



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

REGION IX  
CALIFORNIA

50 UNITED NATIONS PLAZA  
MAIL BOX 1200; ROOM 1545  
SAN FRANCISCO, CA 94102

June 8, 2018

Randal R. Wisbey  
President  
La Sierra University  
4500 Riverwalk Parkway  
Riverside, California 92505

(In reply, please refer to case no. 09-16-2314.)

Dear President Wisbey:

This letter is to inform you that the U.S. Department of Education (the Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against La Sierra University (University). OCR investigated whether the University provided a prompt and equitable resolution of the Student's complaint of student-to-student sexual harassment.<sup>1</sup>

OCR is responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX), as amended, 20 U.S.C. §1681 *et seq.*, and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in education programs and activities receiving financial assistance from the Department. The University is a recipient of financial assistance from the Department. Therefore, OCR had jurisdiction to investigate this matter.

OCR's investigation to date consists of a review of the University's relevant policies and procedures and the documents submitted to OCR by the Student/Complainant and the University regarding the case at issue. With respect to the University's prior and current policies and procedures for addressing reports and compliance of sexual violence/sexual harassment under 34 C.F.R. § 106.9(b), OCR identified areas of noncompliance. With respect to whether the University provided a prompt and equitable resolution under Title IX, prior to OCR completing its investigation, including conducting interviews and reviewing additional documents, the University expressed an interest in a voluntary resolution, and OCR agreed it was appropriate to do so. The legal standards, facts gathered, and the reasons for OCR's determinations in this matter are summarized below.

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<sup>1</sup> OCR identified the Student in its notification letter to the University and is withholding her name from this letter to protect her privacy.

## LEGAL STANDARDS

### *Sexually Hostile Environment and Duty to Respond Promptly and Equitably*

The regulation implementing Title IX, at 34 C.F.R. § 106.31, provides that “. . . no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any . . . education program or activity” operated by recipients of Federal financial assistance. Sexual harassment that creates a hostile environment is a form of sex discrimination prohibited by Title IX. Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, including acts of sexual violence.

When a student sexually harasses another student, the harassing conduct creates a hostile environment if it is so severe, persistent, or pervasive that it denies or limits a student’s ability to participate in or benefit from the recipient’s program or activities. If a recipient knows or reasonably should know about student-on-student harassment, Title IX requires the recipient to respond in a prompt and equitable manner by taking immediate action to eliminate the harassment, prevent its recurrence, and address its effects.

When responding to alleged sexual harassment, a recipient must take immediate and appropriate action to investigate or otherwise determine what occurred. The inquiry must be prompt, reliable, and impartial. Pending the outcome of a response to a report or an investigation of a complaint, Title IX requires a recipient to take steps to protect the complainant from further harassment as necessary, including taking interim measures. The recipient also should take steps to prevent any retaliation against the student who made the complaint and/or those who provided information. A recipient must consider the effects of off-campus misconduct when evaluating whether there is a hostile environment on campus or in an off-campus education program or activity.

Title IX and its implementing regulations are intended to protect students from discrimination on the basis of sex, not to regulate the content of speech. In cases of alleged sexual harassment, OCR considers the protections of the First Amendment of the U.S. Constitution where issues of speech or expression by students or employees are concerned.

### *Grievance Procedures*

34 C.F.R. § 106.8(a) requires each recipient to designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under the regulation implementing Title IX, including investigation of any complaint communicated to the recipient alleging any actions which would be prohibited by Title IX. 34 C.F.R. § 106.8(b) requires that a recipient adopt and publish grievance procedures providing for the prompt and equitable resolution of student and employee complaints alleging any action prohibited by Title IX. OCR examines a number of factors in evaluating whether a recipient’s grievance procedures are prompt and equitable, including whether the procedures provide for the following: notice of the procedure to students, and employees, including where to file complaints; application of the procedure to complaints

alleging discrimination by employees, other students, or third parties; adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; designated and reasonably prompt timeframes for major stages of the complaint process; notice to the parties of the outcome of the complaint; and an assurance that steps will be taken to prevent recurrence of any discrimination and to correct its effects.

### FACTUAL FINDINGS

The University is a private Christian university in Riverside, California with a student enrollment of approximately 2,500. The Complainant was an undergraduate student at the University at the time she filed her complaint of sexual harassment/sexual assault in September of 2015. She graduated in June of 2016.

#### ***Original Sexual Harassment Policy and Grievance Procedure***

At the time the Complainant filed her complaint, the University's sexual harassment policy and grievance procedure (hereinafter policy and procedure) defined sexual harassment as all forms of sexual misconduct, including but not limited to sexual assault, dating violence, and sexual harassment. Sexual harassment was defined, in relevant part, as unwelcome conduct (verbal, nonverbal, or physical) of a sexual nature that: creates a hostile, intimidating or offensive academic or working environment, or is sufficiently severe, persistent or pervasive to limit a person's ability to participate in or benefit from an education program or activity. The policy and procedure applied to students, faculty, staff and third parties. It also included a definition of consent as affirmative, conscious and voluntary agreement to engage in sexual activity, and stated that consent could be conveyed in the form of "clearly understandable words or actions."

In order to file a complaint, community members were to report the conduct to the Title IX coordinator. Interim measures would apply only to the reporting (or complaining) party and could include a no contact order, housing relocation, adjustment of course schedules, alternate learning arrangements, and time off or absences. The University's procedure to respond to complaints was to assign, at a minimum, two investigators, and provide notice to the responding party of the allegations. Once the investigation was completed, generally within 60 days, the associate provost would review the report along with the Title IX coordinator's determination as to whether the Respondent violated a section of the policy and, if a violation was identified, make a recommendation for sanction. Upon receipt of the associate provost's determination, the Title IX coordinator would issue each party a written outcome letter. The letter would include any remedies and/or sanctions. If it was determined that the Respondent engaged in prohibited conduct, the associate provost would deliver the final investigative report, which included recommendations and corrective actions to the chair of the Student Life Judicial Committee (SLJC) for final action. Either party could appeal the findings through the "disciplinary appeals process" but the policy and procedure did not include a timeframe for filing or a decision and it did not include a description of the bases for appeal.

### ***Complainant's First Complaint***

From the University's investigative report, OCR confirmed that on September XX, 2015, the Complainant reported to the Dean that she had been subjected to unwanted touching and nonconsensual sex in a dating relationship with a male undergraduate student (the Respondent). She and the Respondent dated from October 2014 to June 2015. She further alleged that the Respondent was in her XXXXXXXXX XXXXXXXXXXXX class in fall 2015 and his presence in the class created a hostile environment for her. Finally, she alleged that the Respondent subjected other female students to unwanted touching. In a meeting with the Dean documented in the report, the Complainant stated that the Respondent hit her in the face on one occasion, and she admitted to striking the Respondent in the face on one occasion. In a separate interview with OCR, the Complainant stated that at the time she first spoke to the Dean in September 2015, she was unaware of the Title IX process on campus, as it was not widely disseminated to students. She spoke to the Dean because she wanted the Respondent removed from her XXXXXXXXX class.

The Complainant also told OCR that the University provided several interim measures throughout the time of the investigation, including a no-contact directive (discussed in greater detail below), and counseling and extra time for homework and exams, due to the stress of the process which extended through the majority of her senior year of college.

On October X, 2015, the Dean met with the Respondent and discussed the concerns being raised and that it was possible he would have to change out of the XXXXXXXXX XXXXXXXXXXXX class. She also advised him that she was still ascertaining if the matter was a student conflict or a Title IX matter, in which case the matter would have to be turned over to the Title IX office. The Respondent signed a "behavior contract", which reaffirmed that he was required to comply with the student code of conduct and, prohibited him from "participat[ing] in any leadership position on campus" for the remainder of the school year, based on the complaint.

Following the meeting with the Respondent, on October X, 2015, the Dean sent a no contact letter to the Respondent. The letter directed him not to have contact with the Complainant, and two other named students who met with the Dean about the Respondent's conduct. The letter stated that any contact would constitute retaliation and that "suspension or expulsion from the university would be inevitable." The letter stated that the no contact order was mutual, and that the Complainant and two other students had been informed that they were also not to have contact with the Respondent. The letter directed the Respondent to sit on the opposite side of the room if he is in class with the Complainant, or the other two named students.

On October XX, 2015, the Dean referred the complaint to the Title IX coordinator, who assigned an outside investigator on October XX, 2015. On or around October XX, 2015, the Title IX coordinator withdrew the Respondent from the XXXXXXXXX XXXXXXXXXXXX class and enrolled him in an independent study version of the same class, which required that he meet privately with the professor for about 15 minutes weekly.

Between October XX, 2015 and December XX, 2015, the University's investigator (affiliated with an outside law firm) conducted interviews with the Complainant and Respondent and 14

witnesses identified by both parties. Two other witnesses were identified by the parties (or other witnesses) were not interviewed because of non-cooperation. No other evidence was discussed in the investigative report other than text messages and e-mails from the parties and various University staff. The investigator completed the report on January X, 2016 (day 101 after the University received notice); the report is 54 pages long. The report was provided to both parties.

The investigator made three findings. First, she found insufficient evidence that the Respondent subjected the Complainant to sexual harassment or sexual assault in their dating relationship. The investigator noted credibility problems from both parties but by a preponderance standard, there was insufficient evidence of a violation of Title IX. Second, she found sufficient evidence that the Respondent created a hostile environment for the Complainant in the XXXXXXXXX XXXXXXXXXXXX class. The investigator concluded that the Complainant had a difficult relationship with the Respondent, was uncomfortable around him after he broke up with her, and that his presence was interfering with her ability to participate fully in class. Third, the investigator found sufficient evidence that the Respondent's touching of other females in the campus community created a hostile environment for other females on campus. Even though she stated that some female students reported not being bothered by the Respondent's conduct, her determination was based on a finding that he "violated the personal space" of some female students when they communicated that his conduct was not welcomed.

On February X, 2016, the Complainant reported by e-mail that the Respondent violated the no contact order when he "ma[d]e facial expressions and 'scoffed' at her when they made eye contact in passing." She thought that the Respondent and his friends were talking about her and it made her uncomfortable. On February XX, 2016, the Complainant sent an e-mail to the Title IX coordinator stating that on February XX, 2016, she saw the Respondent outside her classroom, laughing out loud.

On February XX, 2016, the Complainant sent the Title IX coordinator a third e-mail asking for an update on her request to prohibit the Respondent from attending an on-campus event on February XX, 2016. Documentation shows that the Title IX coordinator responded to the third e-mail that the Student Life Office was working on a process to make sure that the Complainant could attend the event without seeing the Respondent.

On March X, 2016 (54 days after the investigative report was issued; day 155), the Title IX coordinator sent a letter to the Complainant informing her that the investigation was complete and had been submitted to the SLJC, which would have "at least 14 days" to respond to the Title IX report, after which both parties would be provided notice of the final accommodations, sanctions and recommendations. The SLJC was originally to be chaired by the Dean of Student Life.

On March X, 2016, the University notified by the Title IX Coordinator that the investigation was complete and that the SLJC will have 14 days to deliberate and determine sanctions, after which the parties will have the opportunity to appeal within five days after a final report is issued. The letter is silent as to when or how the parties can review the investigative report. The Complainant was separately notified that the Dean would not serve as SLJC chair.

A “confidential outcome report,” dated March X, 2016, was issued to both parties. The report, seventeen pages in length, contains a summary of the investigate report. The report included sanctions imposed by the SLJC against the Respondent as follows: a letter of censure, upholding of the October X, 2016 behavior contract, a no contact order regarding the Complainant, a required meeting with the Dean of students each quarter, ongoing counseling for the remainder of the Respondent’s stay at the University, and completion of a Title IX training course. The no contact order stated that the Respondent was prohibited from “mak[ing] any contact with the reporting party in person, by email, social media, or through another student/person for the durations of his time enrolled as a student at the University.” The Complainant was also instructed not to have contact with the Respondent, and was encouraged to continue counseling. The file contains information that the SLJC was chaired by Vice President of Student Life (not the Dean). Even though the policy and procedure were silent on the timeframe for appeal, the report included a notification to the parties that they had five business days to appeal the decision.

The file contains e-mail communication between the Complainant and the Title IX Coordinator in which the Complainant requests a copy of the fully investigation report. On March XX, 2016, the Title IX Coordinator provided the Complainant with a copy of the redacted report. The documentation does not indicate if the Respondent was offered or provided a copy of the investigative report. On March XX, 2016, the Complainant submitted an appeal of the finding that the Respondent was not responsible for sexual harassment and sexual assault in their dating relationship to the SLJC chair and submitted a revised appeal on April X, 2016, because the University advised her that it needed to be reformatted. The Respondent did not submit an appeal.

On April X, 2016, the Complainant sent an e-mail to the Title IX coordinator stating that she saw the Respondent outside of a classroom on campus, near where she also has a class and that he was loud on purpose.

On April X, 2016, the Title IX coordinator sent the Respondent a letter indicating that review of his spring 2016 course schedule revealed that he was enrolled in a XXXXXXXXXXX XXXXXXXX course held in the same building and at the same time as the Complainant, and that he and the Complainant had come “into direct contact” as they were entering classes held XXXXXX XXXX XXXX XXXXX. To “prevent interaction,” the Title IX coordinator directed the Respondent to arrive at least 10 minutes prior to the start of class and leave 10 minutes after the end of class. On April X, 2016, the Title IX coordinator sent the Complainant notice confirming this new directive to the Respondent.

Two days later, on April XX, 2016, the Title IX coordinator sent the Respondent a “directive” that he was required to complete the XXXXXXXXXXX XXXXXXXX course “via an alternative method”. He was warned that failure to follow the directive would result in suspension. The file does not contain information regarding why the Respondent was not permitted to complete the course.

On April XX, 2016, the Title IX coordinator met with the Respondent. The Respondent reported that he was having difficulty complying with the no contact directive since his XXXXXXXXXXX

XXXXXXX course was located XXXXXX XXX XXXX from the Complainant's class. They discussed that "interim measures" had been put in place to eliminate the conflict but they were not effective. The coordinator's notes indicate that the Respondent was agreeable to completing the course "via google hangout."

On April XX, 2016, the Complainant sent the Title IX coordinator additional information about the April X, 2016 incident when she saw him in a building where both of them had a class at the same time. She requested that the Respondent complete his class on independent study. On the same day, the Title IX coordinator met with the Complainant. The Complainant described great frustration with the effectiveness of the no contact directive. She described the Respondent as showing up early to class to "linger outside the classroom with his friends", so that she would run into him. The Title IX coordinator said that it would be helpful if she had witness testimony to confirm that the Respondent had tried to have contact with her. The notes indicated that the Title IX coordinator had made contact with the Respondent's friends, and the professors in the classes, and they all stated that the Respondent did not loiter outside the classroom and remained in class as he had been instructed.

On April XX, 2016, the Title IX coordinator sent a letter to the Respondent indicating that despite the no-contact order, "it has been reported that he has been in the same locations as the [Complainant], including in the gymnasium and the library." Based on the report, the Title IX office was making "accommodations," including restricting the Respondent's access to the gymnasium, library, and fitness center for specific time periods. She also informed him that he would not be allowed to attend a club function/event in May 2016 or graduation activities.

On April XX, 2016, the Title IX coordinator sent a letter to the Respondent informing him about the appeal filed by the Complainant and the University's response. The letter states that the provost upheld the finding of insufficient evidence with respect to the allegation of sexual harassment and sexual assault in the dating relationship because of the lack of evidence that the instances of sexual involvement were not consensual and because the Complainant's "refusal to file a criminal report with law enforcement, in spite of allegations of 'rape and battery'" made it difficult for this finding to be overturned. The provost upheld the finding regarding #2 of "hostile environment" in the XXXXXXXXX class and remanded for consideration of additional sanctions. He also upheld the finding of sexual harassment (allegation #3) as to other female students and members of the University community on the basis that witness testimony was consistent that the Respondent was told by some that his actions (hugging and kissing) were unwelcomed, that he had been warned and counseled on several occasions, and that he demonstrated an "unteachable spirit." The provost also found that the record supported the finding on allegation #3 that the Respondent behaved inappropriately toward a number of women. Therefore, the provost remanded the portion of the appeal regarding issue #3 to the SLJC for reconsideration and amendment of sanctions. In addition, the provost stated that the SLJC had found that the Respondent "engaged in sexual activity outside of marriage" but did not adequately consider that the Respondent was X XXXXXXXXXXXX XXXXXXXXXXXX, when he engaged in this type of behavior. As such, the provost remanded for further consideration of "potential consequences" for the Respondent completing the XXXXXXXXXXXX XXXXXXXX program. The University's policies and procedures at the time did not impose separate or different conduct requirements for students in the XXXXXXXXXXXX program.

On April XX, 2016, the Title IX coordinator met with the Complainant to go over the “accommodations” that resulted in further restrictions of the Respondent on campus.

The Title IX coordinator’s notes indicate that on May X, 2016, the SLJC responded to the remand by the provost by imposing a “citizenship probation” on the Respondent, which included a three-day suspension and a campus restriction, specifically that he could no longer be on campus except for a class or an activity related to a class and was prohibited from attending any graduation ceremony or party. On May X, 2016, the University notified the Respondent in writing that he had to restrict his presence on campus to only classes he was currently enrolled in and that violation of the mandate would result in immediate expulsion.

On May XX, 2016, the Complainant was notified by the Title IX Coordinator that the University had opened another investigation on May XX, 2016 with respect to one of her reports (date not specified) that the Respondent violated the no contact order in an incident on campus. The Title IX Coordinator found that the Respondent (who is X XXXXXXXXXXXXX) XXXX XXXXXXXX XX X XXXXXXXX XXXXXXXXXXXX XXXX but it was not for a campus event. She therefore concluded that the Respondent’s actions did not violate the no contact order.

On June X, 2016, the associate provost informed the Complainant that after conferring with the XXXXXXXX XXXXXX, new procedures would be in place regarding candidates for XXX XXXXXXXX found responsible of sexual misconduct.

On June XX, 2016, the Complainant sent a text message to the Title IX coordinator indicating that the Respondent was on campus for graduation. The Complainant stated that she did not see him but was told by someone else that he was on campus. The Title IX coordinator met with the security office to review footage from campus cameras. After spending “multiple hours reviewing footage,” she concluded the Respondent was not on the campus on that day. She so informed the Complainant.

### ***Complainant’s Second Complaint***

On February XX, 2016, the Complainant filed a second complaint with the University alleging that the Dean of Students broke confidentiality and retaliated against her when she allegedly disclosed to a third party (another student on campus) that the Complainant had filed a sexual assault complaint against the Respondent. The University secured the services of an outside attorney to investigate the complaint, which included interviews with the Complainant, the third party and the Dean. In a report dated May X, 2016, the investigator concluded that the Dean had disclosed that the Complainant had filed a complaint, but had not disclosed the nature of the complaint. Nevertheless, the investigator found sufficient evidence that the disclosure violated the confidentiality provisions of the University’s Sexual Misconduct Policy. However, the investigator found insufficient evidence that the disclosure materially harmed the Complainant. The investigator submitted a “supplemental investigation report” on June XX, 2016 after interviewing additional witnesses from the University’s administration and reviewing social media posts from the Dean and other witnesses. In this report, the investigator concluded that the evidence demonstrated that the Dean had a “good faith belief” that the third party was aware



of the complaint at the time she talked to him and that the purpose was related to her advising him to stop him from treating the Respondent adversely based on his knowledge of the complaint.

### ***Revised Sexual Harassment Policy and Grievance Procedure***

On September 14, 2016, the University revised its “Sexual Misconduct Policy”, which includes its grievance procedure, and added provisions, specifically with respect to its procedure for investigating allegations of sexual harassment and assault. It maintained that interim measures applied only to the complaining party, but expanded the list of possible actions to include class withdrawal, access to counseling, limiting access to facilities/events, and modification of course schedules to separate the parties and interim suspension.

The revised policy and procedure state that the Title IX coordinator will determine whether to respond to a report through a formal investigatory process or through informal resolution with the caveat that all sexual violence cases must go through formal investigation. However, the policy and procedure do not provide a reasonably prompt timeframe for completion of the informal process, notice to the complainant and respondent that such process is voluntary, or the ability to end the process and proceed to a formal investigation. The Title IX coordinator is to determine, generally within three days of receipt of the report, whether to proceed with an investigation but the policy and procedure do not state whether notice of that decision will be communicated to the parties. “Most” investigations should be completed within 60 days.

The revised policy and procedure states that the investigation conducted by the University must be prompt, fair, thorough and impartial. The Title IX coordinator shall assign a trained investigator (which can be an outside investigator) within two days of the determination to conduct an investigation. The preponderance of evidence standard applies. Both parties receive notice in writing of allegations under investigation, and the right to have an advisor. The Title IX coordinator must review the investigated finding within 30 days of completion to consider any need for further fact gathering. The preliminary report must be made available to both parties after completion and both parties have an opportunity to provide feedback and request additional fact gathering. Parties are to be notified in writing that an “Investigative Review and Findings” meeting will be scheduled within 5 business days after issuance of the final report. The Investigation Review and Findings meeting includes the investigator(s), two trained community representatives appointed by the Title IX Coordinator, and the Title IX Coordinator, who serves as the chair. The Title IX Coordinator sends notification to each party that each party will have an opportunity to present a written statement in advance and make a statement at the meeting (if they choose to participate in person). At the conclusion, the committee makes findings of fact by majority vote and by a preponderance of the evidence as are necessary to determine whether the respondent was responsible for the alleged violation of the policy.

Both parties have a right to a limited appeal within five business days of receiving the investigative report. The grounds for appeal are: 1) procedural error which is substantially prejudicial to the outcome of the investigation and; 2) new information. The appeal is submitted to an identified and trained appeal officer, who is an internal or external candidate identified by the Title IX coordinator. The appeal must be decided within ten business days.

### ***Second Complaint against the Respondent***

On February X, 2017, the University notified the Respondent that it had received a complaint filed by a different female student that he had engaged in non-consensual sexual intercourse with the Complainant during the 2014-15 academic year. On the day before, the University notified the Complainant that it was investigating a complaint in which she was named as a victim in a Title IX case. The Complainant told the Title IX coordinator that she was aware of a female student who was filing a complaint on her behalf. She stated that she did not wish to be the reporting party and did not want to go through another Title IX process, but was willing to be interviewed. On or around this date, the University assigned the same outside investigator contracted by the College for the previous complaint. She completed a preliminary report of her investigation on March XX, 2017. The complaint submitted was based on a series of social media posts initiated by a third party with the Respondent on January XX, 2017. In this social media conversation, the Respondent made alleged admissions about his conduct toward the Complainant during their dating relationship, including that he engaged in non-consensual sexual intercourse with the Complainant in October 2014 through force and that he pinched her on occasion during the 2014-15 academic year, and slapped her once during an argument. The reporting party had received the social media posts from the third party and shared them with the Complainant and then decided to share the posts with the University. The third party was a female student who was initially interviewed during the first investigation.

As part of the investigation, the Respondent denied that the conversation was authentic, denied that the account was his account, and stated that the conversation was “made up.” He stated that the exchange included inaccurate information and used conversation conventions that he never used. He further denied having nonconsensual sex with the Complainant in October 2014. He stated that pinching was a playful act, and re-stated that he slapped her in response to her slapping him so the act was mutual and the result of an argument. The Complainant, who consented to an interview, stated to the investigator that with respect to the incident in October 2014, she could not say if she actually gave “affirmative consent” and provided some consent and then said “no” as well during the first time they had sexual intercourse; however, during the second time, she did not recall that she ever gave consent.

Under the analysis section, the investigator concluded that the reporting student was more credible and that the screenshots appeared authentic. The investigator acknowledged that she was unable to “independently confirm/dispute” what username the Respondent used on the day of the conversation (January XX, 2017) because she did not have the ability to obtain cooperation of the social media platform. She further acknowledged that the Respondent allowed his phone to be examined but that this examination yielded no information and provided no other credible evidence that he could not have participated in the conversation. The investigator concluded that while there was some evidence that the communication style was not always consistent with his use of language in similar types of postings, this evidence was not sufficient, “by a preponderance standard, to exclude use of this information” or rely upon it to make a finding. The investigator concluded that as a result of the social media posting, there was sufficient evidence that the Respondent engaged in nonconsensual sex in October 2014 when he did not obtain affirmative consent, and that the Respondent engaged in intimate partner violence

as a result of the pinching. The investigator found that the slapping incident was mutual in terms of both parties engaging in intimate partner violence.

On March XX, 2017, the Title IX coordinator issued a final outcome, following a convening of the “Investigative Review and Findings Committee” (committee) meeting in which the committee heard statements from the reporting party and the Respondent. The committee concluded that the Respondent was to be expelled from the University.

In a letter dated March XX, 2017, the Respondent stated that he was appealing the outcome of the investigation. He stated that he never participated in a conversation with the third party through social media, and that the investigator failed to authenticate the social media postings. He also stated that the underlying allegations had already been investigated.

On April XX, 2017, the Respondent provided more information to support his appeal (through an attorney). The appeal documents stated that the Respondent categorically denied the authenticity of the social media exchange, and that the account was not his, and was fraudulently created to impersonate him. The appeal further stated that the University ignored testimony from the Respondent that the username used was not his account at the time of the conversation, and that the postings included conversation conventions he never used such as “yo.” The Respondent hired a private investigator who examined the photographs used in the second account and confirmed that the photos were forged. The attorney contended that the investigator hired by the University examined the Respondent’s phone but because she lacked expertise, and failed to hire an expert, was unable to confirm or deny that his phone was used in the alleged conversation. The attorney also questioned the authenticity of the conversation since it was based on screenshots of a conversation from the reporting party, as no one was able to view the conversation on the social media platform itself since the reporting party deleted the conversation. Finally, the appeal argued that the Respondent was hacked and someone affiliated with an outside advocacy group impersonated him as part of its campaign against the University, and its stated disagreement with the University’s previous resolution of the complaint. As evidence, it includes a posting by the group from March XX, 2017 (before the University’s report was issued) which states; “a student among us has finally admitted to raping and physically assaulting a female student on numerous occasions . . . has finally admitted on social media...” According to the attorney, the group sent all University students, on March XX, 2017, a copy of the “alleged confession” which was the social media conversation and that this posting put pressure on the University to make a finding adverse to the Respondent. According to the attorney, the reporting party admitted during the hearing that she had shared the screen shots with a “trusted friend” who relayed them to the group.

On April XX, 2017, the Title IX Appeal Officer sent a three paragraph letter, stating that the arguments put forth by the Respondent in his letter of appeal received on April XX, 2017 were not considered because they were received outside of the timeframe indicated by a new policy, which requires all appeals to be submitted within five business days (the Complainant’s appeal to the provost was accepted on day 31 after being rejected several times for noncompliance, even though the letter of notification to the parties stated that they each had five business days to appeal). There is no documentation that the Respondent asked for an extension to file an appeal. The University treated the attorney’s letter with exhibits as outside of the timeframe for appeal

and stated the information submitted was not reviewed or considered because it was not timely filed.

### Analysis and Conclusion

The University's policy and procedure, initially applied to the Complainant's case, lacked specific provisions which would ensure a prompt and equitable response to a complaint, specifically it did not discuss how interim measures could be applied equitably to both parties and lacked reasonably prompt timeframes for various stages of the investigative process. The policy also lacked specific information governing how appeals would be processed, including what timeframes and standards would apply. In September 2016, the University revised its policy and added several provisions, including explicit timeframes to ensure a prompt response and a specific appeals procedure for both parties, with timeframes and a standard for review. However, OCR identified areas of noncompliance because of continued inequitable application of interim measures for both parties, and the lack of information about the timeframes and process for the informal resolution process, including whether it was voluntary for the parties, and whether the parties had the right to proceed to formal resolution.

With respect to the resolution of the original complaint at issue, based on the review of documents in the file, OCR identified several concerns with the University's response. First, after meeting with the Complainant, the records, including the investigator's report, show that the Dean waited nearly two weeks before referring the matter to the Title IX coordinator, while she ascertained whether the complaint pertained to a "student conflict" or a Title IX matter. Second, OCR identified a compliance concern because the University may have applied interim measures, such as requiring that the Respondent take classes in a tutorial format and restricting his movement on campus, without determining if applying such measures was equitable under the circumstances and/or assessing whether the allegations regarding violations of the no contact order had been substantiated before identifying additional campus restriction. Third, the investigator may not have followed the Title IX legal standards (or its own policy definitions for sexual harassment) in concluding that the Respondent was not responsible for sexual harassment/sexual assault but was still responsible for creating a hostile environment for the Complainant because he was enrolled in the same class. Fourth, the University may not have provided adequate notice of the outcome of the investigation when it initially notified the parties of the completion of the investigation on March X, 2016 but did not provide information about how they could request and review the investigative report.

Fifth, the University reconsidered the conduct sanctions against the Respondent based on considerations, namely his enrollment in a XXXXXXXXXXXX program and the moral standards that the University wanted to apply for students in such a program, that were separate from Title IX standards and requirements, and, as such, the Respondent may not have received adequate notice that such conduct code requirements were in effect. The University decided to change the conduct code after these allegations, but the Respondent may not have had prior notice of these requirements. The same appeal decision also stated that the Complainant "should have filed a criminal report" with respect to her allegation of sexual assault and to not do so was a factor in determining that her allegation could not be substantiated. However, the University's obligation to investigate a Title IX allegation is separate and apart from a criminal investigation, and the

Complainant cannot be required to file a criminal complaint in order to obtain relief under Title IX and its implementing regulations.

Finally, OCR identified a compliance concern because the University's overall response was likely not prompt for either party, taking approximately 156 days from the date the complaint was originally filed, to notice of outcome.

With respect to the University's response to the second complaint filed by the Complainant against the Dean, OCR reviewed the investigative report and interview notes and found insufficient evidence that the University did not provide a prompt and equitable response to that complaint. With respect to the second complaint against the Respondent, OCR identified an equity concern with respect to the appeal process. The University did not consider all aspects of the Respondent's appeal, even though it considered the Complainant's appeal, which was filed well beyond the five day timeframe communicated to the parties for appeal.

With respect to all of the compliance concerns identified herein, prior to OCR completing its investigation, the University expressed an interest in a voluntary resolution, and OCR agreed it was appropriate to do so.

#### Overall Conclusion

The University has entered into the enclosed Agreement to address the issues of noncompliance and compliance concerns identified in this case. The Agreement includes: 1) revisions to the University's "Sexual Misconduct Policy", including a statement that the Title IX Coordinator will assess interim measures for both parties, and, with respect to the informal resolution process, that the University will provide for the ability of the parties to request a formal investigation, state that the informal resolution process is voluntary, and provide a reasonable timeframe for its completion; 2) training for staff on the University's revised policies and procedures; 3) an offer to both parties to participate in a meeting with the University to learn how the grievance process has changed and for each student to have the opportunity to share concerns about the University's response, including providing the Respondent with an opportunity to have his appeal reconsidered; and 4) a self-monitoring assessment by the University of all sexual harassment and/or sexual violence complaints resolved for the 2017-18 academic year to be submitted to OCR to ensure the investigation and resolution process meets Title IX requirements.

Based on the commitments made in the enclosed Agreement, OCR is closing the investigation of this complaint as of the date of this letter. When fully implemented, the Agreement is intended to address the compliance concerns identified in this investigation. OCR will monitor the implementation of the Agreement until the University is in compliance with its terms. OCR's determination in this matter should not be interpreted to address the University's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. The complainants may have the right to file a private suit in federal court whether or not OCR finds a violation.

This letter sets forth OCR's determination in this case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy

statements are approved by a duly authorized OCR official and made available to the public. Please be advised that the University may not harass, coerce, intimidate, retaliate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, any individual may file a complaint with OCR alleging such treatment.

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

Thank you for your cooperation in resolving this case. If you have any questions regarding this letter, please call OCR San Francisco at (415) 486-5555.

Sincerely,

/s/

Sara Berman  
Team Leader

Enc.