

SEXUAL MISCONDUCT ADVISORY COMMITTEE

SECOND REPORT AND RECOMMENDATIONS

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

January 15, 2021

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EXECUTIVE SUMMARY

On May 6, 2020, the U.S. Department of Education released its final 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 and Recommendations (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).¹ The First Report contained fifteen recommendations focused on two primary areas: (1) handling sexual misconduct incidents outside of an Institution of Higher Education'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](#), as now posted on the Colorado Department of Higher Education's (CDHE) website,² the Title IX rules became effective on August 14, 2020.

Pursuant to its statutory charge to produce its next report on or before January 15, 2021, see § 23-5-147(6)(b), the Advisory Committee met six times from August to December 2020 to discuss recommendations for changes to state statutes and methods of institutions to reduce sexual misconduct at institutions of higher education. The Advisory Committee also discussed the new Title IX rules considering the transition to a

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 representatives from Institutions of Higher Education; two Title IX Coordinators from Institutions of Higher Education; 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 Institutions of Higher Education; an attorney who has experience representing persons accused of sexual misconduct at Institutions of Higher Education; and a person with experience providing trauma-informed care. See C.R.S. § 23-5-147(4)(a). SB 19-007 also requires Institutions of Higher Education 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 October 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)).

² The First Report can be found at <https://cdhe.colorado.gov/sites/highered/files/SMAC%20Report%208.4.20%20FINAL.pdf>.

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 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 this time. Instead, the Advisory Committee continues to support the fifteen recommendations for IHE adoption contained in its First Report and unanimously voted to recommend and focus on the following priorities for this Second Report:

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.

The Advisory Committee provides fuller context below for each recommendation in this Second Report.

Finally, the Advisory Committee wishes to express its continued appreciation to Executive Director Dr. Angie Paccione and the staff of CDHE, Senior Director of Student Success and Academic Affairs and Colorado GEAR UP Project Director Carl Einhaus, Legislative Liaison Chloe Mugg, and Special Projects Coordinator Erin McDonnell for their support and facilitation of the process.

ADVISORY COMMITTEE MEETINGS – AUGUST THROUGH DECEMBER 2020

Following their submission of their First Report on August 4, 2020 and the effective date of the new rules on August 14, 2020 the Advisory Committee³ met six times from August through December 2020 (September 2, 16; October 21; November 5; and December 1 and 17). During their meetings, the discussions focused primarily on three topics: (1) education and prevention; (2) current efforts by IHEs to implement SB 19-007 and the new Title IX rules for the 2020-21 school year; and (3) the anticipated 2021 Summit sponsored by CDHE.

Education and Prevention

The Advisory Committee discussed how critical it will be to ensure that IHEs continue to prioritize education and training for its entire community and consistent with SB 19-007 requirements, with particular emphasis on teaching young adults communication skills, recognizing and pursuing healthy relationships,⁴ sexual and gender socialization and its impact on interpersonal violence, and understanding and applying the concepts of consent and incapacitation and the interplay between the two. The Advisory Committee noted that a key component of the success of any college educational program in this area is to ensure comprehensive education in the K-12 context. Oftentimes, young adults lack comprehensive skills and understanding to navigate and pursue healthy sexual relationships and instead rely heavily on peer, media and social media sources.

³ Since the submission of the First Report, Jeremy Enlow, Title IX Coordinator from the University of Denver resigned from the Advisory Committee and CDHE appointed Heather Kissack, Title IX Coordinator from Colorado College to replace him. The current members as of the date of this Second Report are as follows:

- Lara Baker, Attorney, Foster Graham Milstein & Calisher, LLP;
- Angela Gramse, General Counsel, Colorado Community College System;
- Ana Guevara, Director of Title IX, Adams State University;
- Heather Kissack, Title IX Coordinator, Colorado College;
- Julia Luciano, Victim Advocate, Advocates of Routt County;
- Elle Heeg Miller, Nurse Practitioner, Heath Center at Auraria;
- Emily Tofte Nestaval, Executive Director, Rocky Mountain Victim Law Center;
- Monica Rivera, Director, Women and Gender Advocacy Center, Colorado State University;
- Cari Simon, Attorney, The Fierberg National Law Group;
- Raana Simmons, Director of Policy, Colorado Coalition Against Sexual Assault (**Co-Chair**); and
- Valerie Simons, Associate Vice Chancellor and Title IX Coordinator, University of Colorado Boulder (**Co-Chair**).

⁴ The Advisory Committee also discussed, without any formal endorsement or recommendation at this time, the book “Sexual Citizens.” Authors Jennifer S. Hirsch and Shamus Khan describe their book as providing a new language for understanding the forces that shape young people’s sexual relationships in terms of sexual projects, sexual citizenship, and sexual geographies as shown through intimate portraits of life and sex among today’s college students.

Consequently, many young adults experience their first formal “education” during an adjudicative process, either administrative, criminal or both.

Current Efforts by IHEs to Implement SB 19-007 and the New Title IX Rules for the 2020-21 School Year

During the time period of this Second Report, and as required by SB 19-007, IHEs provided CDHE with (1) their updated sexual misconduct policies for the 2020-21 school year; (2) statements on how they were providing information to students on how to receive support regarding sexual misconduct and promoting awareness and prevention; and (3) descriptions of their respective sexual misconduct training. See § 23-5-146(7)(a). The information can now be found on the CDHE website for review. See <https://cdhe.colorado.gov/sexual-misconduct-policies-and-resources-at-colorado-colleges-and-universities>.

Regarding implementation of those new policies and procedures, the Advisory Committee learned that specific cases were just commencing under the new Title IX rules given the August 14 effective date and thus there was little data (and/or reporting of sexual misconduct incidents to IHEs) in which to review at this time. However, early indications around the state suggested that there may be, at least for some IHEs, perceived barriers for victims to report and pursue institutional responses, primarily because of the formal complaint and live cross-examination requirements of the new rules. Consequently, Advisory Committee members expressed serious concerns about how IHEs could ensure safety and accountability on their campuses if reporting declines as result of the new rules.

In addition, the Advisory Committee discussed the likelihood that Title IX and its regulations would be subject once again to review and potential revision with the new federal administration. While the timeframe of any potential changes is unclear, particularly given the rule-making process employed by the prior administration from November 2018 through May 2020, the Advisory Committee noted that the new rules remain current law as of the date of this Second Report.

2021 CDHE Summit

Subject to available appropriations, SB 19-007 requires CDHE to host summits on sexual misconduct on institutional campuses for stakeholders, advocates, students, faculty, and other interested persons to facilitate communications, share information, and hear from experts, and other efforts to promote awareness and prevention of sexual misconduct on Colorado’s institution campuses. See § 23-5-146(9)(a). Prior to the

summit, CDHE shall convene a planning committee.⁵ See § 23-5-146(9)(b). The Summit Planning Committee was appointed in early January 2021 and is scheduled to have its first meeting on January 28, 2021.

ADVISORY COMMITTEE 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).

As noted above, given the context of the new federal administration and potential changes to the Title IX rules, the continuing pandemic, the relatively short time-frame since August 14, 2020 for IHEs to have implemented the new rules -- as well as the upcoming 2021 Summit -- the Advisory Committee concluded that recommending

⁵ The Planning Committee must include the following members: a representative of a public four-year institution; a representative of a public two-year college; a representative of a public rural college; a representative of a public area technical college; a representative of a private four-year institution; two students (one from a public four-year institution and one from a public two-year college); a representative of a campus-based organization that represents victims of sexual misconduct not otherwise represented on the committee; a representative of a statewide community-based organization that represent victims of sexual misconduct; and a victim of sexual misconduct. See § 23-5-146(9)(b)(I)-(IX). The following members were selected for the Summit Planning Committee as of the date of this Second Report:

- Ella Baca, FRCC, Member of Feminist Uprising Collective
- Rachel Cauwels, UCCS, Student Body VP
- Kara Deschenes, Colorado College, Assistant Director of Human Resources & Deputy Title IX Coordinator for Employees
- Kelila Fitch-Cook, FRCC, Pres of Feminist Uprising Collective
- Aylin Gutierrez Ruiz, CU Denver
- Rabbia Imran, CU Anschutz, First year med student
- Jessica Ladd-Webert, CU Boulder, Director, Office of Victim Assistance
- Fabián Laguna, CU Denver, VP Student Government
- Tisha Lee, Emily Griffith, VP Student Services;
- Stephanie Lucero, Aims, Title IX Coordinator & Student Equal Opportunity Officer;
- Aidan Meadows, UCCS, Student Body President
- Katherine Miller, MSU Denver/The Phoenix Center at Auraria, Advocacy Services Program Manager & Affiliate Professor
- Shelby Schuppe, Western, Title IX & Student Conduct Coordinator;
- Raana Simmons, CCASA, Director of Public Affairs
- Violet Stoudt, CU Boulder, UG Student, Women and Gender Studies
- Tashana Taylor, CCCS, Director of Civil Rights and Investigation
- Molly Wieser, Fort Lewis, Title IX Coordinator; and
- Teresa Wroe, CU Boulder, Senior Director of Education and Prevention/Deputy Title IX Coordinator.

On or before January 15 of the year following the Summit, the Planning Committee shall submit a report to the Education Committees including a summary of the events, attendees, outcomes, and recommendations.

additional changes to state statute was not warranted at this time. However, the Advisory Committee concluded that the recommendations as contained in the First Report should still be adopted by IHEs. Specifically, while the Title IX rules narrowed both the types of sexual misconduct previously covered by Institutions' sexual misconduct policies as well as the jurisdictional reach of those policies, see First Report at 9-10, the Advisory Committee continues to recommend that Institutions address all forms of sexual misconduct (whether defined as Title IX or not) and provide support services for all impacted parties. Moreover, as pertinent to Recommendation Nos. 7 and 12 in the First Report, the Advisory Committee also recommends that IHEs clearly delineate confidential and privileged resources on campus, provide descriptions and explanations for each campus-based "role" in the IHE's specific adjudication process and how they differ using language that is accessible, easy to understand and tailored to the various communities (students v. employees for example) and ensure that advocates with statutory privilege pursuant to CRS § 13-90-107 (1)(k)(II), or meet the requirements of CRS § 12-245-220 (formerly CRS § 12-43-218), identify themselves as such.

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

The Advisory Committee spent considerable time discussing the potential benefits of including K-12 stakeholders in future committee and summit discussions (see below). While the Advisory Committee noted that it was not specifically part of their statutory charge, they concluded that current discussions in the K-12 and university contexts appear to be happening independently of each other, with no connection and sharing of resources and best practices with respect to adjudications, education and training. With its advisory committee process and SB 19-007, Colorado is well-positioned to become a national leader in coordinating efforts among all state educational stakeholders to prevent and respond to incidents of 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.

The Advisory Committee found that considering all of the current uncertainty facing IHEs – including COVID-19 related impacts and a new federal administration – state stakeholders should focus in the short-term on reviewing available information on the current implementation of the new rules during the 2020-21 school year at the 2021 Summit. To that end, the Advisory Committee recommends to the Education Committees, CDHE and the Summit Planning Committee that the 2021 Summit to

include participation of K-12 stakeholders and cover, at a minimum: (1) IHE implementation of the new rules, including discussion of any barriers to participation which may include formal complaint process and/or live cross examination, the role of advisors, resource guides to aid participants; and how to identify and prevent implicit bias in investigative processes; and (2) education and prevention best practices and resources. In addition, as related to both adjudication and education/prevention, the Advisory Committee recommends a separate discussion on whether a state “regional center” is advisable at this time to provide services to IHEs in an “opt in/volunteer” basis.

CONCLUSION

For the reasons stated above, the Advisory Committee submits the three 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). The Advisory Committee is also available to collaborate with the Summit Planning Committee for planning and collaboration for the 2021 Summit.