

SEXUAL MISCONDUCT ADVISORY COMMITTEE

FOURTH REPORT AND RECOMMENDATIONS

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

January 13, 2023

TABLE OF CONTENTS

EXECUTIVE SUMMARY 3

BACKGROUND 7

 Prior Reports of the Sexual Misconduct Advisory Committee..... 7

 Preparing the Fourth Report of the Sexual Misconduct Advisory Committee 9

RECOMMENDATIONS AND FOCUS AREAS 11

 Recommendation Twenty-Two: Improve consistency in policies and procedures within an IHE for faculty and staff respondents 11

 Recommendation Twenty-Three: Improve consistency with advisors and hearing decision makers related to staffing/training/experience 12

 Recommendation Twenty-Four: Improve awareness and provide better guidance using accessible language for retroactive remedial measures or accommodations 13

 Recommendation Twenty-Five: Create equitably funded state grants to support sexual misconduct response and prevention efforts at under-resourced IHEs... 15

 Recommendation Twenty-Six: Urge training/education at the secondary level. . 18

CONCLUSION 19

APPENDIX20

EXECUTIVE SUMMARY

Colorado continues to prioritize statewide efforts to prevent and respond to incidents of sexual misconduct at Institutes of Higher Education (IHEs) following the passage of C.R.S. §§ 23-5-146 *et seq.* (SB 19-007) in May 2019. Through the facilitation of the Colorado Department of Higher Education (CDHE), the Sexual Misconduct Advisory Committee (Advisory Committee) – comprised of Title IX coordinators, advocates, and attorneys who represent both victims and those accused of sexual misconduct – 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 IHE communities and to ensure fair and equitable adjudication processes for sexual misconduct cases. Following the 2020 Title IX regulations and as directed by SB 19-007, the Advisory Committee submitted three reports ([First Report](#), dated August 4, 2020; [Second Report](#), dated January 15, 2021; and [Third Report](#), dated January 15, 2022) containing twenty-one recommendations to the Education Committees of the Senate and House of Representatives of the Colorado General Assembly and IHEs across the state. The complete list of recommendations is contained in the appendix to this report.

In addition to building upon these three prior reports, there were two significant legal developments in 2022 on the federal level that guided the work of the Advisory Committee for this Fourth Report. First, on June 23, 2022, the 50th anniversary of the passage of Title IX, the U.S. Department of Education released for public comment new, 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 11, 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, but 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 Fourth Report, the U.S. Department of Education is reviewing the comments and stated its intent to issue a final rule that addresses the public’s comments in May 2023, though that timeframe remains subject to change.¹ The Advisory Committee will review the final rule upon publication.

Second, last year Congress passed the Violence Against Women Act (VAWA) Reauthorization as part of the Fiscal Year 2022 Omnibus Appropriations Act. In addition to renewing authorizations for existing VAWA programs, the legislation addressed campus sexual assault through a variety of expanded grants, initiatives, and requirements. Most notable for IHEs in Colorado is the establishment of a new survey tool by the Department of Education to track the experiences of sexual violence among postsecondary students. Once the survey is available, each IHE receiving federal education assistance must administer the survey every two years and publish the results on its website and in the biennial report.²

¹ See *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, Office of Information and Regulatory Affairs, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=1870-AA16&fbclid=IwAR3ytH7RkOngm9BRxTWvRQopoxUqoOslG8LQ_VDkzV9GqLZP6aDJeiCVpdQ&mibextid=Zxz2cZ (retrieved January 9, 2023).

² Pursuant to [Pub. L. 117–103, div. W, title XV, § 1507](#), Mar. 15, 2022, 136 Stat. 959.

Additionally, the VAWA Reauthorization created grants for the development, implementation, and evaluation of restorative practices pilots, including in IHE settings. The VAWA Reauthorization also included investments in comprehensive prevention education on college campuses and increased training of campus health centers and staff who work directly with students in recognizing and responding to gender-based violence and victim-centered and trauma-informed interview techniques.

Beyond these federal legal updates, there was also notable state activity in 2022 pertinent to the work of the Advisory Committee. First, the Colorado IHE Title IX Coordinators convened remotely on June 23, 2022 (50th Anniversary of Title IX) 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. More than three dozen Title IX staff from across the state attended the meeting and shared challenges and a desire to continue to share best practices, particularly as related to responding to constantly evolving Title IX law.

Second, the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) at the Department of Regulatory Agencies completed its sunset review process of the Advisory Committee (in addition to other state advisory bodies) and released its Sunset Review Report in October 2022. Pursuant to that Report, COPRRR found in pertinent part the following:

The [Sexual] Misconduct [Advisory] Committee [“Misconduct Committee”] continues to serve as a resource for institutions as they navigate the challenging legal landscape of Title IX, both in terms of the rules themselves and judicial opinions. The complexities of Title IX have created an inequitable situation, in that smaller institutions do not necessarily have the same resources as larger institutions. The Misconduct Committee helps to address that equity issue by creating a forum in which the institutions can share their experiences.

The Misconduct Committee brings together different perspectives to provide guidance to all institutions, so that students have more similar experiences regardless of the institution they attend. To this end, the Misconduct Committee facilitates the sharing of best practices, in a public forum.

Furthermore, SB 207 [partially enacting the Misconduct Committee’s Recommendation No. 17] requires CDE to contract with a third party to study the Title IX rules in the context of K-12 education. The bill requires the party conducting the CDE study to consult with “a committee on sexual misconduct at CDHE.” Although the bill does not specifically name the Misconduct Committee, the intent is clear: CDE’s contractor is expected to consult with the Misconduct Committee. Although Title IX applies to K-12 education, too, that system is very different from

the state's higher education system. Still, the more K-12 and higher education coordinate, the more the state's students will have a consistent set of expectations and experiences. Those in K-12 education might be able to learn from the institutions about what has, and what has not worked for them. In short, the work of the Misconduct Committee is far from complete.

Since the Title IX rules are again being revised and since CDE's contractor has been instructed to consult with the Misconduct Committee, work remains for the Misconduct Committee to perform.

Therefore, the General Assembly should continue the Misconduct Committee.

With this federal and state context in mind, the Advisory Committee met from November 2022 to January 2023 to identify issues and develop recommendations in preparation for this Fourth Report. The Advisory Committee identified over twenty issues for discussion relating to the prevention of and response to sexual misconduct but ultimately determined to significantly narrow their focus given that the newest Title IX regulations had yet to be finalized and released. To that end, the Advisory Committee provides the following, additional recommendations to the Education Committees and IHEs:

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.*

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-12 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 of the Sexual Misconduct Advisory Committee

On May 6, 2020, the U.S. Department of Education released new Title IX rules. On August 4, 2020, following an intensive review of the new rules and based on their collective experience and expertise, the members of the Sexual Misconduct Advisory Committee (Advisory Committee) submitted their **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.* (SB 19-007).³ The First Report contained fifteen 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. After the submission of the Advisory Committee's First Report, the Title IX rules became effective on August 14, 2020.

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 met again in 2020 to discuss recommendations for changes to state statutes and methods of institutions to reduce sexual misconduct at IHEs. The Advisory Committee also discussed the new Title IX rules considering the transition to a new federal administration in January 2021 as well as plans for a CDHE sponsored summit in mid-2021. Given the context of the new federal

³ 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)).

administration and potential changes to the Title IX rules, the continuing pandemic, the relatively short time-frame for which IHEs to have implemented the new rules -- as well as the upcoming 2021 Summit -- the Advisory Committee concluded that recommending additional changes to state statutes was not warranted at that time. Instead, the Advisory Committee continued to support the fifteen recommendations for IHE consideration contained in its First Report and unanimously voted to recommend the following for 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 met five times between October 2021 and January 2022 and focused primarily on the hearing process. In particular, the Advisory Committee spent considerable time reviewing a federal court decision from July 2021 (*Victim Rights Law Ctr v. Cardona*) which struck down the so-called “exclusionary rule” from the 2020 Title IX regulations. As a result of *Cardona*, decision-makers in Title IX adjudications could now consider statements not subject to cross-examination.

In addition, the Advisory Committee sought information from Colorado IHEs about their experiences with the new hearing process. At the Advisory Committee’s request, CDHE facilitated a survey of IHEs in December 2021. While there were still relatively few hearings at the time of the survey, the greatest issue identified by survey respondents was the cost, which averaged \$20,000 per hearing, with a range of \$5,000 to \$50,000 per hearing. Overall, the survey respondents indicated that the hearing process required significant and substantial investments in staffing and training and were hard for students. Based on all the information, including the review of *Cardona* and the Colorado IHE survey, 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 in all sexual misconduct cases; 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.

Preparing the Fourth Report of the Sexual Misconduct Advisory Committee – November 2022 through January 2023 Meetings

Following submission of its Third Report on January 15, 2022, the Advisory Committee⁴ met five times from November 2022 through January 2023 (November 28, December 5, 12, 19 and January 9). During the meetings, the Advisory Committee generally discussed the prior three reports and their current “priority concerns” given the 2020 Title IX Regulations and the 2022 Proposed Title IX Regulations. The Advisory Committee identified and discussed the following (in non-ranked order):

1. Standardizing sexual misconduct processes between IHEs;
2. Inconsistent discipline process and procedures for staff and faculty;
3. Lack of consistency with advisors and hearing decision-makers;
4. Equitable staffing in hearing advisor role for complainants and respondents;
5. Lack of consistent policies, procedures, and supportive measures for non-Title IX sexual misconduct cases as compared to Title IX sexual misconduct cases;
6. Equitable processes that eliminate any racial disparities for reporting/adjudicating under-represented respondents;
7. User-friendly training for parties and witnesses in formal adjudications, including communications about process, steps, and timeline;
8. Guidance for what happens when a respondent leaves an IHE;
9. Adjudication of cross-campus complaints;
10. More resources for complainants, particularly regarding legal advisors/attorneys to support them in the process;
11. Guidance for retroactive remedial measures/accommodations;

⁴ The members as of the date of this Fourth Report are as follows:

- Emily Babb, Associate Vice Chancellor and Title IX Coordinator, University of Denver
- 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;
- Casey Malsam, Interim Director, Women and Gender Advocacy Center, Colorado State University
- Elle Heeg Miller, Nurse Practitioner, Heath Center at Auraria;
- 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**); and
- Rachael Williams, Program Manager, Phoenix Center, University of Colorado, Anschutz Medical Campus

12. Sustainable staffing practices for Title IX offices;
13. More resources for smaller and rural IHEs;
14. Clear and consistent policies and procedures in student conduct offices to ensure best practices;
15. Prevention/education requirements with content focused on strengthening protections and prevention work around LGBTQ students and employees (staff and faculty); consent; “sex ed 101”; and healthy relationships;
16. Responsible employee/mandated reporter/authorized officials training on disclosures and how to be trauma-informed and neutral;
17. Trauma of hearings for complainants;
18. Length of formal adjudications;
19. Use of “pattern evidence” for allegations of repeated perpetration in formal adjudications (same respondent/multiple complainants);
20. Need for additional alternative dispute resolutions and restorative justice options;
21. Required training at the secondary level;
22. Effective Sexual Assault Response Teams or Coordinated Community Response Teams;
23. Pausing additional recommendations or resource initiatives (state center) by the Advisory Committee related to live hearings given uncertainty with 2022 Title IX Regulations; and
24. Prevention and response to incidents of sexual misconduct as an IHE retention issue – in particular, intimate partner abuse cases (dating and domestic violence) causing students to leave.

Upon further discussion, particularly with the uncertainty regarding the 2022 Title IX Proposed Regulations as pertinent to the hearing process, the Advisory Committee chose five issues for its recommendations and discussed in detail below. The Advisory Committee submits these recommendations based on the members experience and subject matter expertise for consideration of IHEs and the Education Committees with the aim of improving the response to and prevention of sexual misconduct on campus.

RECOMMENDATIONS AND FOCUS AREAS

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

While there are wide process variances across IHEs when it comes to resolving sexual misconduct cases involving faculty and staff respondents, this recommendation's focus is on the variances within an individual institution and how it handles such respondents. The Advisory Committee encourages IHEs to review their procedures for formal adjudications involving faculty or staff respondent cases to improve consistency in policies and procedures. Suggested approaches as to how to do so are as follows:

Keep all Title IX cases in the same process. Students and employees in an IHE looking to report experiences of sexual misconduct on campus should be able to easily and readily know where to go to start a process. Having multiple offices handle initial reports and investigations can be confusing and challenging. A streamlined process can also help eliminate redundancies, reduce timelines, and increase participation.

The Advisory Committee suggests an IHE have one *general* process for the adjudication of sexual misconduct cases for employee respondents regardless of whether that employee is faculty or staff. Moreover, while there are additional, legal requirements and processes applicable to specific employee classifications – state classified staff or tenured faculty for example – an IHE can still require a general process, set of procedures, and designated IHE staff to handle faculty and staff respondent cases to ensure consistency, at least initially.

Standardize Employee Procedures for Sanction/Discipline: When employee respondents are found responsible for misconduct in an IHE, they are typically disciplined by their own supervisors (often termed the “disciplinary authority”). The Advisory Committee suggests that IHE supervisors charged with disciplining their employees have training, subject matter guidance (Title IX and legal, for example) and follow a common set of procedures. In other words, “similar situated cases” should be disciplined similarly, while always accounting for individual factors/circumstances for each case as well as additional legal processes, which may be required for certain employee classifications. Supervisors are often fulfilling this disciplining duty without any training or guidance on what an appropriate employee action could and should be. This can lead to disparate outcomes for similar employee behaviors. The Advisory Committee finds that standardization, particularly in the form of a centralized office facilitating one discipline process and one set of discipline procedures (including discipline factors and types of discipline), can also help protect against discrimination. Ultimately, discipline for any

respondent – employee or student – found responsible for a policy violation must be proportionate to the violation and tailored to end the violation, prevent future reoccurrence, and remedy the effects of the violation.

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

As explained in the Advisory Committee’s First Report, the 2020 Title IX Regulations required distinct and separated staffing roles in each phase of the Title IX adjudication process: investigation, hearing/decision, sanction and appeal. Most notably for most IHEs in Colorado was the new requirement to provide (1) staff to conduct hearings for the purpose of live cross-examination and to determine policy findings (responsible or not); and (2) staff to be advisors to conduct the cross-examination on behalf of the parties (at no charge) for any party who did not already have their own advisor.

Similar to above, the Advisory Committee discussed not only the wide variability of experience and training of hearing officers and advisors between IHEs but also within an IHE for sexual misconduct adjudications. To address this disparity, which can lead to inconsistent results, the Advisory Committee recommends that IHEs ensure that all hearing decision-makers and advisors in their hearing process follow a standardized set of processes and procedures, similar to processes and procedures that it presumably has for its investigative stage and investigators. For example, such consistency could be achieved by ensuring:

- standardized, subject matter expertise for all hearing officers and advisors (suggestions included legal training for example);
- individualized and ongoing training for all hearing officers and advisors (in addition to basic training required by the regulations);
- detailed job/role descriptions;
- standardized templates and forms for each stage of the hearing (i.e., hearing manuals, hearing scripts, notices, written determinations);
- routine check-ins with all staff, parties and witnesses for process feedback; and/or
- dedicated IHE staff to monitor work of hearing officers and IHE appointed advisors to ensure consistency and high quality.

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

It is well understood that the impact of sexual misconduct is much broader than the act itself on victims. Studies find that sexual assault victims often experience adverse educational outcomes as a result. These can include a decline in grades, withdrawal from school, loss of scholarship, academic probation, and expulsion.⁵ One study found that one in three students subjected to sexual violence drops out of their college; more than one in four survivors take leaves of absences from school, and one in five transfers schools.⁶

Crucially, many if not most survivors do not report their sexual harassment or assaults immediately after they occur. Rather, survivors may take weeks, months, or years to come forward.⁷ Meanwhile, the impact to their educations and transcripts has already accrued. As such, forward-looking academic accommodations such as extensions may not be sufficient on their own. Retroactive accommodations are often necessary to truly restore educational opportunities. Further, many victims do not take a full credit load of courses after experiencing sexual assault or harassment.⁸ Thus accommodations should also evaluate opportunities that require certain GPA's or credits, such as scholarships, awards, and honors.

The Advisory Committee recommends that IHEs adopt, offer, and increase awareness of restorative supportive measures explicitly aimed at *remedying the impact* that has already occurred on survivors' academics and specifically their grades because of sexual harassment and assault. Although Colorado IHEs provide supportive measures, they could expand accommodations to include ones specifically aimed at restoring victims' educational opportunities. In particular, the Advisory Committee urges IHEs to offer and increase awareness of expanded cost-free supportive measures including academic, health, and potentially financial adjustments that restore and/or preserve a complainant's access to education.

⁵ Naomi Mann, *Taming Title IX Tensions*, 20 J. CONST. L. 631, 638 n.27 (2018).

⁶ Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 0(0) J. COLL. STUDENT RETENTION: RESEARCH, THEORY & PRACTICE 243 (2015); Know Your IX, *supra* note 1, at 4.

⁷ See Konstantin Klemmer et al., "Understanding Spatial Patterns in Rape Reporting Delays," Royal Soc'y Open Sci. (2021), <https://doi.org/10.1098/rsos.201795>; see also "An Underreported Problem: Campus Sexual Misconduct," American Association of University Women (AAUW), <https://www.aauw.org/resources/article/underreported-sexual-misconduct/>.

⁸ Mann, *supra* note 2, at 638 n.27.

The Advisory Committee specifically recommends that IHEs consider the following:

Measures that Address Already Impacted Grades or Classes:

- Allowing a complainant to retroactively withdraw from and retake a class impacted by sexual misconduct without academic or financial penalty;
- Adjusting a complainant's transcript when it has been impacted by sexual misconduct: for example, expunging an impacted grade if possible, removing an impacted assignment or exam from a final grade calculation, changing a C or D into a Pass, removing a Withdrawal from a transcript, or arranging for an independent assessment of the complainant's work; and
- Where regular deadlines for retroactive withdrawals or withdrawals have passed, allowing for an exception to that deadline.

Measures that Address Impacted Academic Costs:

- Considering tuition and/or credit reimbursements where complainants have retroactively withdrawn from courses.

Measures that Address GPA and Credit Requirements:

- Providing survivors with exceptions to GPA and/or credits eligibility requirements and thresholds for honors, scholarships, academic standing, and other statuses and opportunities if there is discretion to do so.

IHEs should also increase awareness of these accommodation options, explaining them in language students can best understand. It is also important to note that how students are informed of their rights to remedial measures makes a major difference in whether students utilize them. For example, if an IHE does not proactively and specifically tell a complainant that a retroactive withdrawal is an available option, many such complainants may not know to request one. Additionally, forcing survivors to pursue academic accommodations with professors rather than the university itself will invariably lead to inconsistent results. Instead, IHEs, through centralized offices and procedures, could offer and manage retroactive withdrawal and other academic accommodations, with input from professors and students as appropriate.

Moreover, experienced and trauma-informed staff at IHEs should directly ask students for more information about how the sexual misconduct has impacted them, their grades, their classes, and their academic transcripts, and then offer and explain specific

academic accommodations, including retroactive withdrawal, exceptions to deadlines, and the other remedial measures listed above that meet students' specific needs. In addition to this one-on-one, explicit and customized communication, the Advisory Committee urges IHEs to include all of the above examples of cost-free supportive measures as options in their internal policies, trainings, and communications to students and employees, and proactively inform all complainants of their rights to measures of this type.

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

Since the implementation of the 2020 Title IX Regulations, the cost of Title IX compliance for IHEs has exponentially increased despite declining enrollment,⁹ a global pandemic, and inflation. As noted above and in the Advisory Committee's prior reports, the 2020 Regulations added to the Title IX process the requirement of a live hearing and, with that hearing, the participation of additional staff in the form of advisors for each party and hearing officers. Larger, urban IHEs often have financial resources small, rural IHEs lack and have been better able to absorb the increased costs. Unfortunately, this has created a disparity between the resources available for parties between IHEs in Colorado. The Advisory Committee urges the General Assembly to allocate state funds to support equity in sexual misconduct response and prevention efforts at under-resourced IHEs.

Advisors

The 2020 Title IX regulations require that for Title IX cases, IHEs provide both complainants and respondents with advisors to conduct live cross-examination on their behalf if they do not already have advisors. The regulations clearly state that advisors do not need to be attorneys but this potentially places IHEs in the position of providing a party with an advisor with limited to no legal experience when the other "opposing" party has licensed counsel. Some IHEs in Colorado regularly provide licensed attorneys when appointing advisors, a practice which is prohibitive for other IHEs whose entire Title IX operating budget wouldn't cover one retainer.¹⁰ The experience a party receives as required by the Title IX regulations should not be limited by the size or location of the IHE.

Practically speaking, IHEs do not avoid additional financial burdens if they appoint non-attorney advisors. All advisors must be trained appropriately to act in this unique, Title IX-

⁹ A reduction of -3.1% for the fall of 2021, and a reduction of -1.1% for the fall of 2022, nationally. Stay Informed with the Latest Enrollment Information (National Student Clearinghouse Research Center, 2022).

¹⁰ This practice is often limited with the attorney advisor only conducting cross examination.

specific role and anyone appointed should be paid appropriately both for the time spent being trained and time spent acting in this role. Post-COVID online offerings have made training more accessible and affordable, but the 2020 regulations have increased the number of participants who need to be trained and, depending on the size of the IHE, it may have quadrupled the number of trained participants. Multiple advisors, hearing officers, coordinators, and investigators all amount to an annual training burden running into thousands of dollars. This estimate does not factor in the cost of travel should an IHE seek in-person training.

Smaller IHEs are often the IHEs of choice for first-generation students and students of color. Because of the socioeconomic reality of these traditionally under-represented populations in higher education, they will often not have the means to provide licensed attorneys for themselves. Increasing funding to under-resourced IHEs is critical to the integrity of the process to ensure equitable and fair outcomes for everyone in Colorado.

Hearing Officers

The 2020 Title IX Regulations require that IHEs conduct hearings in the determination of Title IX complaints. A hearing may be heard by a single hearing officer or by a panel. The hearing officer(s) need not be a licensed attorney but must be trained. The registration cost of providing this outside training is exorbitant and typically beyond the reach of small, rural IHEs or other under-resourced IHEs. Costs for decision-maker training ranges from approximately \$700 for online training to more than \$1500 for in-person training.

The Colorado Attorney General's Office continues to provide half-day, Title IX trainings annually to public Colorado IHEs and has been doing so since August of 2020. The Advisory Committee wants to express its appreciation to the AG's Office for this expanded training for public IHEs. Even so, and considering their own staffing limitations, the AG's training is not customized to specific IHE staff, so that all Title IX Coordinators, investigators, hearing advisors, hearing officers, sanction decision-makers, appeal decision-makers, and any other Title IX-related staff receive the same the training despite the differing roles and responsibilities.

Further, conducting the training in-house at an IHE is time consuming and taxes the already limited resources of small, rural IHEs whose employees juggle multiple responsibilities and demands. In-house training also deprives the IHE of the sharing of ideas a large-scale provider has with insight into what is working and not working across the country.

Conflict of interest

Small, rural Title IX offices often require the hiring of outside support. It is almost impossible to conduct a Title IX hearing on a small campus and not have professionals involved in the process also know a complainant/respondent/witness from a class, sport, or activity. If either the professional, or participant, is uncomfortable with the overlapping relationships, the IHE is required to remove that professional and find a replacement hearing advisor/hearing officer/coordinator/investigator. Depending on the nature of the community the rural IHE resides in, it may also be difficult to find local professionals to fill that role, forcing the IHE to reach out to larger cities to find replacement professionals and thereby incurring an even greater financial burden.

Prevention Training

IHEs are required to offer sexual misconduct training throughout the academic year. Online training providers are extremely expensive but provide the most practical way to deliver and track training. Nevertheless, in-person trainings are critical to communicate to students the culture of the IHE and to create familiarity and trust between students and the staff of the Title IX department. In small, rural IHEs and other similarly under-resourced IHEs, the positions who conduct investigations are also responsible for in-person training and administering online training. Bringing in outside speakers and presenters is typically prohibitively expensive even before the cost of travel is factored in.

Sexual misconduct prevention is one of the most important functions of the Title IX mission. Providing sexual consent education is the only function of the Title IX office aimed to prevent harm; however, under-resourced IHEs are less able to provide these types of educational opportunities when their budgets are wholly dedicated to hiring, training, and supporting advisors and hearing officers.

The Advisory Committee finds that under-resourced IHEs necessitate greater financial resources than currently available to prevent and respond to sexual misconduct such that it urges the State of Colorado to provide equitably funded state grant opportunities for under-resourced IHEs to assist in the expanding costs of providing (1) prevention education; (2) training for practitioners; and (3) the costs of hiring advisors, hearing officers, and conflict support professionals. Having a state grant opportunity to subsidize an IHE's existing Title IX budget would allow small, rural and other under-resourced IHEs to expand regular programming and prevention efforts in critical areas.

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

Elementary and secondary students are not immune from sexual misconduct and gender discrimination. More than 40% of female victims experienced rape before their 18th birthday.¹¹ This early experience of sexual assault also makes young people more likely to be victimized again.¹²

Research suggests that comprehensive sexual education in secondary school may prevent sexual assault in higher education settings.¹³ Preventing sexual misconduct starts with education about bodily autonomy, healthy relationships, and medically-accurate bodily information. By adulthood, our culture and media have already sent too many wrong messages about sex and consent. The Healthy Kids Colorado Survey found that only half of high schools taught sexual health education in 2019.

While SB 19-007 requires annual training at IHEs of incoming students and new faculty and staff to promote awareness and prevention of sexual misconduct and the institution's sexual misconduct policy, no such requirement exists for elementary and secondary students. Some private attorneys in Colorado report a larger number of Title IX cases among secondary students compared to post-secondary students. Meanwhile, IHE Title IX offices report frequently hearing from secondary students seeking information and support in understanding their rights and the process under Title IX.

The Advisory Committee recommends that the Education Committees urge education of secondary students in sexual misconduct prevention, response, consent, and Title IX in Colorado. Additionally, secondary school staff should be trained in awareness and prevention, including sexual misconduct policies and laws, the role of the school in responding to sexual misconduct, law enforcement reporting/mandated reporting, and effects of trauma on reporting parties. Without earlier intervention, the high prevalence of sexual misconduct in higher education is likely to continue.

¹¹ Black, M.C., Basile, K.C., Breiding, M.J., Smith, S.G., Walters, M.L., Merrick, M.T., Chen, J., & Stevens, M.R. (2011). The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention.

¹² Centers for Disease Control and Prevention. (2012) Sexual Violence in Youth Fact Sheet: Findings from the 2012 National Intimate Partner and Sexual Violence Survey.

¹³ Santelli JS, Grilo SA, Choo T-H, Diaz G, Walsh K, Wall M, et al. (2018) Does sex education before college protect students from sexual assault in college? PLoS ONE 13(11): e0205951.

CONCLUSION

For the reasons stated above, the Advisory Committee submits these five 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.