now typically report to the highest level of administration within an institution.

In this case, the firm recommends that OCIC report directly to the President. This reporting structure would help ensure that OCIC has the authority and support needed to effectively carry out its responsibilities in addressing and preventing discrimination within the institution. Such a reporting relationship also provides necessary autonomy and independence to carry out OCIC's responsibilities effectively.

Recommendation Seven: Simplify Reporting Training

The University's policies for mandatory reporting have improved significantly. With that said, witness interviews made it plain that employees still have confusion about what to report and what happens when they do report. With that as backdrop, the firm recommends simplifying its training for mandatory reporting and considering something akin to a zero-tolerance policy for when designated mandatory reporters fail to report.

Additionally, OHSU is governed by the Clery Act⁶² and that law has special reporting requirements for "Campus Security Authorities." As soon as possible, OHSU should reassess whether it has appropriately identified all CSAs and provided them with appropriate training.

Recommendation Eight: Discretionary Policy and Process Changes

The firm recommends the following policy and process changes:

- At the beginning of each investigation, and in a manner consistent with state and federal legal requirements, OCIC must conduct an appropriate risk assessment to ensure appropriate interim actions are implemented. The adequacy of those interim actions should be regularly evaluated, and a process should be developed for community members to appeal when they believe interim actions are inadequate.
- At minimum, once there has been an institutional determination that an employee or student has violated OHSU's anti-discrimination policies and one of the sanctions being considered is termination or expulsion, OCIC should automatically place that individual on administrative leave.
- OHSU's antidiscrimination policies and communications summarizing those policies should have clear guidance regarding investigation timelines, including what to expect and when to expect communication from OCIC investigators. This

⁶² The firm has not been asked to opine on OHSU's compliance with the Clery Act and offers no opinion.

material should be distributed annually and provided immediately to each individual reporter upon filing a report.

- The eligibility criteria for all future discretionary compensation awards or bonuses should at least temporarily disqualify employees who have significant performance-related concerns, including pending OCIC investigations.
- Employees terminated for violating OHSU's anti-discrimination policies should be ineligible for rehire.
- OHSU should create a task force to assess what HR should disclose in reference checks for employees terminated for violating OHSU's anti-discrimination policies. That task force should also assess OHSU's policies and practices with respect to background and reference checks on incoming students and employees.

Recommendation Nine: Provide Robust Alternative Resolution Options

One of the emerging best practices in anti-discrimination work is the provision of alternative resolution options, including mediation and restorative justice, in appropriate cases. OHSU should redouble its efforts on this front. When done appropriately and in accordance with various legal requirements, the benefits of truly voluntary alternative resolution include:

- **Empowerment:** By participating in the resolution process, parties have more control over the outcome compared to traditional investigation/adjudication. They can actively participate in crafting solutions that meet their needs and interests.
- **Speed:** Mediation or conciliation processes are often quicker than investigations, allowing parties to resolve disputes in a timelier manner.
- **Preservation of Relationships:** These processes can help preserve relationships between parties, particularly in situations where ongoing interaction is necessary.
- **Flexible Solutions:** Mediation and conciliation allow for more creative and flexible solutions that may not be available through traditional investigative proceedings. Parties can explore a range of options to address the underlying issues and find mutually acceptable solutions.

- **Educational Opportunity:** Participating in mediation or conciliation can be an educational experience for parties involved, helping them understand each other's perspectives and fostering a greater awareness of discrimination issues.

Recommendation Ten: Reset on Confidentiality.

There needs to be a complete institutional reset of expectations about confidentiality. While perhaps well intentioned, too many members of the OHSU community have outsized expectations about what they are entitled to know about investigations conducted by OCIC. To the extent those demands are motivated by concerns about mishandling of reports, Recommendation Four is designed to provide institutional accountability while preserving confidentiality.

For clarity, reasonable fear about the institution's inability to maintain confidentiality is a **significant barrier** to students reporting misconduct. Suffice it to say that it is unacceptable for an employee who is not a complainant or respondent to discuss specific details about an investigation with anyone who does not have a need to know. Any deviation from that should lead to significant discipline. Additionally, misleading or incomplete information about an investigation should not be disclosed by leaders of the institution, and the institution must commit to honesty in any public statements it makes.

Recommendation Eleven: Remedying Effects of Discrimination

When OCIC determines its anti-discrimination policies have been violated, it must take steps not only to issue appropriate discipline, but it must also remedy the **effects** of the discrimination, the investigation process, and the attendant fallout.

In this case, the fallout from this matter extended in several different directions and included, as noted above, students who were serving in a lab with Dr. Marks who were left scrambling to remedy a situation that negatively affected their education program through no fault of their own.

Recommendation Twelve: Title IX Requirements

New Title IX regulations were recently announced and are effective August 1, 2024. OHSU's current policies do not comply with the existing regulations, the institution must craft policies and procedures which comply with those regulations and are consistent with state law and corresponding judicial opinions. That process should start immediately.