

SEXUAL MISCONDUCT ADVISORY COMMITTEE

FIFTH REPORT AND RECOMMENDATIONS

**as submitted to the Education Committees of the Senate and House of
Representatives of the Colorado General Assembly**

January 12, 2024

TABLE OF CONTENTS

EXECUTIVE SUMMARY 3

BACKGROUND 4

Prior Reports and Recommendations of the Advisory Committee 4

Advisory Committee Work In Advance of the Fifth Report.....6

RECOMMENDATIONS AND FOCUS AREAS 7

Recommendation Twenty-Seven: Ensure that the *Counterman v. Colorado* decision does not impact enforcement of Title IX stalking cases 7

Recommendation Twenty-Eight: Prepare for the release of new Title IX Regulations which may be effective for the 2024-2025 School Year 9

CONCLUSION 10

APPENDIX11

EXECUTIVE SUMMARY

The Sexual Misconduct Advisory Committee (Advisory Committee), established in May 2019 by C.R.S. §§ 23-5-146 *et seq.* (SB 19-007), has met regularly since January 2020 to respond to constantly evolving Title IX law and provide recommendations to promote and sustain safe and non-discriminatory environments for Institutes of Higher Education (IHE) communities and to ensure fair and equitable adjudication processes for sexual misconduct cases. Through the facilitation of the Colorado Department of Higher Education (CDHE), the Advisory Committee – comprised of Title IX coordinators, advocates, and attorneys who represent both victims and those accused of sexual misconduct – has submitted four reports ([First Report](#) on August 4, 2020; [Second Report](#) on January 15, 2021; [Third Report](#) on January 15, 2022; and [Fourth Report](#) on January 13, 2023) containing twenty-six recommendations in total to the Education Committees of the Senate and House of Representatives of the Colorado General Assembly and IHEs across the state.

The following report responds to the few significant changes in federal and/or state law regarding sexual misconduct at IHEs since the Advisory Committee’s last report. The Advisory Committee remains committed to its role as a valuable resource for the state, as new Title IX regulations are expected later this year. To that end, the Advisory Committee provides the following, two additional recommendations to the Education Committees and IHEs:

Recommendation Twenty-Seven: *Ensure that the Counterman v. Colorado decision does not impact enforcement of Title IX stalking cases.*

Recommendation Twenty-Eight: *Prepare for the release of new Title IX Regulations, which may be effective for the 2024-2025 School Year.*

The Advisory Committee provides fuller context below for each recommendation.

Finally, the Advisory Committee wishes to express its continued appreciation to CDHE Executive Director Dr. Angie Paccione and Senior Director of Student Success and P-20 Alignment and Colorado GEAR UP Project Director, Carl Einhaus, for their considerable support of the work of the Advisory Committee and commitment to the safety and support of all our campus communities in Colorado.

BACKGROUND

Prior Reports and Recommendations of the Advisory Committee

On May 6, 2020, the U.S. Department of Education released new Title IX rules, which became effective on August 14, 2020. Following an intensive review of the new rules and based on the members' collective experience and expertise, the Advisory Committee submitted fifteen recommendations in its **First Report** to the Education Committees of the Senate and House of Representatives of the Colorado General Assembly pursuant to their statutory charge under Senate Bill 19-007, codified as C.R.S. §§ 23-5-146 *et seq.*¹ The recommendations focused on two primary areas: (1) handling sexual misconduct incidents outside of an IHE's programs, activities or property as defined by the regulations; and (2) conducting live cross-examination. The First Report also identified further issues for consideration by the Education Committees, including funding/resources, adjudicative timeframes, confidential victim advocates and advisor role, cross-examination and children, and impacts of implicit bias.

Pursuant to its statutory charge to produce its **Second Report** on or before January 15, 2021, see § 23-5-147(6)(b), the Advisory Committee continued to meet in 2020 to discuss recommendations for changes to state statutes and institutional methods to reduce sexual misconduct. Given the context of the new federal administration and expected changes to the Title IX rules, the continuing pandemic, as well as the upcoming CDHE 2021 Sexual Misconduct Summit, the Advisory Committee concluded that recommending additional changes to state statutes was not warranted at that time. The Advisory Committee

¹ SB 19-007 required the Colorado Department of Higher Education to create an Advisory Committee to respond to the new federal rules and make recommendations to the General Assembly and Institutions. See C.R.S. § 23-5-147. SB 19-007 required the Advisory Committee to consist of three IHE representatives; two IHE Title IX Coordinators; three persons who are representatives of organizations that advocate on behalf of or provide services to victims of sexual misconduct; an attorney who has experience representing victims of sexual misconduct at IHEs; an attorney who has experience representing persons accused of sexual misconduct at IHEs; and a person with experience providing trauma-informed care. See C.R.S. § 23-5-147(4)(a). SB 19-007 also requires IHEs to:

- Adopt sexual misconduct policies with required components not otherwise in conflict with applicable Title IX law (C.R.S. § 23-5-146(2)(a)(3));
- Provide information to students on how to receive support regarding sexual misconduct (C.R.S. § 23-5-146(4));
- Promote awareness and prevention of sexual misconduct and applicable policy and distribute policy (C.R.S. § 23-5-146(5));
- Offer training (C.R.S. § 23-5-146(6)); and
- Provide to CDHE each year a copy of its sexual misconduct policy; a statement on how the Institution is informing students, promoting awareness and prevention and training; and any updates/changes to the information (C.R.S. §§ 23-5-146 (7) and (8)).

therefore provided the following recommendations in its Second Report: (1) IHEs should continue to address all forms of sexual misconduct – whether identified as Title IX or not; (2) the Education Committees should identify means to include participation of K-12 stakeholders in a state advisory role to address and respond to sexual misconduct; and (3) CDHE should cover the following issues for the Summit: IHE response to the new rules, implicit bias, and education/prevention.

For its **Third Report**, the Advisory Committee focused primarily on the hearing process, including a review of the federal court decision from July 2021 in *Victim Rights Law Ctr v. Cardona* which struck down the so-called “exclusionary rule” from the 2020 Title IX regulations. As a result, decision-makers in Title IX adjudications could now consider statements not subject to cross-examination. In addition, the Advisory Committee surveyed Colorado IHEs about their experiences with the new hearing process, which found that the hearing process required significant and substantial investments in staffing and training and was challenging for students. Based on this information, the Advisory Committee added three additional recommendations: (1) remove the exclusionary rule for witnesses and parties in all sexual misconduct cases; (2) review IHE policies, procedures, and practices to ensure the reliability of party and witness statements to ensure a fair and equitable resolution by the IHE decision-maker; and (3) convene IHEs and relevant stakeholders to discuss the potential and viability of a “state center” to provide technical guidance and facilitation for adjudication of sexual misconduct cases.

Federal and state developments in 2022 guided the work of the Advisory Committee for its **Fourth Report**. First, on June 23, 2022, the 50th anniversary of the passage of Title IX, the U.S. Department of Education released proposed changes to the regulations ([2022 Proposed Title IX Regulations](#)). Second, Congress passed the Violence Against Women Act (VAWA) Reauthorization, which addressed campus sexual assault through a variety of expanded grants, initiatives, and requirements. Additionally, the Colorado IHE Title IX Coordinators convened remotely on June 23, 2022, to begin discussions on the 2022 Proposed Title IX Regulations (released the same day) and a potential “state center” pursuant to the Advisory Committee’s Third Report. Given that the newest Title IX regulations had yet to be finalized and released, the Advisory Committee focused its recommendations on five areas: (1) response to faculty and staff sexual misconduct cases; (2) training and expertise of advisors and hearing decision makers; (3) awareness of and access to retroactive remedial measures or accommodations; (4) support for sexual misconduct response and prevention at under-resourced IHEs; and (5) training and education at the secondary level.

Advisory Committee Work in Advance of the Fifth Report

Following the Advisory Committee's Fourth Report, the Office of Policy, Research and Regulatory Reform (COPRRR) at the Department of Regulatory Agencies presented its sunset review of the Advisory Committee before the Colorado Senate Education Committee on January 23, 2023. The Committee agreed with the COPRRR recommendation that the Sexual Misconduct Advisory Committee should be continued. Subsequently, the General Assembly passed Senate Bill 23-085 to continue the Advisory Committee indefinitely.

The Advisory Committee² then met five times between September 2023 and January 2024 to continue discussions of federal and state statutes and IHE approaches to address and prevent sexual misconduct. The forthcoming updates to federal Title IX regulations remained a significant topic of discussion. The Advisory Committee also received a presentation from the Attorney General's Office on relevant legal rulings and changes in law with impacts to Title IX, including the U.S. Supreme Court ruling on *Counterman v. Colorado*, defamation cases stemming from statements made in Title IX cases, and the Colorado Protecting Opportunities and Workers Rights (POWR) Act (SB23-172). Following these discussions and with consideration to a pending 2024 release of new Title IX regulations, the Advisory Committee determined that clarification on *Counterman* was a pressing issue for inclusion in this Fifth report.

² The current members as of the date of this Fifth Report are as follows:

- Lara Baker, Attorney/Partner, Foster Graham Milstein & Calisher, LLP;
- Angela Gramse, General Counsel, Colorado Community College System;
- Ana Guevara, Director of Title IX, Adams State University;
- Elle Heeg Miller, Nurse Practitioner, Heath Center at Auraria;
- Jessica Ladd-Webert, Director, Office of Victim Assistance, University of Colorado Boulder;
- Emily Tofte Nestaval, Executive Director, Rocky Mountain Victim Law Center;
- Elizabeth Newman, Public Policy Director, Colorado Coalition Against Sexual Assault (**Co-Chair**);
- Cari Simon, Attorney/Managing Legal Counsel Boulder, The Fierberg National Law Group;
- Valerie Simons, Chief Compliance Officer and System Title IX Coordinator, University of Colorado (**Co-Chair**);
- Matt Ricke, Title IX Coordinator and Equity Officer, University of Northern Colorado; and
- Rachael Williams, Director of Advocacy Services, Center for Advocacy, Prevention, & Empowerment (CAPE), University of Denver.

RECOMMENDATIONS

Recommendation Twenty-Seven: Ensure that the *Counterman v. Colorado* decision does not impact enforcement of Title IX stalking cases

The recent case of *Counterman v. Colorado* has led to some confusion in responding to reports of Title IX stalking. The U.S. Supreme Court ruling affects only the prosecution of ***criminal stalking***. Title IX has its own definition of stalking and therefore, remains unaffected by this ruling. To address potential concerns on the interplay between the *Counterman* ruling and sexual misconduct at IHEs, the Advisory Committee further discusses the case below.

Case Summary: The underlying case involved allegations of criminal stalking in Colorado. In 2014, Counterman contacted a singer-songwriter based in Denver via Facebook. Over the course of the subsequent two years, Counterman sent the singer-songwriter messages that the receiver characterized as “weird” and “creepy”. The messages persisted despite the singer-songwriter’s efforts to block Counterman on Facebook. After the messages became more menacing and threatening (including implying that he wanted the singer-songwriter to die or be killed), the singer-songwriter began carrying a gun, feared for their safety, and eventually filed criminal charges. In 2016, Colorado prosecutors charged Counterman with one count of stalking (credible threat), one count of stalking (serious emotional distress), and one count of harassment; before trial, the prosecution dismissed the count of stalking (credible threat). At trial, he argued that his messages to the singer-songwriter were not “true threats” because he didn’t *actually* intend to harm the recipient; instead, he contended, they were speech protected by the First Amendment. The trial court rejected that argument, and he was convicted in 2017 and sentenced to four-and-a-half years in prison; a Colorado appeals court upheld his conviction in 2021. The case was escalated to the Supreme Court for review.

Holding: In a 7-2 opinion, the Supreme Court held that in order to establish that a statement is a “true threat” unprotected by the First Amendment, the state must prove that the defendant had some subjective understanding of the statements’ threatening nature, based on a showing no more demanding than recklessness. The court vacated the judgment of the Colorado Court of Appeals and remanded the case back down for potential rehearing.

Why is this important? In its opinion, the Supreme Court requires that in order to prove criminal liability for true threats, prosecutors need to demonstrate that the defendant was

reckless in their communication and that the defendant had “some personal, subjective understanding of the threatening nature of their statements” – with “subjective understanding” here meaning the defendant knew or should have known the threatening nature of their communication” (SPARC, 2023). This only applies in cases where the substance of the stalking is speech. Physical violence, property damage, and other stalking tactics are not protected by the First Amendment. A prosecutor need not prove that the defendant *intentionally* caused substantial emotional distress. To be clear, the Supreme Court did not state that *Counterman* was innocent; they simply remanded the case back to Colorado in light of this new framework.

How does this impact Title IX? In short, it doesn’t. This decision only impacts the analysis under criminal law and has no bearing on the administrative procedures pursuant to Title IX. The Title IX Final Rule (2020) includes, as actionable sexual harassment, stalking as defined by the Clery Act:

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to—

- a. Fear for the person's safety or the safety of others; or
- b. Suffer substantial emotional distress.

The definition does not include intent. The Supreme Court’s decision here guides the appropriate prosecutorial standard for *criminal* stalking cases, and as is often the case, a criminal case decision is not controlling with respect to an institution’s Title IX policies and procedures.

Recommendations for Practice: The Advisory Committee does not provide legal advice and recommends consulting with IHE legal counsel on all matters regarding interpretation of law and policy. That said, it is possible that the *Counterman* decision has created confusion for campus communities and for those impacted by stalking behaviours specifically. If your campus has a sworn law enforcement department, it may be beneficial to have conversations with them to clarify the differences between the criminal and Title IX standards for stalking. Additionally, if your institution has advocacy services, or works with community-based advocates, it is important to share with them that the Title IX standards have not changed. The Advisory Committee encourages institutions to develop multidisciplinary partnerships to deliver fully on Title IX’s promise to create educational environments free from sexual harassment and related forms of misconduct.

Resources

- *Counterman v. Colorado* ([Slip Opinion](#))
- Stalking Prevention, Awareness, and Resource Center ([SPARC](#)) ([Handout](#))

Recommendation Twenty-Eight: Prepare for the Release of new Title IX Regulations, which may be effective for the 2024-2025 School Year

On June 23, 2022, the U.S. Department of Education released proposed changes to the regulations ([2022 Proposed Title IX Regulations](#)). The 2022 Proposed Title IX Regulations were subsequently published in the Federal Register on July 12, 2022 and the public comment period closed on September 12, 2022.

The Notice of Proposed Rulemaking made the following ***proposed*** changes to the Title IX regulations:

- Clarify that discrimination based on sex includes discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.
- Revise the definition of sexual harassment, re-naming this sex-based harassment, and defining harassment that creates a hostile environment as “unwelcome sex-based conduct that is sufficiently severe *or* pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person’s ability to participate in or benefit from the recipient’s education program or activity.”
- Require postsecondary institutions to respond promptly to all complaints of sex discrimination, and would permit, not require, a live hearing for Title IX cases (unless otherwise required by state or federal law).
- Provide additional protections for parents, guardians, and other authorized legal representatives of students under Title IX.
- Update existing protections for students, applicants, and employees who are pregnant or have pregnancy-related conditions and strengthen the requirements that schools provide reasonable modifications for pregnant students, reasonable break time for pregnant employees, and lactation space.

The Department of Education published a [Summary of Major Provisions of the Department of Education’s Title IX Notice of Proposed Rulemaking](#) along with the proposed rule. The Department of Education received over 240,000 comments, including comments from the Colorado Attorney General (and joined by numerous Colorado IHEs), public IHEs in Colorado, Colorado advocacy organizations, and Colorado parents, students, and attorneys representing parties in Title IX matters.

As of the date of this Fifth Report, final versions of the 2022 Proposed Title IX Rules are scheduled for March 2024. The Advisory Committee will review the final rule upon publication.

CONCLUSION

For the reasons stated above, the Advisory Committee submits these two additional recommendations identified in this report to the Education Committees of the Senate and House of Representatives pursuant to C.R.S. § 23-5-147(6)(a) and to be distributed to IHEs across the state as guidance and a resource to support their efforts to address and prevent sexual misconduct.

APPENDIX: COMPLETE LIST OF RECOMMENDATIONS SUBMITTED BY THE SEXUAL MISCONDUCT ADVISORY COMMITTEE

First Report Recommendations

Recommendation One: Adjudicate and provide supportive measures regarding incidents of sexual misconduct outside of the designated Title IX jurisdiction.

Recommendation Two: Complete disciplinary proceedings regardless of whether the respondent de-enrolls, quits, graduates, retires or otherwise leaves the institution.

Recommendation Three: Adjudicate and provide supportive measures even where complainant may not be participating or attempting to participate in programs or activities based on status of the respondent and an analysis of the safety and impact of the conduct on the educational or employment environment.

Recommendation Four: Define institution's relationship with all students to ensure clarity regarding Title IX jurisdiction.

Recommendation Five: Ensure that policies (either in one policy or multiple policies) cover non-Title IX sexual misconduct that falls outside the definition of Title IX sexual harassment.

Recommendation Six: Consider multiple options for informal resolution to maximize and promote agency for complainants and respondents but ensure expertise, experience and subject matter knowledge before offering any type of informal resolution, particularly for sexual violence, intimate partner violence (dating and domestic violence) and stalking.

Recommendation Seven: Provide on and off-campus resources and supportive measures for non-Title IX cases for students and employees.

Recommendation Eight: Provide complainants with the contact information for confidential victim advocates pursuant to C.R.S. § 23-5-146(4).

Recommendation Nine: For violations of Title IX and other forms of sexual misconduct (non-Title IX sexual misconduct) refer students and/or employees to the same sanctioning authorities.

Recommendation Ten: Train students and employees pursuant to C.R.S. §§ 23-5-146(5) and (6) for both Title IX and non-Title IX cases.

Recommendation Eleven: Train any individual designated as responsible for investigating or adjudicating complaints under the institution's Title IX and non-Title IX sexual misconduct policy (or policies) pursuant C.R.S. §§ 23-5-146(5) and (6).

Recommendation Twelve: Provide documents explaining rights to entire grievance process and supportive measures for all parties.

Recommendation Thirteen: Provide a case management document.

Recommendation Fourteen: Ensure accessible and reliable technological support and space requirements.

Recommendation Fifteen: Implement procedural/decorum rules and prohibit abusive, misleading, confusing and harassing questioning to ensure a fair process for all participants.

Second Report Recommendations

Recommendation Sixteen: IHEs continue to address all forms of sexual misconduct - whether identified as Title IX or not (See First Report, Recommendations Nos. 1,3, 5, 7, 9,10, and 12) and provide support services/accommodations to victims of sexual assault, again whether in Title IX or not (First Report, Recommendation No. 7).

Recommendation Seventeen: Education Committees identify means to include participation of K-12 stakeholders in state advisory role to address and respond to sexual misconduct.

Recommendation Eighteen: CDHE cover the following issues for the 2021 Summit: IHE responses to new rules (including but not limited to barriers to participation, role of advisors, resource guides and regional center), implicit bias and education/prevention. The Advisory Committee also recommends inviting participation of K-12 stakeholders to the 2021 Summit.

Third Report Recommendations

Recommendation Nineteen: Following the Cardona decision, remove the exclusionary rule for witnesses and parties in Title IX and non-Title IX sexual misconduct hearings.

Recommendation Twenty: Review IHE policies, procedures, and practices to ensure the reliability of party and witness statements gathered during an investigation of Title IX and non-Title IX sexual misconduct cases to promote fair and equitable resolution by IHE decision-maker.

Recommendation Twenty-One: Convene IHEs and relevant stakeholders in summer 2022 to discuss the potential need and viability of a “state center” to provide technical guidance and facilitation if needed for the adjudication of Title IX and non-Title IX cases.

Fourth Report Recommendations

Recommendation Twenty-Two: Improve consistency in policies and procedures, within an IHE for faculty and staff respondents.

Recommendation Twenty-Three: Improve consistency with advisors and hearing decision makers related to staffing/training/experience.

Recommendation Twenty-Four: Improve awareness and provide better guidance using accessible language for retroactive remedial measures or accommodations.

Recommendation Twenty-Five: Create equitably funded state grants to support sexual misconduct response and prevention efforts at under-resourced IHEs.

Recommendation Twenty-Six: Urge training/education at the secondary level.

Fifth Report Recommendations

*Recommendation Twenty-Seven: Ensure that the *Counterman v. Colorado* decision does not impact enforcement of Title IX stalking cases.*

Recommendation Twenty-Eight: Prepare for the release of new Title IX Regulations, which may be effective for the 2024-2025 School Year.