

UNIVERSITY OF ILLINOIS  
AT URBANA-CHAMPAIGN



Committee on  
Faculty Sexual Misconduct  
Report and Recommendations  
September 20, 2019

**ADVICE TO THE READER**

To facilitate digestion of this report, we have included an Executive Summary on pp. 4-5 and collected all sixty-four recommendations on pp. 96-122.

Many readers may wish to start by reading pages 4-5 and 96-122.

The main text from pp. 6-91 explains the reasoning behind these recommendations. Readers should read the main text or consult it for background, context, and explanations.

We have also included flowcharts on pp. 92-95 and 124-127, which depict some (but not all) of the main changes these recommendations would make to current practices and procedures.

# REPORT ON FACULTY SEXUAL MISCONDUCT

## TABLE OF CONTENTS

<b>EXECUTIVE SUMMARY .....</b>	<b>4</b>
<b>I. INTRODUCTION .....</b>	<b>6</b>
A. THE COMMITTEE’S MISSION .....	6
B. TIMING AND SUPPORT FOR THE COMMITTEE’S WORK .....	10
C. SCOPE OF THE REPORT AND RELATION TO OTHER EFFORTS .....	11
D. MAKE UP OF THE COMMITTEE .....	13
<b>II. POLICY REVIEW .....</b>	<b>17</b>
A. REVISED SEXUAL HARASSMENT POLICY .....	18
B. COMPOUND HARMS AND CONSEQUENCES FOR THE NONDISCRIMINATION POLICY .....	36
C. REVISED POLICY ON RELATIONSHIP VIOLENCE AND DOMESTIC VIOLENCE .....	39
<b>III. REVIEW OF SANCTIONS AND OTHER RESPONSIVE MEASURES.....</b>	<b>41</b>
A. PROGRESSIVE SANCTIONS FOR FACULTY AND OTHER CONSEQUENCES FOR PROFESSIONAL DEVELOPMENT.....	44
B. NON-PUNITIVE RESPONSES .....	56
1. <i>Interim Actions</i> .....	56
2. <i>Remedies</i> .....	59
3. <i>Supportive Measures</i> .....	60
4. <i>Protective Measures</i> .....	62
5. <i>Educational Measures</i> .....	62
6. <i>Voluntary Mediation and Restorative Processes</i> .....	65
7. <i>Broader Consequences of Sexual Misconduct in the Digital Age</i> .....	65
C. COORDINATION OF ACTORS WITHIN THE SYSTEM.....	67
1. <i>Survivor Support and Problems of Underreporting</i> .....	67
2. <i>Use of a Special Faculty Investigator</i> .....	69
3. <i>Shared Governance and Faculty Review Boards</i> .....	70
4. <i>Coordinating Expeditious Action at All Stages</i> .....	70
5. <i>Communications with the Campus Community, the Public, and the Media</i> .....	72
<b>IV. REVIEW OF CONFIDENTIALITY AND TRANSPARENCY .....</b>	<b>74</b>
A. CONFIDENTIALITY PRIOR TO A REPORT.....	76
B. CONFIDENTIALITY DURING THE COURSE OF AN INVESTIGATION.....	82
C. CONFIDENTIALITY AND TRANSPARENCY ABOUT OUTCOMES .....	84



## **REPORT ON FACULTY SEXUAL MISCONDUCT**

<b>V. CONCLUSION AND NEED FOR ONGOING REVIEW.....</b>	<b>90</b>
<b>APPENDIX A: FLOWCHARTS OF PROPOSED PROCESSES .....</b>	<b>92</b>
<b>APPENDIX B: SHORT FORM RECOMMENDATIONS BY SECTION .....</b>	<b>95</b>
<b>APPENDIX C: GLOSSARY .....</b>	<b>123</b>
<b>APPENDIX D: FLOWCHARTS (WITH INTERVENTIONS MARKED) ....</b>	<b>124</b>

# REPORT ON FACULTY SEXUAL MISCONDUCT

## EXECUTIVE SUMMARY

- On January 23, 2019, the Provost charged this Committee with evaluating the University's policies on sexual misconduct by faculty. *See* Section I.A.
- The category of sexual misconduct that deserved the most attention in the context of faculty misconduct was sexual harassment. Sexual harassment is the most commonly reported form of sexual misconduct by faculty. Traditional sexual harassment policies are out of alignment with campus values and evolving norms of social acceptability. *See* Section I.A & Section II.A. We also offer revised policies relating to domestic and dating violence. *See* Section II.C.
- Committee members had diverse backgrounds and competing perspectives. *See* Section I.D. They were encouraged to represent these perspectives vigorously but to search for creative solutions that could garner unanimous consensus. The Committee reached out to other stakeholders for input when special expertise or representation was needed. *See* Section I.B.
- The Committee recommends a comprehensive package of changes to policies, processes, and practices, as detailed in the attached report. This package, every recommendation of which has been developed to obtain unanimous Committee support, has the following core virtues:

- a. The new sexual harassment policy would explicitly target broader instances of sexual harassment, including all classes identified by national experts on the subject. The new policy would effectively eliminate the "severe or pervasive" requirement, which was borrowed from legal definitions of hostile environment harassment but creates undue barriers to effective responses to sexual harassment in higher education. *See* Section II.A.
- b. The new policy would prohibit "sexual harassment and related improper behavior" – not just "sexual harassment" as defined by Title IX. As a result, internal findings of policy violations would not expose the University to unwarranted legal liability for sexual harassment. That fact would make it easier to respond to broader forms of sexual harassment and related improper behavior without legal risk. The new policy language can also be harmonized with the Department of Education's proposed Title IX regulations, which will likely require use of a narrower definition of "sexual harassment" in some contexts. *Id.*
- c. The new procedures would allow the University to respond to sexual misconduct more expeditiously and in a more trauma-informed manner – even while adding increased protections for due process, academic freedom, and shared governance. *See* Section III.
- d. Through the creation of new confidentiality rules, which would be clearly communicated to the campus community, the new policies would chill fewer reports of sexual harassment – thus allowing more misconduct to be addressed. *See* Section IV.
- e. The new policies and practices would give the University broader tools—including sanctions and other responsive measures—to address sexual misconduct.

Some examples include (1) a wider array of progressive sanctions for faculty, (2) more sophisticated and effective educational measures, (3) better funded support resources for complainants and other parties that are distributed across campus and within units, (4) more context-specific interim measures, remedies, and protective measures, and (5) the use of some restorative processes—when safe and fully consensual—to address harms, reconcile communities, and foster behavioral change. *See* Section III.

- f. Through transparent policies that describe the response system to the public and through regular reporting of the many varied ways that the University responds to reports of sexual harassment, the new practices would contribute to a campus climate that is widely celebrated as intolerant of sexual harassment. *See* Section III.C.5. A climate of perceived intolerance of sexual harassment is the most powerful predictor of decreased levels of sexual harassment within an organization.
- g. Because traditional definitions of harassment prohibit some expressive conduct but are inherently vague, they can chill some speech. Under the new policy, no exercise of free

## REPORT ON FACULTY SEXUAL MISCONDUCT

speech or academic freedom would be disciplined. The policy includes a new savings clause as well, which is designed to support the free exchange of ideas and safeguard the University's ability to contribute thoughtful solutions to the world's most difficult problems. *See* Section II.A.

- Many of the recommendations in this report could be implemented over the course of an academic year and may be ready for application in the following academic year. Some are already in the process of being implemented. But others will take longer. Full implementation will require the cooperation and coordination of many actors – sometimes within the campus and sometimes even involving the system or other campuses (e.g., for statutory changes). We expect that some recommendations may need to be modified to allow for proper implementation and to address concerns that may arise at the implementation stage. We offer to consult and advise whether alternative methods of implementation capture the values reflected in our recommendations.
- Even if the entire package of recommendations were implemented, more work would need to be done to combat harassment and related misconduct. The three most important limitations of this report, which suggest the importance of three future areas of study, are:
  - a. This report is focused on how to respond to incidents of misconduct. Problems of sexual harassment cannot be fully addressed in this backward looking way or without profound changes in culture and climate that go well beyond the recommendations in this report. We have nevertheless designed the recommendations in this report to fit into broader campus and system-wide efforts to foster a healthy culture and climate around sexual harassment and misconduct. Those broader efforts will likely include the use of multimodal educational programming, techniques for early intervention, a culture of collective responsibility, opportunities for engagement and trust building, new policies to govern faculty-student consensual relations, and special policies that focus on settings that create special vulnerabilities. Some of those efforts have already begun. *See* Section I.C.
  - b. The new sexual harassment policy language was crafted to apply to all members of the campus community (that is, to faculty, staff, students, campus leaders, and even some third parties) without creating any immediate changes to how the University responds to or disciplines student conduct. Sexual harassment policies raise distinctive first amendment and policy concerns when applied to students. A subsequent committee with the right expertise and representation will need to decide whether and how to apply the new policy to discipline broader forms of misconduct by students. *See* Section II.A.
  - c. The new policy addresses harassment based only on sex, gender (including gender identity and gender expression), and sexual orientation. The new policy nevertheless offers a template that could be easily extended to address broader forms of harassment based on other protected classifications, including race, color, religion, pregnancy, disability, national origin, ancestry, age, order of protection status, genetic information, marital status, disability, arrest record status, unfavorable discharge from the military, or status as a protected veteran. A subsequent committee with the appropriate expertise and participation should consider those extensions. *See* Section II.B.
- Even with these limitations, implementation of this proposed package of recommendations should produce a significantly improved climate on campus around sexual harassment. The “climate” of an organization is defined as an experientially-based description of what people in the organization “see” and report happening to them within the organization, including perceptions of what the organization is like in terms of practices, policies, procedures, routines, and rewards. The most potent predictor of fewer incidents of sexual harassment in an organization is a climate of perceived intolerance of sexual harassment. A climate is perceived as intolerant of sexual harassment to the extent that (1) targets of sexual harassment are supported and protected; (2) instances of harassment are investigated fairly and in a timely way—with due process for both targets and alleged harassers; (3) those found to have committed harassment are held accountable or punished appropriately; and (4) the campus community is regularly informed about how the institution is handling/attending to claims and disciplining those who have violated policies. The recommendations in this report were designed to improve all four of these factors.

# REPORT ON FACULTY SEXUAL MISCONDUCT

## I. INTRODUCTION

### A. The Committee's Mission

On January 23, 2019, the Provost charged this Committee with evaluating “the University’s policies on sexual misconduct by faculty.” The charge asked the Committee to:

- (1) Review the campus’s current policies, processes and practices and consider whether the campus should have additional policies specifically regulating harassment and misconduct, and, if so, what those policies should be;
- (2) Recommend what sanctions, remedies or other supportive measures should be available in case of policy violations; and
- (3) Identify norms and practices to govern confidentiality around investigations and findings.

Illinois is committed to promoting a learning and working environment that is free from all forms of discrimination, harassment, and other related improper behavior. Sexual harassment is a form of discrimination. Decades of empirical research establish that sexual harassment causes harms not only to victims and some third party bystanders. Sexual harassment causes harms to educational institutions as well due to organizational withdrawal, decreases in organizational commitment, and decreases in productivity and educational or job performance.<sup>1</sup> Sexual harassment thus harms individual members of the campus community, threatens the work and learning environment of the University, and undermines the University’s educational, research, and service missions. These harms are often exacerbated when a person faces multiple forms of harassment or related misconduct, such as harassment based on gender and race or gender and sexual orientation. These compound harms are called “intersectional” because the harms affect

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<sup>1</sup> THE NATIONAL ACADEMIES OF SCIENCES, ENGINEERING AND MEDICINE, SEXUAL HARASSMENT OF WOMEN: CLIMATE, CULTURE, AND CONSEQUENCES IN ACADEMIC SCIENCES, ENGINEERING, AND MEDICINE at 67 (2018) [*hereinafter* SEXUAL HARASSMENT OF WOMEN] (“Sexual harassment has been studied in a variety of industries, social and occupational classes, and racial/ethnic groups. Negative effects have been documented in virtually every context and every group that has been studied. That is, the impact of sexual harassment extends across lines of industry, occupation, race, and social class (for meta-analytic reviews of these effects, see Chan and colleagues [2008], Ilies and colleagues [2003], Sojo, Wood, and Genet [2016], and Willness, Steel, and Lee [2007].”). For discussion of consequences on individual well-being, see *id.* at 68 (“Overall, the research has demonstrated that women’s experiences of sexual harassment are associated with reductions in their professional, psychological, and physical health,” even when controlling for many factors). With respect to third party bystanders, see *id.* (“Other studies . . . show that negative effects extend to witnesses, workgroups, and entire organizations.”). For effects on professional outcomes, see *id.* at 69-72 (discussing research that establishes sexual harassment is linked with decreases in job satisfaction, increases in organizational withdrawal (both in terms of (1) work withdrawal (distancing oneself from the work without actually quitting) and (2) job withdrawal (turnover thoughts, intentions or actions), and reduced productivity and organizational commitment). With respect to educational outcomes, see *id.* at 72-73 (“[S]exually harassed students have reported dropping classes, changing advisors, changing majors, and even dropping out of school altogether just to avoid hostile environments,” while “[t]he women who remain in school tend to suffer academically.”).

## REPORT ON FACULTY SEXUAL MISCONDUCT

people who are at the intersection of two or more protected classifications. Traditional policies and frameworks often obscure what happens to these individuals, even though they are often at greater risk of harassment and violence, because they are subject to interlocking systems of power and marginalization.

The Committee's charge refers to "sexual misconduct," which is a broad term that covers many forms of prohibited behavior. Under the heading of "sexual misconduct," the existing Sexual Misconduct Policy prohibits "sexual harassment," "sexual assault," "sexual exploitation," "stalking," "dating violence," and "domestic violence."<sup>2</sup> The Committee reviewed these categories and concluded that the category that deserved the most attention in the context of faculty misconduct was sexual harassment. Not only is sexual harassment the most commonly reported form of sexual misconduct by faculty,<sup>3</sup> but the Committee concluded that the campus's current policies, processes, and practices for handling reports of sexual harassment by faculty are out of alignment with the campus's current values, evolving norms of social acceptability, and facts about how sexual harassment most commonly presents itself and can persist within an organization even when it is complying fully with Title IX. This report will also make recommendations relating to campus policy against what is now called "dating violence" and "domestic violence" but which this report will call "dating abuse" and "domestic abuse" so as to include some non-violent forms of intimate partner abuse.

The Sexual Misconduct Policy prohibits these six classes of misconduct to all members of the campus community<sup>4</sup> so long as the University has jurisdiction over the parties and so long as the conduct either "occurs on University premises or property" or "substantially affects the University community's interest."<sup>5</sup> The policies, processes, and practices that govern the University's responses to sexual misconduct by faculty nevertheless differ in some ways from those that govern complaints against other classes of respondents. As a major research university committed to excellence in the production of research, education, and knowledge, the University of Illinois grants many of its faculty protections for tenure and academic freedom that are distinctive to their positions. These protections are designed to ensure that faculty can pursue their research and teaching agendas free from external and political influence. Yet these protections also create some substantive and procedural complexities, including some needs for shared governance, which are *sui generis* to the faculty context and can differentially affect how complaints against tenured and tenure-stream faculty are and should be handled. These procedures were never meant to protect faculty from claims of sexual misconduct. Given the special problems created by these procedures, the Committee interpreted its charge to "evaluate the University's policies on sexual misconduct by faculty" as inviting especially focused examination of the policies, processes, and practices for handling reports of sexual misconduct by tenured and tenure-stream faculty.

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<sup>2</sup> See Campus Administrative Manual, HR-76, Sexual Misconduct [*hereinafter* Sexual Misconduct Policy] (last revised November 1, 2017), available at [cam.illinois.edu/policies/hr-79/](http://cam.illinois.edu/policies/hr-79/).

<sup>3</sup> In the past few years, roughly 90% of the OAE cases involving an employee respondent (including any faculty respondent) have involved allegations of sexual harassment.

<sup>4</sup> The Sexual Misconduct Policy applies to faculty, non-faculty employees, students, and even some third parties.

<sup>5</sup> Sexual Misconduct Policy, *supra* note 2.

## REPORT ON FACULTY SEXUAL MISCONDUCT

This report will make clear when its recommendations apply to only one or more categories of faculty. Many of the recommendations relating to how the University should respond to reports of sexual misconduct by faculty will apply only to tenured and tenure-stream faculty due to the special procedural rules that currently apply to them. The Committee's recommendations for changes in what behavior should be prohibited by the Sexual Misconduct Policy will, by contrast, apply to specialized (non-tenure-stream) faculty as well other employees—all of whom make critical contributions to the University's missions. Changes to the Sexual Misconduct policy should probably apply to students as well, though the question of whether and how broadly to apply the new sexual harassment policy to students will need to be addressed separately through a process that ensures appropriate expertise and representation.<sup>6</sup>

In the present climate, it makes sense to create a committee to focus on the policies, practices, and procedures that govern sexual misconduct by faculty. Student perceptions of how the University of Illinois responds to reports of sexual misconduct are on the whole quite positive. The 2017 Sexual Misconduct and Perceived Campus Response Survey suggests that 86.5% of students believe that the University would take a report of sexual misconduct seriously; 95.9% believe the University would maintain the privacy of a person making a report; and 86% believe the University would support the person making the report.

As reassuring as this aggregate data is, this survey did not specifically distinguish perceptions of responses to sexual misconduct by tenured faculty. Nationwide evidence on this topic suggests that “[h]igher education is . . . replete with cases where offenders are an ‘open secret’ but are not sanctioned.”<sup>7</sup> One empirical study of this problem, not conducted at the University of Illinois, concludes that “colleagues often clearly knew which individuals had a history of sexually harassing behavior.”<sup>8</sup> The study notes that while “warnings were often provided [to potential targets] by both male and female colleagues,” these warnings “were often accompanied by advice that trying to take actions against these perpetrators was fruitless and that the best options for dealing with the behavior were to avoid or ignore it.”<sup>9</sup> This national problem resonates with recent cases on this campus as well as with discussions the Committee has had with department heads, faculty, and students. Higher education currently faces a national problem with respect to how best to respond to some improper behavior by faculty.<sup>10</sup>

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<sup>6</sup> The new sexual harassment policy has been drafted so that it could be implemented without creating any immediate changes to how the University disciplines or otherwise responds to sexual harassment by students. The new sexual harassment policy could, however, also be applied to discipline broader classes of misconduct by students if a subsequent committee with the right expertise and representation were to believe broader application is warranted. For further discussion, *see* Section II.A, *infra*. Application of the new policy to students raises special questions because students have some free speech rights on campus that government employees lack.

<sup>7</sup> THE SEXUAL HARASSMENT OF WOMEN, *supra* note 1 (citing Catalupo and Kidder 2017).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Given these facts, perceptions of how institutions of higher education respond to reports of sexual misconduct by faculty are likely to be lower than perceptions of responses to sexual misconduct in general. The 2017 Survey did not distinguish or measure perceptions of how reports of misconduct by tenure-stream

## REPORT ON FACULTY SEXUAL MISCONDUCT

There is also national evidence to suggest limitations in the effectiveness of campus investigatory and response practices that are aimed primarily at compliance with Title IX of the Education Act of 1972 (Title IX). Most institutions of higher education, including the University of Illinois, have Title IX offices set up to meet these legal requirements. According to a recent study by the National Academies of Science, Engineering, and Medicine, however, “[e]ven though laws have been in place to protect women from sexual harassment in academic settings for more than 30 years, the prevalence of sexual harassment has changed little in that time.”<sup>11</sup> On most campuses around the nation, legal compliance appears to be a necessary but insufficient mechanism to prevent improper sexual behavior by faculty. On this campus, 31.1% of female and 20.3% of male students surveyed in 2017 reported experiencing some form of gender-based hostility and/or sexist, sexualized or gender harassment by faculty, instructors, or staff during their time at the University.

Though some forms of harmful conduct have survived decades of legal compliance with Title IX, public reactions to it have been rapidly evolving in recent years. The nation and our campus community have begun to take these problems much more seriously and to hold institutions accountable for their responses or lack thereof. In this new climate, the traditional procedural protections for faculty have prevented many universities from being able to address sexual misconduct by faculty in a satisfying manner.

Universities across the nation have, in effect, been placed on the horns of a dilemma. Because special procedural safeguards protect tenured faculty from sanctions and dismissal without process that can be hard to meet, many recent high profile cases from around the nation have resulted in relatively muted responses to sexual harassment by faculty. Many members of our community have begun to find these responses insufficient—sometimes alarmingly so. That is the first horn of the dilemma. But in response to this problem, some universities have begun to try to impose more sanctions on faculty while bypassing the ordinary procedural rules for their implementation. Actions like these can prove detrimental to a university’s mission in other ways because they can create a climate where fear of arbitrary administrative authority or public pressure undermines freedom of thought and inquiry. Rights to tenure and academic freedom do not just protect the private interests of the individual faculty members who happen to have them; these rights also protect more public and enduring values, like freedom of thought and inquiry, which are necessary for excellence in the advancement of knowledge at a major research university. That is the second horn of the dilemma.

It would be ideal to solve the first problem without creating the second. Rather than accepting this dilemma as permanent, the Committee has sought to develop recommendations that show, wherever possible, how the value of ensuring a safe environment free from improper sexual or gender-based behavior for all members of this

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faculty are handled, though it did distinguish the prevalence of some types of reports of misconduct by faculty/staff/supervisor misconduct from that of student misconduct.

<sup>11</sup> THE SEXUAL HARASSMENT OF WOMEN, *supra* note 1, at 93.

## REPORT ON FACULTY SEXUAL MISCONDUCT

campus community need not be antithetical to the values of academic freedom or shared governance. Though many institutions are currently searching for better solutions to this problem, the Committee was not yet able to find any existing model that it felt met both of these goals at once in a fully satisfying manner. Many institutions are struggling with this problem, and many policies and procedures are currently in flux. Where appropriate and useful, this report incorporates parts of some existing models, but it ultimately recommends an integrated system of policies and procedures with novel features. The Committee believes that adoption of this integrated suite of recommendations—or some near variant of it—will protect the campus community from sexual misconduct much more vigorously and effectively, even while offering added protections for academic freedom, due process, freedom of speech, and shared governance.

### **B. Timing and Support for the Committee's Work**

At a time when national attention has increasingly focused on problems of sexual harassment, the Committee is grateful to have received strong support for its mission from all administrative levels and many other sources from around campus. At the Fall 2018 Annual Faculty Meeting, Chancellor Robert J. Jones chose to begin his wide-ranging comments about the state of the campus by calling attention to the need to address problems of sexual harassment on campus more effectively. Expressing urgency to address the problem, Chancellor Jones said that the campus's policies and procedures for responding to allegations of sexual misconduct "are the means by which we deliver on the promise of educational opportunity and personal safety that we make every student, staff, and faculty member."<sup>12</sup> President Timothy Killeen and Provost Andreas Cangellaris reiterated Jones's views in their subsequent remarks, and all three emphasized the urgency of ensuring that this campus's procedures for handling reports of sexual misconduct maintain consistency with these values. When charging this Committee, Provost Cangellaris reminded the Committee of these views, offered his office's full support for the Committee's charge, and instructed the Committee to take its charge with utmost seriousness. The Provost has instructed the Committee to identify solutions to the problem without concern for the costs of transition or implementation.

Other expressions of support for a reexamination of the University's policies that govern sexual misconduct by faculty have come from many sources, including the deans of all sixteen college-level units on campus, the Academic Senate, the Senate Executive Committee, the Committee on Academic Freedom and Tenure, the Illinois Student Government, and the Illinois Law Student Bar Association.

This broad and strong support gives the Committee optimism that conditions are ripe for effective and comprehensive policy reform in this area.

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<sup>12</sup> See Chancellor's remarks from Annual Meeting of the Faculty, 10/29/2018, *available at* <https://blogs.illinois.edu/view/6231/714000>.



## REPORT ON FACULTY SEXUAL MISCONDUCT

### C. Scope of the Report and Relation to Other Efforts

In order to set up expectations properly, it is important to understand that the recommendations in this report will address only one part (though an important part) of the larger aim of reducing sexual harassment on campus. In its Preliminary Report to the Provost dated May 30, 2019 and in informal conversations, the Committee conveyed that it is crucial for the administration to continue to use other committees and processes to address that aim in a more holistic manner. Problems of sexual harassment cannot be fully addressed without profound changes in culture and climate.

Empirical research on sexual harassment has identified at least five major factors that contribute to higher incidents of sexual harassment within an organization. They are: 1) culture and climate (including whether there is a perceived tolerance of sexual harassment within the organization); 2) highly hierarchical power structures (in which potential victims are geographically or socially isolated and highly dependent on a single person for advancement); 3) male-dominated workplaces (especially ones that include male-domination in positions of relative authority); 4) uninformed or uninspired leadership (that is, leadership that is unwilling to take bold and aggressive measures to understand the causal antecedents and harms of sexual harassment and to seek to reduce sexual harassment in more effective manners); and 5) too much focus on mere compliance with legal requirements, like those set forth in Titles IX of the Education Acts of 1972 and Title VII of the Civil Rights Act of 1964, which “has resulted in policies and procedures that protect the liability of an institution but are not effective in preventing sexual harassment.”<sup>13</sup>

Given the nature of the Committee’s charge, this report will respond most directly to the last issue (major cause 5): that is, to problems that can arise from campus systems for handling complaints of improper sexual behavior with policies and procedures that merely comply with legal requirements. The Committee views this as its central charge, and the recommendations in this report go well beyond the legal minimum. The recommendations in this report will also incidentally address one—but only one—aspect of problems of culture and climate (major cause 1). A relationship exists between this Committee’s charge and issues of climate because climate is defined as “an experientially-based description of what people ‘see’ and report happening to them in an organizational situation,” and as involving “employees’ perceptions of what the organization is like in terms of practices, policies, procedures, routines, and rewards.”<sup>14</sup> A workplace is seen as intolerant of sexual harassment—and thus exhibits a *climate* of perceived intolerance of sexual harassment—when:

1. “targets of sexual harassment are supported and protected;”
2. “instances of harassment are investigated fairly and in a timely way—with due process for both targets and alleged harassers;”

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<sup>13</sup> THE SEXUAL HARASSMENT OF WOMEN, *supra* note 1, at 3-4.

<sup>14</sup> Cheri Ostroff, Angelo J. Kinicki & Rabiah S. Muhammad, *Organizational Culture and Climate*, in HANDBOOK OF PSYCHOLOGY 643, 644 (2d ed. 2013).

## REPORT ON FACULTY SEXUAL MISCONDUCT

3. “those found to have committed harassment are punished appropriately;” and
4. “the campus community is regularly informed about how the institution is handling/attending to claims and disciplining those who have violated policies.”<sup>15</sup>

Empirical evidence demonstrates that a climate of perceived tolerance of sexual harassment is the most potent predictor of sexual harassment within an organization—though it is not the only one.

Many other potential causes of sexual harassment could be addressed in principle, but not by a report that focuses primarily on recommendations to improve the policies, procedures, and practices used to investigate and respond to sexual misconduct by faculty. Fortunately, there are three other campus-wide committees, and one system-wide committee, whose work may address some other parts of that larger aim. Specifically:

1. The Exploratory Group on Campus Culture, Climate, and Sexual Misconduct has been charged with studying and making recommendations relating to culture and climate as it relates to sexual harassment (major cause 1, construed broadly), while leaving to us questions about the policies, practices, and procedures to respond to faculty misconduct (major cause 5, and one significant aspect of major cause 1). The University of Illinois system has also created the System Task Force on Sexual Harassment, which is focused on similar questions of culture and climate at the system-level (major cause 1, construed broadly), but which has still left to us questions about the best policies, practices, and procedures to respond to faculty misconduct (major cause 5 and one significant aspect of major cause 1). The Committee believes that the work of these other two committees will be essential to broader efforts to combat sexual harassment on campus and within the system.
2. The Campus Committee on Graduate Student Experience has been charged with considering, among its tasks, questions relating to the sexual harassment of graduate students. Graduate students often face unique vulnerabilities due to the long, close, and highly dependent nature of their studies and professional progress on their graduate advisors. We believe it is crucial that the Committee on Graduate Student Experience consider recommendations to address those dependencies regardless of how faculty misconduct is investigated or sanctioned (thus helping to address part of major cause 2).
3. The Campus Committee on Faculty-Student Consensual Relations has been charged with developing an explicit policy to govern consensual

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<sup>15</sup> THE SEXUAL HARASSMENT OF WOMEN, *supra* note 1, at 4.

## REPORT ON FACULTY SEXUAL MISCONDUCT

relations between faculty and students. This policy will sometimes prohibit, sometimes manage, and sometimes recommend against faculty-student relationships depending on the circumstances. We believe that clearer policy guidance on these topics should help to address many problems of improper sexual behavior by faculty.

The campus has created mechanisms to ensure coordination and cross-fertilization of ideas among these different committees. These mechanisms include the use of biweekly meetings between the chairs of the four campus-wide committees (including this one) and the inclusion of two people on this Committee who are members of the System Task Force on Sexual Harassment. Some efforts that might help reduce the incidence of improper sexual behavior on campus, but will more likely be addressed by one of these other committees and/or by other campus or system-wide initiatives, include—but are in no way limited to—diversity initiatives, sustained attention from leadership, better notification of reporting methods and expectations of conduct, multimodal educational programming, techniques for early intervention, a culture of collective responsibility, opportunities for engagement and trust building, and other policies that govern faculty-student consensual relations or other relationships that involve power imbalances or special vulnerabilities.

No single set of policy changes can, however, address a problem as complex as sexual harassment in higher education. What is most needed is a profound shift in both climate and culture. Unlike climate, which depends on what people “see” and report happening to them in an organizational situation, culture “pertains to fundamental ideologies and assumptions” that are largely shared.<sup>16</sup> Culture can be “influenced by symbolic interpretation of organizational events and facts,” but culture “represents an evolved context embedded in systems.”<sup>17</sup> Culture “is more stable than climate, has strong roots in history, is collectively held, and is resistant to manipulation.”<sup>18</sup> This report seeks to identify policies, practices and procedures that can be widely celebrated as exhibiting increased intolerance of sexual harassment on campus. It seeks to make significant improvements to a climate of perceived intolerance of sexual harassment. But there is no way to address problems of sexual harassment in full without tackling broader issues of culture and climate in ways that go well beyond the recommendations in this report.

### **D. Make Up of the Committee**

The Provost sought to create a committee with a variety of expert backgrounds and viewpoints, and with the collective expertise to develop recommendations that could be both effective and implementable from a practical, institutional, and legal standpoint. The Provost sought members who could represent a broad range of concerns that different stakeholders might have with respect to how faculty misconduct should be treated. The Committee members include.<sup>19</sup>

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<sup>16</sup> Ostroff et al., *supra* note 14 at 644.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> The committee consulted with the Office of University Counsel during its deliberative process as it attempted to identify and reconcile various legal issues, either currently in existence or potentially resulting

## REPORT ON FACULTY SEXUAL MISCONDUCT

- Nicole E. Allen is Professor of Psychology and Associate Head and Director of Graduate Studies for the Department of Psychology. Professor Allen's research has explored processes of system change in response to intimate partner violence and sexual assault, including how collaborative settings and processes can facilitate systems change. She is an expert on empirical methods and has conducted research that examines organizations' culture and climate, including patterns and incidents of sexual misconduct on campus. Her other research examines the experiences of individuals as they navigate complex systems, such as the criminal justice system and other investigatory processes. She also sits on the System Committee on Sexual Harassment, which is focused on system-wide issues of culture and climate.
- Matthew Ando is Professor in the Department of Mathematics and Associate Dean for Life and Physical Sciences in the College of Liberal Arts and Sciences. He has extensive experience as an administrator dealing with issues of climate and misconduct including sexual harassment. He has served since its inception on the campus's DRIVE committee, whose charge it is to diversify the faculty.
- Leslie Arvan is Senior Director of Labor and Employee Relations, a unit within Illinois Human Resources. This office advises campus units and employees on all aspects of performance, management, and discipline for all employee groups. This role includes handling initial investigations into violations of the University's Code of Conduct by employees, including faculty, that are not governed by Title IX and its definitions of sexual harassment/misconduct. She has extensive experience with the policies, processes, and practices that are currently used when handling such complaints, as well as with collective bargaining agreements and other policies that may be relevant to the investigatory processes used with respect to campus employees.
- Jennifer Leeann Hardesty is Professor of Human Development and Family Studies. She is a national expert on intimate partner violence, including on the patterns and methods of coercion, violence, abuse, and harassment that occur in current and former intimate partner relationships. She also studies the effects of such behaviors on the health, safety, and wellbeing of victims, particularly after relationship dissolution when abuse and harassment, including sexual harassment and assault, may escalate and threaten the safety of victims and some third parties.
- Craig J. Hoefer is Senior Associate University Counsel in the Office of University Counsel. He is principally responsible for overseeing labor and employment matters involving faculty, academic professionals, civil service and student

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from the committee's proposals. The committee nevertheless recognizes that additional formal legal review is likely necessary to identify the relative legal risks of the new proposals as compared to the status quo. The fact that members of the Office of University Counsel participated in the process that resulted in these recommendations should not be viewed as a substitute for that formal and final legal review.

## REPORT ON FACULTY SEXUAL MISCONDUCT

employees at the Urbana campus. In carrying out those responsibilities, he has handled a multitude of matters relating to discrimination, harassment, sexual misconduct, disability accommodations, pay equity, diversity, discipline, international employment law, academic freedom, free speech, shared governance, tenure, unionization and union disputes, the negotiation and administration of collective bargaining agreements, threat assessments, and other related issues. He has offered legal advice on such issues, provided training, drafted and revised policies, negotiated and drafted various contracts or agreements, resolved grievances, conducted disciplinary and tenure revocation proceedings, and represented the University in conjunction with litigation, administrative proceedings, arbitrations, mediations, and appeal hearings.

- Amy J. Wagoner Johnson is Professor of Mechanical Science and Engineering in the College of Engineering and the Carle Illinois College of Medicine (0%). She served on the Faculty Advisory Committee (FAC) from 2012 through the 2018-2019 academic year. Service on the FAC has given her institutional experience with handling aspects of faculty misconduct. Under University Statutes, “[w]hen it shall appear to the president that cause for the dismissal of an appointee may exist, the president shall consult with the Faculty Advisory Committee,” and “after such consultation, shall determine whether dismissal proceedings should be instituted.”
- Heidi Johnson is Director of the Office of Access and Equity (OAE), which is the office that handles investigations of sexual harassment and sexual misconduct by faculty and employees. The OAE is responsible for ensuring that such investigations comply with Title IX, the federal law that states that “[n]o person in the United States 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 receiving Federal financial assistance.” The OAE is also responsible for ensuring that these investigations comply with all other governing laws and internal campus standards. Johnson has extensive experience with the policies, processes, and practices that this campus has historically used to handle complaints and investigations of sexual harassment by faculty.
- Robin Bradley Kar (Chair) is Professor of Law and Philosophy and Chair of the Senate Executive Committee. He played a lead role from within the Senate in developments that led to formation of this Committee. He was part of the system-wide working group that drafted system-level comments in response to the Department of Education’s proposed Title IX regulations. He was a facilitator for the recent Board of Trustees retreat discussions, leading to the creation of guiding principles for the system on how to foster healthy relationships across the campuses. He has both a JD (Yale) and a PhD (in moral and legal philosophy) and is a former law clerk to the Honorable Justice Sonia Sotomayor.
- Sandra Kopels is Professor of Social Work. She has both a JD and an MSW degree and before entering academia was Director of the Legal Advocacy Service

## REPORT ON FACULTY SEXUAL MISCONDUCT

of the State of Illinois Guardianship and Advocacy Commission. Her research focuses on legal and ethical issues as they affect social work clients and practitioners. She has authored dozens of journal articles and book chapters on subjects related to confidentiality, the disclosure of client information, and duties to warn. Professor Kopels is on the Legislative Committee of the Illinois Association of School Social Workers and is a member of its Board.

- Danielle Morrison is Director of the Title IX Office and the Title IX & Disability Coordinator. She is responsible for providing leadership, coordination, and oversight of the University's comprehensive programs and activities to ensure compliance with University policies and state and federal laws related to sex discrimination and misconduct. She is also responsible for ensuring leadership and coordination of institutional compliance with the Americans with Disabilities Act of 1990, as amended, and related laws, and with University policies addressing the rights of people with disabilities. Before taking this position, Danielle served as an Assistant Dean in the Office for Student Conflict Resolution, where she regularly investigated Title IX and Student Code cases, provided educational programming, and conducted alternative conflict resolution. She has worked in higher education for over ten years. She holds a BS in Political Science, a JD, an MA in Higher Education/Student Affairs, and a PhD in Higher Education.
- Leslie K. Morrow is Director of the Lesbian, Gay, Bisexual, and Transgender Resource Center. Leslie self-identifies as a Black queer woman and advocate for change. She brings a history of intersectional and on- and off-campus coalition work to address, among other things, problems specific to experiences of intersectionality. In addition to a Master's in College Student Personnel, Leslie is pursuing a PhD in the Department of Education Policy, Organization, and Leadership at the University of Illinois in Urbana-Champaign. She has worked on a variety of committees at the University, many of which are devoted to diversity and social justice. She is involved nationally and is a member of, among other associations, the National Consortium of Higher Education LGBT Resource Professionals, the American Educational Studies Association, and Student Affairs Administrators in Higher Education.
- Sharon Reynolds is Assistant Provost for Administrative Affairs in the Office of the Provost. Sharon's responsibilities include shared governance, policy development, and faculty employment matters, including issues that fall under the Sexual Misconduct and Discrimination policies. Previously, Sharon served as Associate Director for Academic Labor and Employee Relations, where she oversaw investigations of academic staff under the University Code of Conduct and other relevant policies. Sharon has also served as Director of Human Relations and University Equal Opportunity in the University System Office, where she conducted Title IX and Title VII investigations.

## REPORT ON FACULTY SEXUAL MISCONDUCT

- Bruce Rosenstock is Professor of Religion. He serves as a member of the Policy Committee on the University's chapter of the American Association of University Professors (AAUP)—an organization that is committed to protecting academic freedom and tenure but has also published recommended policies and procedures to address sexual harassment in higher education. He is past President of the Campus Faculty Association (CFA), which is an advocacy organization for faculty and other campus workers committed to shared governance, academic freedom, and a strong voice for faculty on campus.
- Mark Steinberg is Professor, Associate Chair, and Director of Graduate Studies in the Department of History. He was the 2018-2019 Chair of the Senate Committee on Academic Freedom and Tenure (CAFT) and a member of the Senate Executive Committee, the Graduate College Executive Committee, and the Executive Committee of the Russian, East European, and Eurasian Center. Over the years, he has participated in many policy committees across campus and numerous investigations into faculty misconduct or claims of institutional violations of academic freedom. He also sits on the System Committee on Sexual Harassment, which is focused on system-wide issues of culture and climate. His research and publications concern urban life, social movements, emotions, violence, religion, social reform, and policing. He is currently President of the Association for Slavic, East European, and Eurasian Studies and a member of the Association's Conduct Task Force (which is developing a new policy for handling sexual harassment at conventions). Fellowships and grants have included SSRC, NEH, Carnegie, and Guggenheim.

## II. POLICY REVIEW

The first part of the Committee's charge asks the Committee to "[r]eview the campus's current policies, processes, and practices and consider whether the campus should have additional policies specifically regulating harassment and misconduct, and, if so, what those policies should be." The way that such policies are perceived is a critical aspect of the "climate" of an organization—and, in particular, of whether an organization has a climate of perceived tolerance of sexual harassment or related improper behavior. Because a climate of perceived tolerance of sexual harassment is the most potent predictor of sexual harassment within an organization, it is important to develop policies that are widely understood to target sexual harassment explicitly, comprehensively, and aggressively. At the same time, changes in policy, practice, and procedure can only go so far. Sexual harassment is also sustained by cultural facts that are hard to change (that is, by shared beliefs, ideologies, and assumptions with deep roots in society and/or higher education). The problem of sexual harassment cannot be fully addressed without profound shifts in culture and climate that go well beyond the recommendations in this report.

The campus's current policies that specifically regulate sexual harassment and sexual misconduct are contained in the Sexual Misconduct Policy and Nondiscrimination

## REPORT ON FACULTY SEXUAL MISCONDUCT

Policy. The Committee believes these policies should be revised and supplemented in several ways to be described.

### **A. Revised Sexual Harassment Policy**

The Committee's first conclusion is that the campus policies that currently govern sexual harassment are out of alignment with the campus's values, evolving norms of social acceptability, and facts about how sexual harassment most commonly presents itself and can persist within an organization even with full Title IX compliance. Under "definitions," the Sexual Misconduct Policy currently says: "sexual harassment means unwelcome sexual, sex-based, or gender-based conduct, whether verbal, written, electronic and/or physical in nature, that is either

(A) (1) sufficiently severe or pervasive; and (2) objectively offensive; and (3) unreasonably interferes with, denies, or limits a person's ability to participate in or benefit from educational and/or employment opportunities, assessments, or status at the University; or

(B) by a person having power or authority over another in which submission to such conduct is made explicitly or implicitly a term or condition of educational and/or employment opportunities, participation, assessments, or status at the University."

The Committee's primary concern is with part A of this policy. This part imports a standard found in federal law into the Sexual Misconduct Policy. Under federal law, if a student or employee of the University suffers from unwelcome sexual, sex-based, or gender-based conduct that is sufficiently severe or pervasive (and objectively offensive enough) to unreasonably interfere with, deny, or limit an individual's ability to participate in or benefit from educational or employment opportunities, assessments, or status at the University, then that conduct will create a "hostile environment." Universities that allow hostile environments to persist without an adequate response can risk federal funding and individual lawsuits. A hostile environment is, however, a relatively extreme situation, which may be created by the conduct of many individuals—not just one. The University's Sexual Misconduct Policy is, by contrast, directed at least in part at particular individuals (even if departments can sometimes also be respondents and be subject to a complaint for a hostile environment).

Because of this disconnect, individual faculty members are currently being told by the Sexual Misconduct Policy that many forms of unwelcome sexual, sex-based, or gender-based conduct are not sexual harassment—though they may violate the campus code of conduct's more amorphous professional responsibility obligations. Explicitly prohibiting only severe or pervasive forms of sexual harassment and quid pro quo sexual harassment may well ensure that the University maintains technical compliance with Title IX's federal funding requirements. Prohibitions like these do not, however, explicitly prohibit many other forms of unwelcome sexual, sex-based, or gender-based conduct.



## REPORT ON FACULTY SEXUAL MISCONDUCT

Currently, the provisions of the campus code of conduct are sometimes being used to reprimand employees (including faculty) for these broader forms of misconduct. But these provisions are too general and amorphous to place faculty on sufficient notice of what is prohibited to survive many faculty grievances, faculty review, and/or legal challenges. Without an internal policy that clearly and explicitly prohibits unwelcome sexual, sex-based, and gender-based conduct, even if it is not “severe or pervasive” enough to be prohibited by law, it will be hard to sanction faculty for these broader forms of misconduct or to engage in some other responses in an effective enough way to stop the misconduct. The current policy language makes it difficult to foster a culture or climate that is perceived as sufficiently intolerant of sexual harassment.

These problems are not unique to the University of Illinois. They have been the subject of a great amount of discussion among experts on sexual harassment. The Committee has, in fact, found very little empirical evidence that explicitly prohibiting only the most egregious classes of unwelcome sexual, sex-based, or gender-based conduct is sufficient to combat sexual harassment or many of its well-documented harms. After reviewing the available empirical evidence, the National Academies of Science, Engineering, and Medicine’s Consensus Report on the Sexual Harassment of Women concludes that “[w]hile adherence to legal requirements is necessary, it is not sufficient to drive the change needed to address sexual harassment.”<sup>20</sup>

One problem with policies that focus primarily on legal compliance is that they explicitly prohibit only the most “severe” or “pervasive” forms of sexual harassment or quid pro quo sexual harassment. Much like the legal standards on which they are based, policies like this can thus be perceived as implicitly *permitting* many seemingly less severe or pervasive forms of sexual harassment. It does not always help for internal investigations to conclude that other forms of behavior may constitute unprofessional workplace conduct because the campus code of conduct’s professional standards are too poorly defined to allow for notice and sanctioning in the faculty context. The empirical evidence demonstrates that these other forms of sexual harassment can cause large harms not only to individual victims and bystanders<sup>21</sup> but also to the campus’s research and teaching missions owing to work and organizational withdrawal and poorer educational outcomes.<sup>22</sup> Some egregious forms of sexual harassment (like sexual assault or quid pro sexual harassment) occur less frequently at institutions where the culture or climate is perceived as intolerant of all forms of sexual harassment.<sup>23</sup> Further, unwelcome sexual

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<sup>20</sup> THE SEXUAL HARASSMENT OF WOMEN, *supra* note 1, at 4 (“[T]hese policies have and procedures have not been shown to prevent sexual harassment, and they are based on the inaccurate assumption that a target will promptly report the harassment without worrying about retaliation. While policies against sexual harassment [based on the law] are widely in place and have been for years, nonetheless, sexual harassment continues to exist and has not significantly decreased.”).

<sup>21</sup> *Id.* at 73-76 (outcomes on the health and wellbeing of victims); *id.* at 78 (harmful outcomes for bystanders).

<sup>22</sup> *Id.* at 69-73 (harmful outcomes for an organization, due to work withdrawal, and for education).

<sup>23</sup> Fitzgerald, L., Drasgow, F. and Magley, V. (1999). Sexual harassment in the armed forces: a test of an integrated model. *Military Psychology*, 11, pp. 329–343; *see also* Illies, R., Hauserman, N., Schwochau, S.

## REPORT ON FACULTY SEXUAL MISCONDUCT

attention and sexual coercion (including quid pro quo sexual harassment) often occur only in the context of widespread sexual harassment of these other forms.<sup>24</sup> These facts give the University a compelling interest to prohibit these broader forms of sexual harassment. In part because of reasons like these, some states, like New York, have recently eliminated the “severe or pervasive” requirement for sexual harassment under state antidiscrimination law.<sup>25</sup> Other states, like Minnesota, are considering similar legislation.<sup>26</sup> There is no reason why this University must require that harassment or related improper behavior be limited to “severe or pervasive” incidents to violate its internal policies,

There are further grounds for concern with policies that do not clearly and explicitly target all forms of sexual harassment. When a campus investigatory or response system is viewed as insufficiently responsive to all forms of sexual harassment, or when it makes severe forms too hard to prove or sanction, many victims are left with the experience or perception that it is futile (and sometimes even more damaging to them than effective) even to report sexual harassment.<sup>27</sup> That perception is especially likely with respect to faculty respondents because of the special procedural rules designed to protect tenure and academic freedom, which can make discipline and some other responsive measures hard to impose.<sup>28</sup> Those procedural rules were never meant to shield faculty from claims of sexual harassment or related improper behavior. Yet these factors can contribute to widespread underreporting<sup>29</sup>—thus making it difficult for an institution to identify and respond appropriately even to some faculty who engage in repeat misconduct. Systems like this can embolden a few bad actors to test the limits of the system by engaging in increasingly severe and repeat forms of sexual harassment while just skirting the line of what the law deems sufficiently severe or pervasive to prohibit.

The Committee also has some concerns with part B of the current sexual harassment policy. Part B prohibits unwelcome sexual, sex-based, or gender-based conduct “by a person having power or authority over another in which submission to such conduct is made explicitly or implicitly a term or condition of educational and/or

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and Stibal, J. (2003). Reported incidence rates of work-related sexual harassment in the US: using meta-analysis to explain reported rate disparities. *Personnel Psychology*, 56, pp. 607–618.

<sup>24</sup> For example, in a study conducted at a large public university, where 34% of women reported experiencing gender harassment, 20% reported experiencing unwelcome sexual attention in combination with gender harassment, while only 5% reported unwelcome sexual attention alone. 4% reporting sexual coercion and unwelcome sexual attention and gender harassment. Schneider, K. T., Swan, S., & Fitzgerald, L. F. (1997). Job-related and psychological effects of sexual harassment in the workplace: empirical evidence from two organizations. *Journal of Applied Psychology*, 82(3), 401.

<sup>25</sup> See N.Y. Senate Bill S6577, available at <https://www.nysenate.gov/legislation/bills/2019/S6577>.

<sup>26</sup> See A bill for an act relating to human rights; clarifying the definition of sexual harassment; amending Minnesota Statutes 2016, section 363A.03, subdivision 4., available at [https://www.revisor.mn.gov/bills/text.php?number=HF4459&version=latest&session=ls90&session\\_year=2018&session\\_number=0](https://www.revisor.mn.gov/bills/text.php?number=HF4459&version=latest&session=ls90&session_year=2018&session_number=0).

<sup>27</sup> THE SEXUAL HARASSMENT OF WOMEN, *supra* note 1, at 79-82.

<sup>28</sup> It is also hard for tenure-track but not yet tenured faculty to know what to do, if anything at all, when facing sexual harassment by tenured professors.

<sup>29</sup> *Id.* at 81 (“If targets fear reprisals, and feel that the institutional process will not serve them, they will be unlikely to report.”).

## REPORT ON FACULTY SEXUAL MISCONDUCT

employment opportunities, participation, assessments, or status at the University.” This definition is too narrow. Some forms of sexual coercion that should be prohibited do not involve differences in authority or improper offers of access to education or employment. For example, a faculty member or student might learn of the undocumented immigration status of a student and threaten to report the person to federal authorities absent sexual compliance. That is not a threat that relates to educational or work access. For another example, one faculty member (or student) might threaten to publicize the sexual orientation of a student unless the student complies with sexual activity. Women of color – even those who have positions of relative power – frequently experience sexual harassment from people who do not have an official position of authority over them.<sup>30</sup>

Clearly, the current definition of “sexual harassment” found in the Sexual Misconduct Policy (and based on the law) does not cover all of the unwelcome sexual, sex-based, or gender-based conduct that should be prohibited on this campus. The Committee’s first recommendation is, accordingly, to amend this policy language to cover the broader classes of unwelcome sexual, sex-based, or gender-based conduct that are recognized as sexual harassment by national experts on the topic.<sup>31</sup> This amendment could be achieved by changing the current definition of “sexual harassment” found in the Sexual Misconduct Policy to cover all sexual harassment, and not just those instances that are “severe or pervasive” enough to create a hostile environment or would qualify as quid pro quo sexual harassment. The Committee’s recommended language would say:

**Sexual Harassment and Related Improper Behavior** means any unwelcome sexual, sex-based, or gender-based conduct occurring within or having an impact on the workplace or academic environment, regardless of how it is conducted (physically, verbally, in writing, or via an electronic medium) and regardless of the genders of the individuals involved. Such behavior may take a variety of forms, including without limitation any one or more of the following:

- **Gender-Based or Sexual Hostility:** Objectively offensive treatment of another person or group, through words or conduct, with hostility, objectification, exclusion, or as having inferior status based on sex, gender (including gender identity or gender expression), or sexual orientation.<sup>32</sup>

<sup>30</sup> See, e.g., <https://hbr.org/2019/04/ending-harassment-at-work-requires-an-intersectional-approach>.

<sup>31</sup> To identify these categories, we began with the recent and comprehensive review of the literature found in THE SEXUAL HARASSMENT OF WOMEN, *supra* note 1. We edited some of the definitions found in the literature in minor ways and/or used alternative terminology at times in order to adapt that literature to the policy aim of providing clear practical guidance to internal investigators and subjects of the policy—not all of whom will be familiar with this literature—and to ensure consistency with other governing laws.

<sup>32</sup> In the literature on sexual harassment, this category is sometimes referred to as “gender harassment.” We have refrained from using this term in the proposed policy language to avoid confusion with the legal definition of harassment. The terms “sexist hostility” and “sexual hostility” are often used in the literature on sexual harassment to identify the two major forms that gender harassment takes. We have chosen to adapt this latter terminology, which we believe is clearer in meaning to non-experts. But we have also modified the standard way of defining gender harassment so that we refer to “treatment of another person or group, through words or conduct, with hostility, objectification, etc.” – and not to “conduct that conveys

## REPORT ON FACULTY SEXUAL MISCONDUCT

- **Unwanted Sexual Attention:** Objectively offensive sexual attention, advances, or comments that a person reasonably should know are unwanted or which continue to occur or persist after the recipient has communicated a desire that the behavior stop;
- **Sexual Coercion:** Use of force, violence, threats, or other wrongful conduct by an individual to compel or attempt to compel another individual to engage in unwelcome sexual activity of any kind;
- **Hostile Environment:** Unwelcome sexual, sex-based, or gender-based conduct (gender-based or sexual hostility or unwanted sexual attention) that is severe or pervasive, objectively offensive, and unreasonably interferes with, denies, or limits an individual's ability to participate in or benefit from educational or employment opportunities, assessments, or status at the University; or
- **Quid Pro Quo:** Sexually-based conduct by an individual having actual or apparent authority over another, where submission to that conduct is made an implicit or explicit term or condition of educational or employment opportunities, assessments, or status at the University.

Harassment or related improper behavior need not be illegal under existing employment laws to violate this policy. To be disciplined, however, the behavior must either be by an employee or constitute hostile environment or quid pro quo harassment. In investigating and responding to reports of violations, due consideration will be given to an individual's rights to free speech, expression, and academic freedom. Speech is not harassment or related improper behavior just because it is subjectively offensive. A reasonable person must also find it offensive and it must lack bona fide academic purpose. Speech can, however, be used to harass (or engage in related improper behavior) and can provide evidence of discriminatory intent to engage in such conduct. What sanctions or other responsive actions may be deemed appropriate, if any, will depend on the facts and circumstances of the case.

Before continuing, we offer several observations about this proposed policy language. As an initial matter, the Committee does not see any good reason to limit its application to tenured faculty or even faculty (as opposed to faculty and other employees). It would, in fact, seem counterintuitive and contrary to the University's values to prohibit faculty but not employees from engaging in all of this conduct while teaching or on the job or when their behavior would otherwise substantially affect the

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hostility, objectification, etc.” We believe these two descriptive phrases refer largely to the same classes of misconduct, but our terminology clarifies that the new policy seeks to prohibit discriminatory conduct (that is, the treatment of some individual or group in a disfavorable way based on membership in a protected classification), rather than seeking to suppress speech based on its content or viewpoint.

## REPORT ON FACULTY SEXUAL MISCONDUCT

University's educational or work environment. At the same time, the Committee recognizes that students are in a different category from employees unless they are employees of the University. Students have distinctive free speech concerns, which require that they be treated more like citizens than employees in some higher education contexts. These considerations may affect how this policy should be applied to students.

Though the new policy language was drafted with the advice of legal counsel to avoid legal concerns, this committee—which was charged to focus on sexual misconduct by faculty—cannot decide questions of student application on its own. It has neither the appropriate expertise nor the appropriate representation. Before significant changes can be made to the Student Code, special procedures and representation are typically required – which could well take another year to develop.<sup>33</sup> While the new policy is being implemented, the Committee recommends that a new task force begin considering whether and how the new sexual harassment policy should be applied in the student context.<sup>34</sup> In the interim, placing the new policy language in the Campus Administrative

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<sup>33</sup> A change to the Student Code (at least anything in Article 1, which is where the Sexual Misconduct policy is found) must pass through the Conference on Conduct Governance (CCG) and be approved by the Chancellor – typically for inclusion in the following academic year's Student Code. Before CCG will consider any significant changes, it will typically expect that the proposed changes have been vetted by the appropriate stakeholders (in this case, at least OSCR, the Title IX Office, and possibly the Women's Resources Center). For significant changes, CCG will also typically expect that students have been involved or otherwise consulted during the development of the proposals. Because students serve on CCG, student input on some minor policy changes can often come directly from the CCG student members. But in the case of any larger changes, CCG would likely expect significant student input prior to bringing the proposals to CCG.

<sup>34</sup> Without prejudging the work of that group, the group would likely need to determine what major classes of conduct, unprotected speech, and proscribable speech fall into the first three categories of the new policy even if the behavior does not qualify as hostile environment or quid pro quo sexual harassment under the law. Sexual coercion will almost certainly need to be prohibited to students just as defined. The group will also need to consider how to determine when speech is being used to harass—and not (or not merely) to express a viewpoint—and how social context can change what speech is protected for students. The group will likely want to develop internal protocols to guide OSCR investigators and clear rules for students to be placed on notice as to when sexual harassment and related improper behavior may subject them to discipline. In hard cases, OSCR will need to rely on the advice of legal counsel at the point of application. But the group will likely want to develop relatively clear and transparent standards or carve outs both to avoid disciplining protected student speech and to ensure that the new harassment policy does not unreasonably chill student free speech rights. At the same time, not all misconduct that falls short of hostile environment or quid pro quo sexual harassment is even expressive, and some should presumably be disciplinable under the new policy. *See, e.g., Jones v. Clinton*, 990 F. Supp. 657 (1998) (holding that an individual exposing himself to a female in the workplace on one occasion is neither sufficiently severe nor pervasive enough to create a hostile work environment); *see also Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001) (holding that non-expressive, physically harassing conduct falls outside the scope of the First Amendment). Speech that is not protected should presumably allow for student discipline in some cases as well. For just a few cases that should be consulted when considering this issue, *see Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969) (indicating that expressive speech that would substantially disrupt or interfere with the work of a school or the rights of other students may be regulated); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 92 L. Ed. 2d 549, 106 S. Ct. 3159 (1986) (suggesting circumstances that would permit the regulation of lewd, vulgar or profane language by students in an academic setting); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988) (permitting academic institutions to regulate any speech that a reasonable observer would view as the institution's own speech on the basis of any legitimate pedagogical concern). Efforts to address these questions should be harmonized with larger campus efforts to promote

## REPORT ON FACULTY SEXUAL MISCONDUCT

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healthy relationships across the campuses and a culture and climate that is welcoming and supportive to a diverse community in a number of non-punitive ways (including through multimodal education, early intervention, some uses of restorative process when appropriate, opportunities for engagement and trust building, and a culture of collective responsibility for culture and climate on campus).

It will be essential for any group that considers questions of broader application to students to have representation from national experts on sexual harassment. The group will also need input from free speech experts. The University should choose its First Amendment experts carefully. Experience suggests that some First Amendment experts lack familiarity with how the Supreme Court, the Office of Civil Rights (“OCR”), and other agencies (like the EEOC) define harassment when interpreting or offering guidance on Titles VII and IX. Many also lack familiarity with the forms that harassment commonly takes, with the distinctive ways harassment often blends conduct with expression, and with the inherent difficulties involved with defining what harassment is. Unless a First Amendment expert has wrestled with these specific issues, the expert may be inclined to consider even traditional definitions of harassment (like those found in Supreme Court precedent, OCR guidance, EEOC regulations and guidance, and forthcoming Title IX regulations) to be unconstitutionally vague or violative of due process. As a result, some First Amendment experts can be initially critical of *any* proposed definition of harassment, even those that may offer improvements over traditional definitions on all these scores.

Any group to consider when expressive conduct by students should be considered harassment that may be disciplined, as opposed to protected speech, will need to go beyond the overly simplistic formulations found in many First Amendment cases. First Amendment cases commonly suggest that all “speech” is presumptively protected unless there is an exception to the First Amendment. But if the term “speech” is used in its ordinary nontechnical English sense, then those legal statements will be misinterpreted and produce inaccurate interpretations of the law as a whole. Frederick Schauer—one of the leading national experts on the First Amendment who teaches at Harvard Law School—has put the point as follows: “[T]he domain of application of the First Amendment – its *coverage* – is not coextensive with the forms of behavior that would count as ‘speech’ in ordinary nontechnical English.” *The Speech-ing of Sexual Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 347-65 (eds. Catherine A. Mackinnon & Reva B. Siegel, 2004). Though the point is not commonly recognized by First Amendment scholars, almost all human conduct has some expressive dimension (it at minimum reveals an intention), but that fact rarely leads to the regulations of the conduct being subjected to First Amendment scrutiny. As Schauer explains, “For a vast range of verbal, linguistic, and pictorial conduct, the First Amendment is simply not part of the picture. Indeed, although it is common for critics of some proposed constraints on linguistic acts to complain about the impermissibility of making an *exception* to the First Amendment, in truth the First Amendment is itself an exception, even if a vital one, to the principle that linguistic behavior – speech in the ordinary language sense – is subject to control according to the same standards as is any other behavior.” *Id.*

Another leading expert on this topic, Robert Post, the Dean of Yale Law School, has made similar observations when considering the relationship between sexual harassment law and the First Amendment. He says: “There is growing apprehension of possible tensions between the First Amendment and Title VII’s prohibition of sexual harassment. . . . The [First Amendment] jurisprudence applies to human action that is characterized as ‘speech.’ But unfortunately we have only crude doctrinal and theoretical tools for determining when human action should be characterized in this way. The problem is especially acute when we seek to determine the application of the First Amendment to behavior like sexual harassment that . . . [had never at that time] been subject to constitutional oversight.” Robert Post, *Sexual Harassment and the First Amendment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 347-65 (eds., Catherine A. Mackinnon & Reva B. Siegel, 2004).

The question of when conduct with expressive dimensions is “speech” for First Amendment purposes is not, in other words, one that standing First Amendment doctrine addresses on its own. Any group that decides potential application of the new policy to students must study materials like these carefully and wrestle with the difficult prior question whether the First Amendment even applies to different classes of harassing conduct based on how those classes of conduct are defined. Just as it is

## REPORT ON FACULTY SEXUAL MISCONDUCT

Manual would not change the way the University responds to students. To ensure there is no immediate change for students, unless they are employed by the University, we have added the line: “To be disciplined [for sexual harassment or related improper behavior,] the behavior must either be by an employee or constitute a hostile environment or be quid pro quo harassment.” This sentence effectively allows discipline for broader forms of harassment by faculty and employees while creating no disciplinary changes for students. We have refrained from taking a formal position on whether broader forms of sexual harassment should be disciplinable by students out of deference to the processes needed to decide that question—not because we believe that the policy should not be applied any more broadly.

Next, the Committee has considered a number of alternatives for implementation, including not only issuance of a new policy that is specific to faculty but also revision to the definition of “sexual harassment” in the current Sexual Misconduct Policy. On balance, the Committee believes that the above amendment to the Sexual Misconduct Policy would be best. Placing the new policy in the Campus Administrative Manual would offer a clear statement of the University’s values that make it clear that these values apply to the entire campus community. In order to promote the cultural shifts needed to address sexual harassment more effectively, our experts on sexual harassment view it as extremely important to communicate that the behavior prohibited in this new policy is all related, and of a similar kind, even if the law only prohibits some forms of sexual harassment that it considers the most “severe” or “pervasive” or quid pro quo. It would be hard to communicate this if the new prohibitions were set apart from the University’s policies on sexual harassment. At the same time, legal counsel has voiced concerns with a new policy that would simply use the phrase “sexual harassment” in this broader way in our Sexual Misconduct Policy because internal investigations and findings of “sexual harassment” might then expose the University to unwarranted legal liability (that is, to legal liability when there is no actual “sexual harassment” under the law and so should be no legal liability). Use of the heading “sexual harassment and related improper behavior” avoids that problem because findings of policy violations cannot be misrepresented in litigation as admissions of “sexual harassment” – either as understood by Title IX regulations or as referred to under campus policy.

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vandalism (a form of conduct that is clearly not protected by the First Amendment) to spray a political slogan on the side of a public building, so too can harassment fall outside the reach of the First Amendment if defined correctly as a form of discriminatory conduct. There are arguments to the contrary, which assume that discriminatory conduct that takes the form of expression must always be protected by the First Amendment. *See, e.g., Eugene Volokh, Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992). A subsequent task force should consider those materials as well. But those arguments appear overly general and overly simplistic, in this Committee’s view. They fail to recognize just how many laws regulate classes of conduct that may have expressive dimensions but are never considered by anyone to raise any First Amendment issues. Familiarity with the First Amendment cases can leave a skewed impression. The constitutional cases really address only a limited amount of conduct that might be considered “speech” in the ordinary nontechnical English sense of the word. Scholars of torts, contracts, property, family law, criminal law, and many other areas, will be familiar with numerous examples of legal doctrines that regulate conduct, including some speech acts, that most would consider “speech” in the ordinary nontechnical English sense but that are never considered subject to First Amendment scrutiny.

## REPORT ON FACULTY SEXUAL MISCONDUCT

This compromise language also addresses a structural problem with traditional Title IX systems. Traditional Title IX systems have been criticized for creating a situation in which university counsels have professional obligations to warn against the legal risks of findings of “sexual harassment” under organizational policy. Such warnings may lead to fewer findings of violations of the Sexual Misconduct Policy (unless the facts are extremely clear) and may lead to more findings of mere inappropriate workplace conduct. Legal counsel currently reviews the reports and recommendations developed by OAE before they are issued in part to identify legal risks. Even though the new policy would target broader classes of misconduct, there would be no analogous legal risks with finding violations of the new policy because internal findings would not necessarily be findings of “sexual harassment” either by name or under governing legal standards. Use of the phrase “sexual harassment and related improper behavior” should also make the new policy easy to harmonize with the Department of Education’s proposed Title IX regulations, which will likely require use of a narrow definition of “sexual harassment” that applies only to hostile environment and quid pro quo sexual harassment in some contexts. The proposed Title IX regulations require dismissal of any “sexual harassment” claims that allege harassment short of hostile environment or quid pro quo, but will have to allow complaints to proceed that allege internal policy violations

At the same time, the Committee believes that a term with sufficient moral clarity is needed to convey the seriousness of improper sexual, sex-based, and gender-based behavior. Calling it “inappropriate workplace behavior” or a mere breach of “professionalism” is insufficient and often traumatizing and psychologically harmful to survivors of sexual harassment. Such treatment can produce muted and less effective responses. The terminology we suggest, along with the placement of all of these prohibitions within one sexual harassment policy, would help with that problem too. Two of the new categories (the ones we refer to as “gender-based or sexual hostility” and “unwanted sexual attention”) are also the very same categories that would constitute sexual harassment under the law if they were sufficiently severe or pervasive. National experts on sexual harassment consider this behavior to be sexual harassment in a non-legal sense, as does the Title IX Office when considering what classes of behavior to respond to in informal ways under current policy.<sup>35</sup> The new policy language would allow the University to respond more fairly and aggressively to all forms of sexual harassment and to employ sanctions or educational or other measures as appropriate.

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<sup>35</sup> In fact, even the United States Equal Employment and Opportunity Commission (EEOC) uses the term “harassment” in its public communications to refer to more than just what is legally prohibited as hostile environment or quid pro quo. When defining “sexual harassment” on its public website, it says:

Although the law doesn’t prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is *illegal* when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).”<sup>35</sup>

Like the policy we are recommending, the EEOC thus distinguishes between harassment that is illegal (which is covered by our current policy language) and harassment that is not illegal (but may be explicitly addressed under this new policy).



## REPORT ON FACULTY SEXUAL MISCONDUCT

The new policy also clarifies that violations can lead to a range of responses, which may not always involve discipline. Which sanctions or other responsive measures should be used in a particular case will depend on a number of factors, including without limitation: the nature and severity of the misconduct, the complainant's desire for confidentiality or for an informal resolution, the respondent's disciplinary history, the respondent's motives and willingness to correct the misbehavior behavior, a safety and risk analysis, where the conduct occurred and in what capacity, how much the misconduct impacts the workplace or academic environment, and whether the misconduct was unintentional or might have been thought to further a legitimate academic purpose or be protected speech. Section III will discuss responses to policy violations and identify a broad set of tools that should be available to respond to reports of policy violations, including: (1) a wider set of progressive sanctions for faculty, (2) improved educational measures, (3) an improved system of interim actions, supportive measures, and protective measures, and (4) some use of mediation and/or restorative processes—when safe and fully consensual—to address harms, reconcile communities, and support a culture and climate that is widely celebrated as welcoming and supportive.

Finally, because sexual harassment is a form of discriminatory conduct that often has expressive aspects, it is important to distinguish harassment, which is conduct that may or may not involve speech, from speech that is a valid exercise of academic freedom or free speech. Experience suggests that many people find this distinction hard to draw.<sup>36</sup> Just like the old policy, the new policy would not be applied to discipline any exercises of academic freedom or free speech. Government employees (including faculty) also have fewer free speech rights than students when working or representing the University, unless they are discussing issues of public concern. Because some find harassment definitions vague and hard to understand, traditional harassment policies can nevertheless chill some valuable speech, including efforts by faculty to address controversial topics and help solve some of the world's most difficult problems. To address this issue, we have suggested adding a savings clause, which goes beyond traditional harassment policies, and would say: "Speech is not harassment or related improper behavior just because it is subjectively offensive. A reasonable person must also find it offensive and it must lack bona fide academic purpose."<sup>37</sup>

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<sup>36</sup> The Supreme Court has observed that a determination of what harassment is "is not, and by its nature cannot be, a mathematically precise test." *Harris v. Forklift Systems*, 510 U.S. 17, 22 (1993). According to the the Supreme Court, "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required." *Id.* at 23.

<sup>37</sup> If and when the University decides that students should be subject to discipline for some broader forms of sexual harassment and related improper behavior, a similar limiting clause may be needed to ensure students feel comfortable discussing controversial issues or expressing their views when such speech is protected by the First Amendment. The University may nevertheless want to respond to some of that speech with speech of its own or with educational or other measures designed to help students learn how to discuss controversial issues in respectful and professional manners (if they so desire) and how to succeed in

## REPORT ON FACULTY SEXUAL MISCONDUCT

In case it helps, the Committee has also drafted a longer form of this policy language, which is targeted at faculty and contains longer examples and explanations meant to clarify what the campus expects of faculty members in particular. Longer explanations with examples can help faculty members understand what abstract policy language means in application. With little or no modification, the text found below could be placed into documents used to educate faculty and/or notify them of their professional obligations relating to sexual harassment and related improper behavior. The text could also be put into a Provost Communication to faculty or other handbooks or materials as needed. The Committee would like to discuss possible options for implementation with the Provost and how the text might need to be changed for use in different settings. The longer-form text is set forth below:

### **SEXUAL HARASSMENT AND RELATED IMPROPER BEHAVIOR BY FACULTY**

Illinois is committed to promoting a learning and working environment that is free from all forms of sexual harassment and related improper behavior. Sexual harassment is a form of discrimination, which the University does not tolerate.

Decades of empirical research establish that sexual harassment causes not only individual harms to victims and some third party bystanders (such as decreases in mental and physical health). Sexual harassment also causes institutional harms due to organizational withdrawal, decreases in organizational commitment, and decreases in productivity and educational or job performance.<sup>1</sup> Sexual Harassment harms individual members of our community, threatens the working and learning environment of the University, and undermines the University's educational, research, and service missions. Faculty should be aware that these harms are often exacerbated when a person faces multiple forms of unwelcome behavior, based not only on sex, gender, or sexual orientation but also on other characteristics like race, color, religion, pregnancy, disability, national origin, ancestry, age, order of protection status, genetic information, marital status, disability, sexual orientation, gender identity, gender expression, arrest record status, unfavorable discharge from the military, or status as a protected veteran.

Illinois does not tolerate sexual harassment or related improper behavior in its work, academic, or residential life. The University will seek to prevent such behavior and will investigate and take appropriate responsive action when receiving reports of any such misconduct. This policy applies to all faculty members, whether tenure-stream or specialized, and to any conduct that occurs on University premises or property or otherwise substantially affects the University community's interest.

**Sexual Harassment and Related Improper Behavior** means any

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professional settings where they will have restricted free speech rights. The University may also want to offer restorative processes to help students who would to heal harms they have caused and maintain healthy relationships in cases of conflict.

## REPORT ON FACULTY SEXUAL MISCONDUCT

unwelcome sexual, sex-based, or gender-based conduct occurring within or having an impact on the workplace or academic environment, regardless of the manner conducted (physical, verbal, in writing, or via electronic medium) and regardless of the genders of the individuals involved. Such behavior may take a variety of forms, including any one or more of the following:

- **Gender-Based or Sexual Hostility:** Objectively offensive treatment of another person or group, through words or conduct, with hostility, objectification, exclusion, or as having inferior status based on sex, gender (including gender identity or gender expression), or sexual orientation;<sup>1</sup>
- **Unwanted Sexual Attention:** Objectively offensive sexual attention, advances, or comments that a person reasonably should know are unwanted or which continue to occur or persist after the recipient has communicated a desire for the behavior to stop;<sup>1</sup>
- **Sexual Coercion:** Use of force, violence, threats, or other wrongful conduct by an individual to compel or attempt to compel another individual to engage in unwelcome sexual activity of any kind;
- **Hostile Environment:** Unwelcome sexual, sex-based, or gender-based conduct that is severe or pervasive, objectively offensive, and unreasonably interferes with, denies, or limits an individual's ability to participate in or benefit from educational or employment opportunities, assessments, or status at the University; or
- **Quid Pro Quo:** Sexually based conduct by an individual having actual or apparent authority over another, where submission to that conduct is made an implicit or explicit term or condition of educational or employment opportunities, assessments, or status at the University.

**Examples and Illustrations.** The first possible category of improper sexual behavior, which may be referred to as “gender-based or sexual hostility,” includes any objectively offensive treatment of another person or group, through words or conduct, with hostility, objectification, exclusion, or as having inferior status based on sex, gender (including gender identity or gender expression), or sexual orientation. It includes homophobic and transphobic conduct. Hostility based on other protected classifications is also prohibited. That includes unwelcome conduct based on race, color, religion, pregnancy, disability, national origin, ancestry, age, order of protection status, genetic information, marital status, disability, arrest record status, unfavorable discharge from the military, or status as a protected veteran.

## REPORT ON FACULTY SEXUAL MISCONDUCT

Conduct of this kind can always be harmful, and faculty members are prohibited from engaging in it while on campus or if the conduct has an impact on the workplace or academic environment. There may be some instances, however, where a faculty member discusses sex, gender, gender identity, gender expression, sexual orientation, or some other protected classification in the classroom in ways that further legitimate pedagogical or professional purposes and are thus protected by academic freedom. Even though some students may find discussions of these topics difficult, discussions of this kind are not prohibited by University policy. Faculty also have broad free speech rights when acting as private citizens in ways that will not have significant impacts on their capacities to fulfill their professional duties. For further discussion of academic freedom and freedom of speech, see below.

An example of improper gender-based or sex-based hostility would be one faculty member making derogatory comments in class or in the workplace about an individual's capacity based on that individual's gender; or about an entire sex, gender, or sexual orientation. This first class of improper behavior can also come in the form of using insulting gender-based terms or making derogatory comments about people based on their failure to comply with stereotypical gender or sex-based expectations. Examples of sexual (as opposed to gender-based) hostility may include unwelcome sexual or crude commentary about members of one gender, sex, or sexual orientation while at work or in an academic environment, whether or not the comments are directed at a particular target.

The second category of improper sexual behavior, which may be referred to as "unwanted sexual attention," includes sexual attention, advances, or comments that a person reasonably should know are unwanted or which continue to occur or persist after the recipient has communicated a desire that the behavior stop. Examples of such conduct may include repeated requests for dates or persistent attempts to establish a sexual or romantic relationship with a person despite rejection that is made express or can be reasonably implied from conduct or circumstances. Sometimes, it can be reasonably known from social context that sexual advances are almost certainly unwelcome, unwanted or otherwise inappropriate—as, for example, would be an overture by a faculty member toward a student in class. Other examples of unwanted sexual attention may include the unwanted commenting on a person's sex appeal or unwanted expressions of sexual or romantic desires (either directly or indirectly) in a professional or advising setting.

Some forms of unwanted sexual attention may also constitute sexual assault, which is prohibited independently by the Sexual Misconduct Policy. Sexual assault refers to, but is not limited to, touching the private areas of someone's body (e.g., fondling, or attempted, or completed oral, vaginal or anal penetration perpetrated by coercion, incapacitation, threat of physical force, and/or physical force). The fact that sexual assault is independently prohibited as sexual assault does not mean that it is not also sexual harassment or related improper behavior.

In other cases, unwanted sexual attention may not constitute sexual assault but may still constitute sexual harassment or related improper behavior. Examples might

## REPORT ON FACULTY SEXUAL MISCONDUCT

include repeatedly invading someone's physical space while showing unwanted sexual interest. Other examples might include hugging, squeezing, pinching, putting an arm around someone's shoulder, and/or rubbing someone's back when a reasonable person would know that such behavior is unwanted or after the recipient has communicated that physical contact is not desired.

The third category of improper behavior, which may be referred to as "sexual coercion," refers to the use of force, violence, threats, or other wrongful conduct to compel or attempt to compel another to engage in unwanted sexual activity of any kind. One form of wrongful conduct involves the offering by one person who has power or authority over another of access to education or work opportunities in return for sexual compliance. Such conduct is commonly referred to as "quid pro quo sexual harassment," which will be discussed further below. But not all forms of sexual coercion involve wrongful attempts to compel sexual activity in this precise way. For example, one faculty member might learn of the undocumented immigration status of a student and threaten to report the student to federal authorities unless there is sexual compliance. That would be sexual coercion but not quid pro quo sexual harassment. For another example, one faculty member might threaten to reveal another faculty member's sexual orientation unless the student engages in sexual activity. That would also be an act of sexual coercion.

As the last example shows, official power differentials are not necessary for sexual coercion. Sexual coercion may occur whenever a faculty member uses force, violence, threats, or threats of other wrongful conduct to compel or attempt to compel another to engage in sexual activity of any kind.

The fourth category of improper behavior, which may be referred to as behavior that creates a "hostile environment," occurs whenever one of the previous forms of misconduct (or any other form of unwelcome sexual or sex-based conduct) is severe or pervasive enough and objectively offensive enough to unreasonably interfere with, deny, or limit an individual's ability to participate in or benefit from educational or employment opportunity, assessment, or status at the University. Hostile environments are sometimes created by the conduct of many individuals, whereas this policy covers sexual harassment and related improper behavior that may contribute to a hostile environment without independently creating one.

The fifth category of improper behavior is often called "quid pro quo sexual harassment." Quid pro quo sexual harassment is a subset of sexual coercion, which arises whenever the wrongful conduct used to try to compel sexual activity or compliance is the conditioning of educational and/or employment opportunities, assessments, or status at the University on sexual activity of any kind. The opportunities, assessments, or status offered (or threatened to be withdrawn) on condition of sexual activity can be wide ranging. Examples may include offering or threatening to withhold anything from a research assistant position to better grades to being a co-author on a paper or getting a chance to travel and present research.

The examples in this section illustrate some common forms that sexual harassment and related improper behavior take but do not exhaust the misconduct covered by this

## REPORT ON FACULTY SEXUAL MISCONDUCT

policy.

### **Relationship to the Law**

Sexual harassment and related improper behavior need not be illegal under existing employment laws to violate this policy.

### **Reports of Policy Violations**

The University encourages reports of sexual harassment and related improper behavior as it arises, regardless of its severity, to unit staff, faculty and/or department heads. Officials who receive learn of any alleged violation must make a formal report to the Title IX Office, which is responsible for coordinating responses to reports of policy violations. An individual who believes this policy has been violated may also confer with a Confidential Advisor, who is not required to report to the Title IX Office. For information on Confidential Advisors, see \_\_\_\_\_.

### **Responses to Reports of Policy Violations**

The University will take all reports of violations of this policy seriously. What sanctions or other responsive actions may be deemed appropriate, if any, will depend on the facts and circumstances of the case, including without limitation: the nature and severity of the misconduct, the complainant's desire for confidentiality or for an informal resolution, the respondent's disciplinary history, the respondent's motives and willingness to correct the misbehavior behavior, a safety and risk analysis, where the conduct occurred and in what capacity, how much the misconduct impacts the workplace or academic environment, whether the misconduct was unintentional or might have been thought to further a legitimate academic purpose or be protected speech, and any applicable legal standards.

Faculty who violate this policy may be subject to discipline even if the behavior is not illegal under existing employment laws. Depending on the severity and recurrence of the misconduct, the following progressive sanctions may be imposed: (1) a written letter of expectation; (2) a fine or reduction in salary corresponding to one week's salary; (3) a fine or reduction in salary corresponding to one month's salary; (4) suspension without pay for a one-term period (or a one-year suspension from teaching with concomitant reduction of pay) with a requirement of counseling and proof of rehabilitation prior to any return to full employment;<sup>38</sup> and (5) dismissal (with revocation of tenure). Sufficiently severe cases may lead to immediate dismissal proceedings or to immediate proceedings leading to a temporary suspension without pay (or to a reduction of teaching duties with a concomitant reduction in pay). These last two sanctions can only be imposed in accordance with the University's statutory procedures governing,

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<sup>38</sup> This will need to be revised to refer to "one year" instead of "one term" if Article IX is ever revised in accordance with our recommendations in Section III.A.

## REPORT ON FACULTY SEXUAL MISCONDUCT

respectively, faculty dismissals (Article X) and severe sanctions other than dismissal (Article IX).

Non-punitive responses may include, without limitation, interim actions (including paid emergency removals or paid administrative leaves if appropriate under campus policies governing faculty suspensions), the use of counseling, educational measures, changes in workplace responsibilities, and the use of mediation or restorative processes—when safe and fully consensual—to repair some harms, reconcile some communities, and contribute to a healthy culture and climate.

### **Relationship to Faculty-Student Consensual Relationship Policy**

The Faculty-Student Consensual Relations Policy prohibits intimate or sexual relationships between faculty and students in some circumstances, seeks to manage conflicts and power differentials in others, and merely discourages faculty-student relationships in still others. If sexual harassment or related improper behavior occurs within an intimate or sexual relationship that is permitted by the Faculty-Student Consensual Relations Policy, then that fact does not make the unwelcome behavior permissible under this policy. In addition, if a faculty member makes sexual or intimate advances to a student in circumstances where the resulting relationship would be discouraged, managed, or prohibited, then those advances will be presumed unwelcome barring sufficient evidence to the contrary. The strength with which the relationship is discouraged or not permitted under the Faculty-Student Consensual Relations Policy will bear positively on the severity of any unwelcome sexual advances found under this policy.

### **Targeted or Ambient**

Sexual harassment and related improper behavior can be directed at a particular individual, but it can also be “ambient.” “Ambient” misconduct refers to behavior or comments that are not directed at a single individual but may contribute to a hostile environment. Ambient misconduct can also refer to cases in which a bystander witnesses unwelcome sexual, sex-based, or gender-based conduct directed at another individual and is harmed. Because sexual harassment and related improper behavior is known to cause harm not only to its direct targets but also to some third party bystanders, third party bystanders can be victims of ambient misconduct if they can show harm.

By encouraging third parties to report incidents of ambient misconduct regardless of its severity and employing a system of progressive sanctions and other non-punitive responses, this policy seeks to minimize behavior that can contribute to a culture or climate of perceived tolerance of sexual harassment. Studies show that some egregious forms of sexual misconduct—like quid pro quo sexual harassment and sexual assault—occur less frequently in organizations that are widely perceived as intolerant of broader forms of sexual harassment and related improper behavior.

### **A Pattern of Behavior/Single Incident**

## REPORT ON FACULTY SEXUAL MISCONDUCT

The conduct targeted by this policy most often comes in the form of patterns of behavior. People who engage in this type of behavior typically do it on more than one occasion (that is, either multiple times with the same individual, on multiple occasions with different individuals, or both).

Conduct that is sufficiently severe may be found to violate this policy even if it happens only once. Pattern and frequency will nevertheless be considered when responding to reports of policy violations, both to determine whether ambiguous behavior is best interpreted as a policy violation and to determine the appropriate response to any policy violations. A pattern of behavior may be considered repeated, and hence more severe, even if the conduct does not always target the same individual. For example, a faculty member who repeatedly makes unwanted sexual advances toward different students, or who makes other unwanted sexual comments to them or gives them other forms of unwanted sexual attention, could be engaging in sexual harassment or related improper behavior that is severe even if the faculty member targets different students on each occasion.

### **Power Imbalances**

Conduct that violates this policy may occur when one person has official power or supervisory authority over another. But differences in power or authority are not necessary. People who engage in sexual harassment or related improper behavior can have equal official power or authority as those who are subjected to the behavior (e.g., faculty of the same rank and standing) or may have less official power or authority (e.g., a student engaging in sexual harassment or related improper behavior toward a faculty member).

Imbalances of power or authority can nevertheless exacerbate the severity and harms of policy violations. In some cases, imbalances may also provide evidence of some classes of misconduct, like quid pro quo sexual harassment.

### **Academic Freedom and Free Speech**

Although faculty members are prohibited from engaging in sexual harassment or related improper behavior, the discussion of some sexually explicit or controversial materials in class may sometimes be germane to proper instructional goals. Discussion may also be germane to faculty research or service commitments or to policy endeavors that call upon a faculty member's expertise. Occasionally, this material may be challenging or even offensive to some students or to the public.<sup>1</sup> The discussion of sexually explicit or controversial material in the pursuit of genuine instructional, research, or service goals is protected by academic freedom. As a result, speech will not be considered harassment or related improper behavior unless (in addition to meeting the formal definitions in this policy) it serves no bona fide academic purpose. The fact that speech may be subjectively offensive to some is not enough to turn it into harassment or related improper behavior. To violate this policy, a reasonable person must find the



## REPORT ON FACULTY SEXUAL MISCONDUCT

speech offensive in social context.

Faculty should be cautious, however, about introducing discussions of sexually explicit or controversial topics into a classroom setting if the discussions do not obviously serve instructional goals. Faculty should also be careful about distinguishing between gender or other stereotypes as an object of study and as their own expressed viewpoint. While academic freedom covers much that is said that is germane to a class, it does not cover everything. The more that a classroom discussion strays from relevant instructional content, the more likely it may constitute harassment or related improper behavior.<sup>1</sup> Before presenting difficult material in the classroom, some professors may find it advisable to provide a “trigger warning” to students, but failure to do so will not turn an exercise of academic freedom into harassment or related improper behavior.<sup>1</sup>

An instructor’s statements that convey stereotyping and/or denigrating views about any person’s sex, gender, gender identity, or gender expression (or any other protected classification, including race, color, religion, sex, pregnancy, disability, national origin, ancestry, age, order of protection status, genetic information, marital status, disability, sexual orientation, arrest record status, unfavorable discharge from the military or status as a protected veteran), without appropriate clarification of the relationship between those views and legitimate instructional or academic content, or without larger efforts to ensure an educational environment where everyone is treated fairly, may be violating this policy. The repeated use of sexually explicit language by a faculty member that does not credibly further instructional goals may similarly be judged to violate this policy. Finally, when unwelcome sexual, sex-based, or gender-based conduct is directed at other members of the campus community, or when other members of the campus community suffer as third party bystanders, the University adopts the AAUP’s view that such conduct is “threatening to the academic freedom of others.”<sup>1</sup>

In responding to reports of sexual harassment or related improper behavior at the investigation stage or when deciding whether to impose sanctions or other responsive measures, if any, due consideration will be given to an individual’s rights to free speech, expression, and academic freedom. Speech conducted as a private citizen is protected by principles of free speech, but faculty should understand that not all free speech is costless. Some private speech by faculty can harm other people, undermine the reputation of the University and the profession, and have a negative impact on a faculty member’s ability to offer an education on terms that are equally welcoming and supportive to students regardless of sex, gender (including gender identity and gender expression), sexual orientation, race, color, religion, pregnancy, disability, national origin, ancestry, age, order of protection status, genetic information, marital status, disability, sexual orientation, gender identity, gender expression, arrest record status, unfavorable discharge from the military, or status as a protected veteran. When speaking as private citizens, faculty should be careful to consider these harms and to distinguish their personal views from those of the University.

## REPORT ON FACULTY SEXUAL MISCONDUCT

### **B. Compound Harms and Consequences for the Nondiscrimination Policy**

Sexual harassment is only one species of unwelcome conduct based on a protected classification. The Committee believes it would be problematic to create a new policy that explicitly prohibits a broader class of unwelcome sexual, sex-based, and gender-based behavior without addressing analogous behavior based on other protected classifications like race, color, religion, pregnancy, national origin, ancestry, age, order of protection status, genetic information, marital status, disability, sexual orientation, gender identity, gender expression, arrest record status, and unfavorable discharge from the military or status as a protected veteran. For members of our campus community who face multiple forms of unwelcome conduct based on membership in more than one protected category, the compound harms that arise from intersectional harassment and related improper behavior can have unique qualities and be particularly damaging. These harms are not always given the attention they deserve because the topic of compound harms has not been as well studied and because members of our campus community who suffer them are not always numerous enough to make their voices heard.

Empirical research suggests that people who are members of more than one protected classification, or who are members of protected classifications that have not traditionally been protected by the law, tend to experience some forms of unwelcome sexual, sex-based, or gender-based conduct more often than others. The harms are often compounded. Though empirical research on this topic is still in its early stages, it is already clear that lesbians, women of color, and transgender members of our community face unwelcome and harmful sexual, sex-based, and/or gender based conduct, along with compound harms, more often than straight, white, cis-gendered women or straight, white, cis-gendered men. The Committee believes that the campus should therefore appoint a task force that can develop analogous recommendations for other protected classifications and ensure uniformity for different classes of harassment.

Those recommendations may not be implementable simultaneously with the main recommendations in this report, which are focused on sexual, sex-based, and gender-based misconduct. But those additional recommendations should be implemented in a timely manner after appropriate consultation with members of our campus community who face these additional risks and harms. The aim of instituting these policies as close as possible in time would be to produce a more inviting culture and climate for all members of our campus community and to reduce harms to them from discriminatory behavior that is often especially damaging. The hope would be to help prevent problems at the source that can lead to mental health problems, a sense of alienation and institutional withdrawal, and poor educational outcomes and development at the University of Illinois. At the same time, the Committee believes it is critical that implementation of changes in the University's responses to sexual harassment not be delayed by these efforts and would support a graduated set of implementations to prevent delay.

To aid a future task force that focuses on these issues, the Committee notes that the just like the current Sexual Misconduct Policy, the current Nondiscrimination Policy

## REPORT ON FACULTY SEXUAL MISCONDUCT

prohibits harassment using definitions imported from the law, which only address hostile environment and quid pro quo forms of harassment. The current policy states in relevant part:

### **Harassment**

A form of discrimination and unwelcome conduct based on an individual's status within a Protected Classification. The unwelcome conduct may be verbal, written, electronic or physical in nature. This policy is violated when the unwelcome conduct is based on one or more of the protected classifications (defined below), and is either:

- (1) sufficiently severe or pervasive; and (2) objectively offensive; and (3) unreasonably interferes with, denies, or limits a person's ability to participate or benefit from educational or employment opportunities, assessments, or status at the University; or
- performed by a person having power or authority over another in which submission to such conduct is made explicitly or implicitly a term or condition of educational and/or employment opportunities, participation, assessments, or status at the University.

### **Protected Classifications**

Race, color, religion, sex, pregnancy, disability, national origin, ancestry, age, order of protection status, genetic information, marital status, disability, sexual orientation, arrest record status, unfavorable discharge from the military or status as a protected veteran.

The Committee recommends that a future task force consider creating a policy that prohibits not just "harassment," as defined by the current policy, but "harassment and related improper behavior," in a way that is analogous to our recommendations relating to sexual harassment. The amended policy should effectively eliminate the "severe or pervasive" requirement for all forms of harassment. Without prejudging the work of such a task force, the outlines of the new policy language might look like this:

**Harassment and Related Improper Behavior** means any unwelcome conduct based on a protected classification that occurs within or has an impact on the workplace or academic environment, regardless of how it may be communicated or displayed (verbally, in writing, electronically, or physically). Such behavior may take a variety of forms, including without limitation any one or more of the following:

- **Improper Hostility:** Objectively offensive treatment of another

## REPORT ON FACULTY SEXUAL MISCONDUCT

person or group, through words or conduct, with hostility, objectification, exclusion, or as having inferior status based on their membership in any protected classification. Offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance.

- *[Insertion of Other Common Categories to Be Added By Experts on a Future Task Force]*
- **Hostile Environment:** Unwelcome conduct based on any protected classification that is severe or pervasive, objectively offensive, and unreasonably interferes with, denies, or limits an individual's ability to participate in or benefit from educational or employment opportunities, assessments, or status at the University; or
- **Quid Pro Quo:** Unwelcome conduct based on any protected classification by an individual having actual or apparent authority over another, where submission to that conduct is made an implicit or explicit term or condition of educational or employment opportunities, assessments, or status at the University.

### Protected Classifications

Race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, pregnancy, disability, national origin, ancestry, age, order of protection status, genetic information, marital status, disability, arrest record status, unfavorable discharge from the military, or status as a protected veteran.

### Responses to Harassment and Related Improper Behavior and Relationship to Protected Speech

Harassment or related improper behavior need not be illegal under existing employment laws to violate this policy. To be disciplined, however, the behavior must either be by an employee or constitute hostile environment or quid pro quo harassment. In investigating and responding to reports of violations, due consideration will be given to an individual's rights to free speech, expression, and academic freedom. Speech is not harassment or related improper behavior just because it is subjectively offensive. A reasonable person must also find it offensive and it must lack bona fide academic purpose. Speech can, however, be used to harass (or engage in related improper behavior) and can provide evidence of discriminatory intent to engage in such conduct. What sanctions or other responsive

## REPORT ON FACULTY SEXUAL MISCONDUCT

actions may be deemed appropriate, if any, will depend on the facts and circumstances of the case.

### C. Revised Policy on Relationship Violence and Domestic Violence

In reviewing the classes of sexual misconduct covered in the Sexual Misconduct Policy, the Committee concluded that the policies that prohibit “domestic violence” and “dating violence” are under-inclusive given the values of our community. The Sexual Misconduct policy currently says:

**Dating violence** means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, and the existence of such a relationship shall be determined based on the reporting party’s statement and with consideration of the length of relationship, the type of the relationship, and the frequency of the interaction between the persons involved in the relationship.

**Domestic violence** means felony or misdemeanor crimes of violence committed by:

1. a current or former spouse or intimate partner of the alleged victim;
2. a person with whom the alleged victim shared a child in common;
3. a person who is cohabiting with, or has cohabited with, the alleged victim as a spouse or intimate partner;
4. a person similarly situated to a spouse of the alleged victim under the domestic family violence laws of the State of Illinois; or
5. any other person against an adult or youth alleged victim who is protected from that person’s acts under the domestic or family violence laws of the State of Illinois.

The problem with these policies (which are based on current legal definitions of domestic and dating violence) is that they prohibit violence or threats of violence to a partner within an intimate or sexual relationship but do not prohibit many other common forms of relationship abuse that involve coercive control. The current policy does not, for example, prohibit threats of killing a pet or a child in order to control a partner. Nor does the current policy prohibit one partner from locking another in the house, taking away a cellphone or access to bank accounts, or many other forms of coercive control that are common in actual cases of relationship abuse but not explicitly prohibited by domestic law. Coercive control often comes in a pattern, which may well include violence and threats of violence, but not all intimate partner abuse involves violence or threats of violence to a partner.

## REPORT ON FACULTY SEXUAL MISCONDUCT

To remedy this problem, the Committee recommends adoption of a policy—either to replace the definitions of “dating violence” and “domestic violence” in the Sexual Misconduct Policy or in a separate policy dedicated to this topic—that would use the following language:

**Dating (or Relationship) Abuse** means any act or pattern of abuse, or threat thereof, committed by a person who is or has been involved in a sexual or intimate relationship with the victim, regardless of the sexes or genders of the partners. The existence of a sexual or intimate relationship will be determined by considering the length of the relationship, the nature of the relationship, and the frequency of interaction between the persons involved.

Dating (or relationship) abuse can involve a range of behaviors, including physical or sexual violence (e.g., hitting, punching, kicking, biting, or any unwanted or coerced sexual activity), or threats thereof, against a current or former partner. Dating abuse can also include coercive control, which is most often a pattern of behavior that aims to force, intimidate, or control a current or former partner, using acts that may include—but are not limited to—

1. isolating a person or threatening to isolate them from friends, family, or support networks;
2. harming or threatening harm to self, others, property, or pets;
3. surveilling or monitoring;
4. unreasonably preventing access to friends, family, or other support networks;
5. limiting access to educational, employment, or community opportunities or resources;
6. interfering with or threatening to interfere with an individual's freedom of movement;
7. interfering with or threatening to interfere with an individual's ability to contact or communicate with others, or to use the phone or internet;
8. unreasonably restraining or threatening to restrain access to money, medication, transportation, or other necessities.
9. threatening to act or acting in ways that a reasonable person in similar circumstances would find intimidating, frightening, terrorizing, or threatening, or that one person should reasonably know that the other actually finds intimidating, frightening, terrorizing, or threatening.

If a single incident of harm or threat of harm to self or others is sufficiently severe, it may constitute coercive control without being part of a larger pattern of behavior.

**Domestic Abuse** means any dating or relationship abuse committed by a

## REPORT ON FACULTY SEXUAL MISCONDUCT

current or former spouse or intimate partner, a cohabiting or formerly cohabiting sexual or intimate partner, a person who shares a child in common with the victim, a person similarly situated to a spouse under the domestic family violence laws of the State of Illinois, or any other person against an adult or youth who is protected from that person's acts under the domestic or family violence laws of the State of Illinois.

In case it helps clarify the policy further, the following language—or some near variant of it—could be added to the Sexual Misconduct Policy to explain how the new domestic and dating abuse standards relate to existing legal standards and how the University typically responds to claims of domestic or dating abuse. The committee that handles changes to the Campus Administrative Manual should be in the best position to decide whether the following elaboration is useful or necessary:

**Relationship to Legal Standards.** In addition to violating this policy, some relationship abuse and domestic abuse may constitute criminal activity.

**Consequences of Dating (or Relationship) Abuse or Domestic Abuse.** The University will take all reports of relationship or domestic abuse seriously. Its response will depend on a number of factors, including the level and imminence of risk to the alleged victim (or any other parties who may be at risk), the nature and severity of the reports, the requirements of the law, the need for coordination with police authorities or other organizations involved, the special circumstances and needs of the parties (with particular attention to the safety concerns of the alleged victim), and the degree to which the conduct occurs during or may reasonably affect the work, study, or residential life of the University community.

### III. REVIEW OF SANCTIONS AND OTHER RESPONSIVE MEASURES

On October 29, 2018, the deans of all sixteen college-level units sent a letter to the Chancellor and Provost “condemning incidents of sexual misconduct on our campus and expressing concerns about the lack of definitive disciplinary procedures.” The letter asked for an expansion in “the scope of sanctions available for dealing with such misconduct and the range of circumstances under which sanctions can be issued.” The letter also called for the articulation of procedures to be used before employing such measures that better “balance the rights of the accused with our need as a campus to protect our students, faculty, and staff.” The second part of the Committee’s charge asks it to “recommend what sanctions, remedies, or other supportive measures should be available in case of policy violations.”

To reduce sexual harassment and related improper behavior on campus, it is critical not only to have policies that explicitly target sexual harassment in all forms but

## REPORT ON FACULTY SEXUAL MISCONDUCT

also to respond fairly and effectively to reports of misconduct. The most potent predictor of sexual harassment within an organization is whether there is a climate of perceived tolerance of sexual harassment. Whether such a climate exists is largely a function of whether (1) “targets of sexual harassment are supported and protected;” (2) “instances of harassment are investigated fairly and in a timely way—with due process for both targets and alleged harassers;” (3) “those found to have committed harassment are punished appropriately;” and (4) “the campus community is regularly informed about how the institution is handling/attending to claims and disciplining those who have violated policies.”<sup>39</sup> This section addresses how the University should respond to reports of violations of the new policy. The recommendations are designed to improve academic climate by addressing these four factors.<sup>40</sup>

The term “sanction” can be used in both a colloquial and a technical sense. In the technical sense, **sanctions** are official measures imposed on a respondent after a finding of a campus policy violation in order to penalize the respondent, express official disapproval of misconduct, rehabilitate the respondent when possible, and deter future instances of misconduct. In addition to sanctions in this technical sense, there are many other tools that the University can use to respond to reports of sexual misconduct. Many—like **remedies** that aim at ensuring educational access, **supportive measures** that aim to help complainants with the impact, stress, or trauma resulting from alleged misconduct, or **educational measures** that remind or retrain respondents about organizational policies and campus expectations—do not require final findings of fact or the same procedural safeguards for faculty before they can be used. Other measures, such as **interim actions**,<sup>41</sup> are meant to preserve the status quo during an investigation and thus cannot await a final finding from an investigation. Many of these other measures are nevertheless important tools in the larger arsenal for combatting sexual misconduct.

The Committee interprets the second part of its charge as asking the Committee to address what broad responsive measures the University should use to address reports of violations of the new policy. Our recommendations are designed to give the University sufficient means to address faculty misconduct fairly, effectively, expeditiously, and in a trauma-informed manner (to minimize retraumatization). An effective response system will require the coordination of many campus actors. This section thus ends with recommendations designed to promote that coordination. Appendix A contains flowcharts that illustrate how the response system would work if the University were to

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<sup>39</sup> THE SEXUAL HARASSMENT OF WOMEN, *supra* note 1, at 4.

<sup>40</sup> As noted on several occasions, however, sexual harassment cannot be fully addressed without broader shifts of culture in society and the academy. Culture is a function of shared beliefs, ideologies and assumptions, which are often deeply embedded and highly resistant to change. Cultural shifts are much harder to produce than shifts in climate.

<sup>41</sup> Interim actions are defined as temporary actions taken prior to the completion of an investigation to address concerns during the course of an investigation regarding either party’s safety or well-being, access to the University’s employment or education programs and activities, the safety of educational or work climate for non-parties, and/or the integrity of the investigative or response process.



## REPORT ON FACULTY SEXUAL MISCONDUCT

adopt the entire package of recommendations found in this report.<sup>42</sup> Appendix D contains similar flowcharts with the new proposals and interventions highlighted.<sup>43</sup>

The Committee adopted the following list of principles and goals to guide its decision-making in this section:

### Guiding Principles and Goals

The recommendations in this section are designed to:

- Provide the University with a robust set of tools to respond early, effectively, and expeditiously to faculty violations of the new policy;
- Enable swift and effective resolutions of egregious violations and early intervention for repeat offenders;
- Implement effective educational and rehabilitation efforts when appropriate;
- Facilitate reporting, regardless of the severity of the alleged behavior;
- Support complainants and witnesses, safeguard them from retaliation, and minimize retraumatization from multiple stages of review;
- Promote coordination, communication, transparency, and expeditious action between different parts of the response system;
- Ensure that the University's response system respects due process, academic freedom, free speech, and shared governance, preserves a culture of freedom of thought, and can withstand review and challenges both internally and externally;
- Enable the University to explain and defend its response system in simple and transparent enough terms to assure the community of protection;
- Produce a campus climate that is widely celebrated as intolerant of sexual harassment and related improper behavior; and

<sup>42</sup> See Appendix A, *infra*, pp. 92-95.

<sup>43</sup> See Appendix D, *infra*, pp. 124-127.

## REPORT ON FACULTY SEXUAL MISCONDUCT

- Foster a safe and welcoming environment where members of the campus community can carry out their work and studies free from sexual harassment and related improper behavior.

### A. **Progressive Sanctions for Faculty and Other Consequences for Professional Development**

The University's Statutes currently recognize only two tiers of official sanctions for tenure-stream faculty: "[s]evere sanctions other than dismissal" (governed by Article IX) and the severe sanction of dismissal (governed by Article X). This two-tiered system is common in higher education, but it does not allow for a sufficiently fair or effective framework to sanction tenure-stream faculty for all of the misconduct covered by the new policy. When developing a more fair and effective system with additional sanctions, it is important to clarify what procedures to follow to ensure adequate sensitivity to due process, academic freedom, freedom of speech, and shared governance.

One useful place to start this endeavor is with guidance from the American Association of University Professors (AAUP). Just as the AAUP played a formative role in articulating the norms that higher education should follow to protect academic freedom, the AAUP has more recently been at the vanguard of developments to align those norms with the growing needs of higher education to address sexual misconduct by faculty. In February 2014, the AAUP published a revised version of *Sexual Harassment: Suggested Policy and Procedures for Handling Complaints*.<sup>44</sup> In this document, the AAUP takes the position that traditional academic freedom concerns, which justify special procedural protections for faculty, require stronger-than-traditional protections for victims of sexual misconduct in higher education. The AAUP's explanation of this point is illuminating and worth reading in full:

The American Association of University Professors has traditionally opposed every kind of practice that interferes with academic freedom. In recognition of the profession's own responsibility to protect that freedom, moreover, the Association has frequently spoken to the need for colleges and universities to provide appropriate ethical standards and to provide suitable internal procedures to secure their observance.

Recently, national attention has focused on complaints of sexual harassment in higher education. These particular complaints invoke the Association's more general commitment to the maintenance of ethical standards and the academic freedom concerns these standards reflect. In its *Statement on Professional Ethics*, the Association reiterates the ethical

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<sup>44</sup> This document has been adopted by the AAUP's Committee on Women in the Academic Profession as well as by the AAUP's Council. The AAUP's Eighty-First Annual Meeting also formally endorsed it.

## REPORT ON FACULTY SEXUAL MISCONDUCT

responsibility of faculty members to avoid “any exploitation of students for . . . private advantage.” The applicability of this general norm to a faculty member’s use of institutional position to seek unwanted sexual relations with students (or anyone else vulnerable to the faculty member’s authority) is clear. Similarly, the Association’s *Statement on Freedom and Responsibility* states that “intimidation and harassment” are inconsistent with the maintenance of academic freedom on campus. This statement is no less germane if one is being made unwelcome because of sex, rather than because of race, religion, politics, professional interests or other irrelevant characteristics. The unprofessional treatment of students and colleagues assuredly extends to sexual discrimination and sexual harassment, as well as to other forms of intimidation.

It is incumbent upon a university or college to make plain the general policy we have just described, with an established procedure for its implementation. Educational programs about sexual harassment may be very useful in preventing its occurrence.

The institution should also make clear that sexual harassment and attempted sexual duress are included under the heading of unprofessional conduct threatening to the academic freedom of others. At the same time, it is incumbent upon a university or college to provide due process for those accused of harassment.

Not all institutions find it sufficient to treat sexual harassment under existing policy and procedures. Some have developed definitions of exceptional detail. Whatever policy is adopted, it should be made clear that the institution does not condone abuses by faculty members of the academic freedom of others, whether in respect to sexual harassment or otherwise, and that genuine internal recourse is available against such misconduct. It should also be made clear that these procedures will provide due process for those accused.

...

Well-publicized procedures such as these will help to create an atmosphere in which individuals who believe that they are the victims of harassment are assured that their complaints will be dealt with fairly and effectively. It is more important still to create an atmosphere in which instances of sexual harassment are discouraged. Toward this end, all members of the academic community should support the principle that sexual harassment represents a failure in ethical behavior and that sexual exploitation of professional relationships will not be condoned.<sup>45</sup>

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<sup>45</sup> <https://www.aaup.org/report/sexual-harassment-suggested-policy-and-procedures-handling-complaints>.

## REPORT ON FACULTY SEXUAL MISCONDUCT

The AAUP has not recommended a single policy or set of procedures to ensure that “genuine internal recourse is available against [sexual] misconduct.”<sup>46</sup> The AAUP has, however, published other documents that articulate a system of progressive sanctioning that might be imported into higher education for this purpose. The Committee believes that an explicit system of progressive sanctioning would prevent some repeat violations more quickly and effectively than the current two-tiered system, while still allowing for more severe sanctions (like dismissal) to be imposed when warranted.

In *Faculty Misconduct and Discipline*, Donna Euben, AAUP staff counsel, and Professor Barbara Lee describe how a system of progressive discipline might be adapted to faculty sanctioning in higher education.<sup>47</sup> In place of a traditional two-tiered system, universities might develop a three-tiered system of “minor” sanctions, “severe sanctions short of dismissal,” and then the most severe sanction of dismissal. Within the first two tiers, universities might identify a set of increasingly serious sanctions. Citing a previous AAUP document,<sup>48</sup> Euben and Lee offer the following list, comprising eight possible sanctions in total:

- (1) oral reprimand, (2) written reprimand, (3) a recorded reprimand, (4) restitution (for instance, payment for damage due to individuals or to the institution), (5) loss of prospective benefits for a stated period (for instance, suspension of “regular” or “merit” increase in salary or suspension of promotion eligibility), (6) a fine, (7) reduction in salary for a

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<sup>46</sup> *Id.* But see *id.* (articulating one possible set of procedures).

<sup>47</sup> Euben and Lee first describe how systems of progressive discipline often work in nonacademic institutions:

In nonacademic organizations, particularly those whose employees are unionized, a system of “progressive discipline” has emerged that is standard practice in most of these organizations. The rationale for progressive discipline is that the organization’s response to a first offense (unless it is a very serious one . . . ) should be more moderate than the response to a second, third, or fourth offense, particularly if the employee repeats the same offense. Therefore, initial discipline for a moderately serious offense would typically be an oral reprimand or warning, the discipline for the second occurrence might be a written warning, the discipline for a third offense might be an unpaid suspension, and termination might follow a fourth offense.

Benefits to the organization of progressive discipline include a clear record of employer attempts to “rehabilitate” the employee by punishing each successive offense more severely, and giving the employee several chances to improve prior to imposing severe discipline or termination. The use of progressive discipline also enables the organization to show that it communicated to the employee and to co-workers that the misconduct violated organizational rules, and will be responded to firmly.

Donna R. Euben & Barbara Lee, *Faculty Discipline: Legal and Policy issues in Dealing with Faculty Misconduct*, 32(2), JOURNAL OF COLLEGE AND UNIVERSITY LAW 241-308 (2006).

<sup>48</sup> This prior 1972 document was authored by a Special AAUP Joint Subcommittee charged with identifying proper sanctions for faculty short of dismissal,

## REPORT ON FACULTY SEXUAL MISCONDUCT

stated period, (8) suspension from service for a stated period, without other prejudice.

In *The Sexual Harassment of Women*, the National Academies of Science, Engineering, and Medicine cite this work of Euben and Lee<sup>49</sup> and recommend responding to sexual harassment by faculty using “[a] range of progressive/escalating disciplinary consequences that corresponds to the severity and frequency of the misconduct and has the potential of correcting behavior before it escalates and without significantly disrupting an academic program.”<sup>50</sup> As examples, they suggest the escalating use of “counseling, changes in work responsibilities, reductions in pay/benefits, and suspension or dismissal.”<sup>51</sup>

Euben and Lee distinguish between “minor” and “severe” sanctions for a reason. They recognize that in a fair system of progressive sanctioning, sanctions of different severity should be impossible with different levels of procedural safeguards for faculty. That view is consistent with how the law determines due process. In *Mathews v. Eldridge*, the Supreme Court explained that “due process is flexible and calls for such procedural protections as the particular situation demands.”<sup>52</sup> The core of due process is always twofold (notice and an opportunity to be heard), but the way this core can be instantiated when taking official actions that may burden a respondent “requires consideration of three factors”:

- (1) the private interest that will be affected by the official action [in this context, the burden to the faculty respondent that comes from the sanction that is being sought];
- (2) the risk of an erroneous deprivation of [a faculty respondent’s] interest through the procedures used, and probable value, if any, of additional safeguards [for that faculty respondent]; and
- (3) the Government’s interest [here, the University’s interest in combatting sexual misconduct by faculty], including the fiscal and administrative burdens that the additional or substitute procedure would entail.”<sup>53</sup>

When sanctions that are being sought differ in severity, different procedures can and should be followed to protect a faculty member’s due process rights. For example, if a sanction is relatively minor, that fact will speak in favor of procedures that allow for

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<sup>49</sup> See *Faculty Discipline*, *supra* note 47.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* It should be noted that not all of the consequences listed in this recommendation are sanctions in the technical sense used in this report. The National Academies suggest the use of progressive responses that may include not only sanctions, in the technical sense, but also some informal responses like counseling or changes in work responsibilities. This section will nevertheless focus on sanctions and leave to subsequent sections the question of how to integrate broader responsive measures into an effective system that may include progressive sanctioning.

<sup>52</sup> 424 U.S. 319 (1976).

<sup>53</sup> *Id.*

## REPORT ON FACULTY SEXUAL MISCONDUCT

imposition of the sanction prior to an opportunity to be heard so long as there is subsequent notice and a right to challenge the sanction. The relative lack of severity of a sanction may similarly speak against the necessity of a live hearing with cross-examination for imposition of the sanction and in favor of allowing imposition based on a finding of misconduct by a mere preponderance of the evidence (rather than requiring clear and convincing evidence).

In university contexts, considerations of academic freedom go beyond due process to suggest a need for shared governance in sanctioning decisions. Under long-standing AAUP principles, which have been endorsed by this University, faculty—and not the administration or owners of the University—should have the primary responsibility for academic decisions, which include decisions of “who may teach, what may be taught, how it shall be taught, and who shall be admitted to study.”<sup>54</sup>

To protect both due process and shared governance, Euben and Lee suggest that systems of progressive sanctioning in higher education should provide faculty with the following core protections:

- 1) “Notice of the alleged misconduct;”
- 2) “[O]ppportunity to respond to the charges;”
- 3) “[R]eview by a faculty body of both the factual allegations and the proposed discipline;”
- 4) “[P]rogressive discipline, if appropriate to the seriousness of the misconduct;” and
- 5) “[O]ppportunity for higher-level review of the fact-finding and the proposed sanction.”

Regarding severe sanctions, these core protections are already reflected in Articles IX and X of the University Statutes, which grant faculty the right to a live hearing with a faculty review committee and cross-examination before severe sanctions can be imposed. It is, however, a separate question whether the same burdensome procedures should be required for lesser sanctions or in a system of progressive sanctioning for faculty short of dismissal. Consistent with Euben and Lee’s suggestions, less cumbersome and more trauma-informed procedures could be used in these other settings. Less burdensome procedures are needed to strike the right balance in these other settings because sexual misconduct is severely harmful not only to those who experience it but also to the University’s educational and research missions and to the academic freedom of others.

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<sup>54</sup> *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring). (cited with approval in <https://www.aaup.org/issues/academic-freedom/professors-and-institutions>)

## REPORT ON FACULTY SEXUAL MISCONDUCT

More specifically, the procedures used to impose some lesser or progressive sanctions for violations of the new policy could offer notice and an opportunity to be heard but only *after* a sanction has been imposed. Faculty review boards could begin with findings from the Office of Access and Equity (OAE) and overturn them only if a faculty respondent can show by a preponderance of the evidence—and without a live hearing or cross-examination—that either (1) the alleged misconduct did not occur; (2) the sanction was disproportionate given the respondent’s disciplinary history; or (3) the conduct that is being sanctioned was a valid exercise of academic freedom. Though statutory changes would be required to make the option possible, this Committee believes that the University and System should consider allowing for progressive, severe sanctions short of dismissal to be imposed in the same streamlined manner as for non-severe sanctions if behavior keeps recurring that has already been sanctioned and violates a prior letter of expectation. In this form, faculty review would allow for expeditious and trauma-informed responses to sexual misconduct while still protecting due process, academic freedom, and shared governance.

If, on the other hand, the University seeks to dismiss a faculty member or impose a severe sanction short of dismissal absent repeat behavior that violates a prior letter of expectation, the severe sanction should only be imposable after following the current procedures found in Articles IX or X of the University Statutes. Those procedures require a pre-imposition hearing by a Senate-appointed panel, which is empowered to hear live testimony and must offer faculty respondents an opportunity to cross-examine witnesses in some way. The University bears the burden to prove its case with clear and convincing evidence.

Based on these considerations, the Committee offers the following recommendations:

**Recommendation 1: Adopt an Explicit System of Progressive Sanctions for Faculty Violations.** The University should adopt an explicit system of progressive sanctions for faculty, which is broader in scope than the sanctions that are currently available and includes some non-severe sanctions. The schedule should include, in order of increasing severity: (1) a formal letter of expectation (which functions as a recorded reprimand); (2) a temporary reduction in salary corresponding to a loss of one week salary; (3) a temporary reduction in salary corresponding to a loss of one month salary; (4) suspension without pay for a one-year period (or a one-year suspension from teaching with concomitant reduction of pay) with a requirement of proof of rehabilitation prior to any return to full employment; and (5) dismissal. In addition to sanctions that fall on this formal schedule, sexual misconduct may have other consequences for prospective benefits, merit salary increases, awards, honors, positions, discretionary funds, or other aspects of professional development—as described more fully below in recommendations 7 and 8. For a description of which tier of sanction to choose in response to different policy violations and when lower tiers should be skipped altogether, see recommendation 2 below.

The schedule proposed in this recommendation contains two monetary sanctions

## REPORT ON FACULTY SEXUAL MISCONDUCT

(see tiers (2) and (3)). Both of these sanctions have been carefully designed to be “non-severe” for purposes of Article IX of the University Statutes and to avoid raising any special academic freedom concerns. Those facts should obviate the need for following the cumbersome Article IX procedures that must currently be followed before a severe sanction short of dismissal can be imposed. Although the University might in principle try to implement a monetary sanction in different ways (e.g., as a fine, a furlough, a reduction in salary, or an automatic payroll deduction), the easiest path to implementation would appear to involve modifying future notices of appointment to include both a promised annual salary and a warning that violations of the Sexual Misconduct or Nondiscrimination Policy may lead to temporary reductions in salary corresponding to one week or one month of salary—or to an unpaid suspension or dismissal in cases that are sufficiently severe. To implement a monetary sanction in this way (and as a reduction in salary) would avoid problems associated with seeking to garnish wages; with requiring faculty members to work for any period of time without compensation; and with contracts that may be in place.

Though this list of progressive sanctions includes monetary sanctions, the University should emphasize in all public communications and discussions of these non-severe sanctions that their purpose is not to measure or remedy harms to a complainant but rather to create a progressive system of discipline with sufficient force, proportionality, and flexibility to correct some classes of misconduct when behavior may be correctible. If the misconduct in question is sufficiently severe or suggestive of safety or other risks to the campus community, then the faculty member should be placed on immediate administrative leave and the University should begin removal proceedings in addition to imposing these immediate reductions in salary. In other cases, progressive sanctions can provide an opportunity for learning and improvement within a context that clearly signifies that failures to correct the behavior will lead to a limited number of increasingly severe sanctions on the road to dismissal.<sup>55</sup>

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<sup>55</sup> In developing this proposed schedule of sanctions, the Committee considered other options, which may be easier to implement but which we believe should be considered only if monetary sanctions prove impossible to implement. For example, the University might use an alternative schedule of progressive sanctions that includes: (1) a letter of expectation; (2) ineligibility for a merit raise for one year; (3) ineligibility for a merit raise for two years; (4) suspension without pay for a one-year period (or a one-year suspension from teaching with concomitant reduction of pay) with a requirement of proof of rehabilitation prior to any return to full employment; and (5) dismissal. Our primary recommendation is for the University to find a way to implement financial sanctions of some kind (perhaps as a reduction in salary or perhaps as a furlough or even as an unpaid leave of absence in some cases if necessary), in part because the severity of ineligibility for merit raises depends on the annual salary program, which could be zero. If the University finds a way to impose financial sanctions and does not treat ineligibility for a merit increase as part of this formal schedule of sanctions, then we recommend that ineligibility for a merit increase still be treated as a non-punitive consequence of sexual misconduct for prospective honors and professional advancement, under the aegis of Recommendation 8 below. That treatment would obviate the need for ineligibility to appear as a part of a formal scheme of progressive sanctions, and would allow for sexual misconduct to prompt both immediate financial sanctions and other non-punitive consequences for prospective merit salary increases.

As yet another alternative, the Committee considered the option of using letters of expectation that are more and more strongly worded before turning to Article IX or Article X proceedings. These letters



## REPORT ON FACULTY SEXUAL MISCONDUCT

### **Recommendation 2. Clarify How the University will Respond to Sexual Misconduct.**

The University should place faculty and employees on notice that when responding to policy violations, the University will progress in its responses using the above-mentioned system of progressive sanctions. Choice of response should be based on the frequency and severity of the misconduct and the harm caused and on the potential to correct misconduct without significantly disrupting the academic or work environment. In some cases, responses should be non-punitive and may involve educational measures or counseling—as discussed more fully below in Section III.B. In cases of sufficient severity, the University should, however, begin suspension or dismissal proceedings immediately and should not be required to progress through lesser tiers of sanctions. Note, finally, that in addition to generating sanctions, sexual misconduct may have other effects on prospective faculty awards and benefits as described more fully in recommendations 7 and 8.

**Recommendation 3. Ensure Uniformity of Sanctioning.** For any sanctions of a faculty member that go above a letter of expectation, the University should place the final sanctioning decision with the Provost. The effectiveness of a progressive system of sanctions depends in large part on the predictability of sanctions for repeat violations. Predictability can also strengthen confidence in a system's fairness by allowing sanctions to be implemented in a uniform manner across units. Having a single person decide sanctions for faculty members will help to produce a fair and effective sanctioning regime.

In making these decisions, the Provost should confer with a larger “sanctioning team” that includes the Vice Provost for Academic Affairs, the College Dean, the Executive Officer of the faculty member's department, a representative from Human Resources, a representative from OAE and the Title IX Office, a representative from legal counsel, and a special Senate or faculty representative. These representatives may have special knowledge about how like cases have been treated or about any other legal or factual issues that may be relevant to a

might be given specific names, like an initial letter of expectation, a probationary warning, and a letter of final warning. Use of such an option would, however, hardly differ from the system that is currently in place and so would not create much of an advance in the University's ability to respond effectively to sexual harassment or related improper behavior. Any increased effectiveness that this option might have over the current system would depend in large part on whether the statutory changes proposed in recommendation 5 are implemented. There is no guarantee that that will happen, and we do not believe this option would be nearly as effective as a schedule that includes increasing monetary sanctions in addition to increasingly severe warnings. Finally, although we will be proposing the use of interim actions and protective measures to protect other interests in various ways in the recommendations below, monetary sanctions do not have any academic freedom issues associated with them that might suggest a need for Article IX procedures. Sanctions that involve removing faculty members from teaching or some other duties can prove more controversial in that regard. We recommend engaging in such actions as interim actions or protective measures in the appropriate circumstances, but not as part of any formal schedule of sanctions. For our short form recommendations relating to interim actions and protective measures, see pp. 104-105 and 106-106.

## REPORT ON FACULTY SEXUAL MISCONDUCT

particular case. Ideally, sanctioning decisions would take place quickly, before an initial report and recommendation is issued by OAE, so that the sanctioning decision could be communicated simultaneously with the OAE's report and recommendation.

The decision to sanction and the nature of the sanction should then be conveyed to the faculty member by the appropriate unit executive officer, who should retain continued (but reviewable) discretionary power in relation to other protective measures and non-punitive actions as necessary for the successful operation of the unit. The effective and fair implementation of the progressive sanction system should respect and leave in full force the statutory powers currently vested in all the officers of the University.

**Recommendation 4. Clarify Procedures for Imposing Non-Severe Sanctions and Progressive Sanctions Short of Dismissal.** Before any sanctions are imposed on faculty, the choice of sanction should be considered by a group to consist, at minimum, of the Vice Provost for Academic Affairs, the College Dean, the Executive Officer of the faculty member's department, representatives from OAE and the Title IX Office, the Office of Legal Counsel, and at least one faculty member who will not provide any conflicts of interest with respect to any future grievance processes (e.g., the Chair of FAC). The purpose of faculty representation at this early stage should be to advise as to whether any contemplated sanctions are likely to be deemed disproportionate on appeal or reversed because the conduct was a valid exercise of academic freedom. To prevent delay, the faculty representative could be given a short but reasonable turnaround time to raise any objections and advise as to how a faculty review board might view the matter. Absent a timely objection, the sanctioning group could proceed without such input. Letters of expectation could be issued without Provost input, though the Provost should be responsible for deciding to impose or pursue any larger or progressive sanctions on faculty members for reasons discussed in the last recommendation.

Non-severe sanctions and progressive sanctions short of dismissal should be impossible without any further review by a faculty review board. (For progressive sanctions that are severe but short of dismissal, this procedural innovation would require a change to the statutes, as described more fully in recommendation 5 below.) Faculty members should, however, be given the right to appeal to a panel that includes faculty representation. Current OAE procedures already include such a right, and the appeal panel includes faculty representation with special training to handle sexual misconduct cases. The panel is authorized to affirm, reverse, or remand findings relating to policy violations due to errors in factual findings or conclusions, procedural errors, or new evidence that is material but could not have been presented earlier. The Committee recommends formalizing this procedure, including a requirement of faculty representation and special training on sexual misconduct for any appeal within OAE of a sexual misconduct case involving a faculty respondent. The forthcoming OAE procedures have taken steps to do this.

## REPORT ON FACULTY SEXUAL MISCONDUCT

Under Article X, Section 2, faculty respondents have a further right to bring a grievance before the Committee on Academic Freedom and Tenure if they believe that they “do not enjoy the academic freedom which it is the policy of the University to maintain and encourage.” The statutes specify that “[t]he several committees may from time to time establish their own rules of procedure.” In cases where a non-severe sanction or progressive sanction short of dismissal is being imposed for sexual misconduct, CAFT should consider developing special, streamlined procedures to hear any challenges to such sanctions and recommend reversal only if the conduct found in the OAE process was protected by academic freedom or is being sanctioned in ways that unreasonably burden academic freedom. To decide these questions, CAFT should not engage in any new fact-finding or conduct any new hearings that require cross-examination of a complainant in the context of sexual misconduct cases. The proceedings could happen only after the OAE appeals process has been exhausted, such that the existence of the conduct has been established and the only remaining check is for a violation of academic freedom assuming those facts.

If, however, the University brings either dismissal proceedings against a faculty respondent or seeks to impose a severe sanction short of dismissal without violation of a prior letter of expectation, then the sanction can only be imposed after the University has followed the more extensive pre-imposition proceedings before CAFT or a Senate-appointed review board as described in Articles IX or X of the University Statutes.

**Recommendation 5. Revise Article IX’s Definition of “Severe Sanctions Other than Dismissal.”** An ad hoc Senate committee should be formed to develop and propose changes to Article IX of the University of Illinois Statutes to address its overly narrow limitation on the “severe sanctions other than dismissal” that are available.

Article IX currently allows only one severe sanction other than dismissal: “suspension with or without salary (full or partial) for a period not to exceed one-half of the individual’s normal appointment period.” A one-term suspension with salary can function more like a free unpaid sabbatical than a severe sanction short of dismissal. This limitation also prevents the University from imposing other severe sanctions short of dismissal that may be necessary in a fair and effective system of progressive sanctioning. Before seeking to dismiss a faculty member, the University may need to be able impose a year-long suspension without pay along with a requirement of proof of counseling and rehabilitation prior to rejoining.

Article IX does not appear to be functional with its limited definition of “severe sanctions other than dismissal.” One sign that it is not functioning is that no one on the Committee remembers Article IX ever having been invoked in any case on this campus.

An ad hoc Senate committee could be formed to address these problems. Without judging the work of that committee, one way to do this would be to

## REPORT ON FACULTY SEXUAL MISCONDUCT

amend Article IX, Section 6(e) to read:

When misconduct is determined to have occurred, a severe sanction other than dismissal may consist of a suspension without pay not to exceed the individual's normal appointment period or long-term relief from teaching with a concomitant reduction in pay along with proof of counseling and rehabilitation before rejoining. During the period of any sanctions other than dismissal, health and retirement benefits shall be maintained.

In order to align Article IX with the needs of a system of progressive sanctioning that is sufficiently expeditious and trauma-informed in the context of repeat misconduct, the following language (or some near variant of it) should be included in any revision of Article IX:

If the cause for initiating the procedures in this Article is a violation of the Sexual Misconduct Policy or Nondiscrimination and Harassment Policy for which prior sanctions have been imposed, then the initial grounds for imposing the sanction shall require only a finding, based on the preponderance of evidence, that the respondent failed to comply with the prior letter of expectation. The faculty member shall have a right to appeal the sanction before a Senate-appointed review board, which may reverse the sanction or require a lesser progressive sanction but only if the respondent can show by a preponderance of the evidence, and without a live hearing that requires cross-examination of any complainant, either that (1) the conduct described in the report was protected by academic freedom or (2) is being sanctioned in ways that unreasonably burden academic freedom.

This change would allow for a more rapid and trauma-informed system of progressive sanctioning, including the immediate imposition of severe sanctions short of dismissal in cases of sufficiently severe and repeat misconduct.

Statutory changes are difficult to achieve and would require the coordination of three campus Senates as well as the Board of Trustees. There is no guarantee that this change is possible. Without such a change, however, the only functional severe sanction that the University will have to respond to sufficiently severe or repeat misconduct by faculty is dismissal with revocation of tenure. Dismissal proceedings are lengthy and difficult at any University because of the procedural protections granted to tenure. Dismissal proceedings can involve retraumatization of complainants and dismissal may not always be the best response if something less severe might still be effective. Complainants, faculty, the Provost's Office, the Board of Trustees, and other campuses in the system may therefore find they agree that it would be more fair and effective to allow one-year unpaid suspensions (or one-year suspensions from teaching with concomitant reductions in pay) with proof of rehabilitation before returning to full service in some cases.

**Recommendation 6. Consider Trauma-Informed Methods when Revising Articles IX and Any Related Grievance or Review Procedures.** Balancing the

## REPORT ON FACULTY SEXUAL MISCONDUCT

obligations of due process and protection of victims is a delicate challenge. Involving members of FAC or CAFT early in the development of a case, as proposed in recommendation 3, may help reduce the need for repetitive collection of evidence and help minimize the retraumatization of complainants due to multiple stages of lengthy review or cross-examination. The need to minimize retraumatization should be considered throughout University processes that deal with sexual misconduct.

**Recommendation 7. Clarify Other Consequences of Misconduct for Awards, Honors, Prospective Benefits, and Professional Development.** In addition to any sanctions that may fall into the system of progressive sanctions described in recommendation 1, faculty should be made aware that many administrative decisions include reflections about how a faculty member's reputation for integrity or fitness for certain roles fit into the University's missions. The University reserves the right, which it currently exercises in many such contexts, to examine an individual's disciplinary record when making such decisions. These outcomes are not punitive but can have impacts on professional development.

**Recommendation 8. Incorporate Expectations about Faculty Conduct into Materials Distributed at Hiring or when Describing Some Awards or Other Forms of Professional Advancement.** The University should make its expectations concerning sexual misconduct by faculty clear when extending offers of appointment, awards, honors, and other forms of professional development. The University could do this in much the way it makes its expectations of tenure clear to incoming faculty when making tenure-stream hires, in materials provided to lateral hires, and in other similar communications. The University should provide faculty with notice when some honors and awards may be subject to revocation in case of violations of the new policy. Though many of these prospective benefits have traditionally been decided without consideration of a disciplinary history relating to sexual misconduct, the Committee believes that it would be appropriate and send the right signal throughout campus to make it clear that sexual misconduct will render a person ineligible (either for some time or permanently) for many of these prospective awards and benefits.

In some cases, there will be difficult questions of what awards should be subject to conditions or eligibility constraints of this particular kind. To address these issues with appropriate shared governance, the University should facilitate the creation of a joint senate-administration committee to determine when, as a matter of general educational policy and mission, faculty who engage in sexual misconduct should be ineligible for some prospective awards, rewards, or grants offered by the University and for how long. Examples might include temporary ineligibility for merit salary increases, honors, promotion, chairs, leadership roles, sabbaticals, and other discretionary grants. Units or other granting committees should engage in similar reevaluations, using appropriate procedures to ensure shared governance over any decisions about any academic matters at the college level.

These recommendations would bring the University in line with recent

## REPORT ON FACULTY SEXUAL MISCONDUCT

developments in higher education. Increasingly, external institutions—such as the AAUP, the American Academy of Arts and Sciences (AAAS), the National Science Foundation, the American Economic Association, the American Geophysical Union, and the American Mathematical Society—have begun to develop explicit policies that recognize that sexual misconduct interferes with the academic mission of research, teaching, and service. Professional organizations have increasingly begun to state that some grants or honorary recognitions are dependent on a record of integrity that includes a history of refraining from sexual harassment. Several of these organizations have developed procedures that allow for the revocation of some grants or honors in the event of sexual misconduct. Examples include the honors of being an AAAS Fellow or an American Mathematical Society Fellow.

### **B. Non-Punitive Responsive Measures**

In addition to sanctions, the University has traditionally used a wider array of measures to respond to reports of sexual misconduct. This section discusses non-punitive responses and offers recommendations for the extended, amended, or new use of different classes of non-punitive measures when responding to alleged violations of the new policy. The categories to be discussed include interim actions, remedies, supportive measures, educational measures, voluntary mediation, and restorative process. Each of these terms will be defined in an appropriate section below. They are also defined in the glossary.

#### **1. Interim Actions**

When a report of sexual misconduct is first made to the Title IX Office, the University may need to engage in some interim actions before there has been any informal process or formal investigation. The term “interim action” refers to any temporary, non-punitive action taken prior to the completion of such processes to address concerns during an investigation about either party’s safety or well-being, continued access to the University’s employment or education programs and activities, the safety of the educational or work environment for third parties, and/or the integrity of the investigative process.

The critical feature of an interim action is that it is interim—or *temporary*. Unlike sanctions, which can only be imposed after a finding of wrongdoing, interim actions are typically taken at or near the start of an informal process or formal investigation and last only until completion of one of those processes. Examples may include temporary restrictions on contact between the parties, temporary changes in work or housing locations, temporary modifications of work or class schedules, paid administrative leaves, emergency removals, and other similar actions.

The question of whether and what interim actions to use in a case, if any, is currently discussed by an interim action team. For faculty respondents, this team contains representatives from the Provost’s Office, the OAE, the Title IX Office, the Office of

## REPORT ON FACULTY SEXUAL MISCONDUCT

Human Resources, the Dean of the college where the faculty respondent has a primary appointment, the Department Head, and, in some cases, the College's Office of Human Resources. Interim actions are initially imposed only until the completion of an informal process (maximum of 30 days) or a formal investigation (maximum of 60 days). Extensions may be granted, if needed, by the interim action team. Interim action decisions are based on internal protocols, which require consideration of safety and risk factors, the parties' needs and situations, and the integrity of the investigative process.

### **Recommendation 1. Extend Traditional Interim Actions to the New Policy.**

The University should extend its current use and methods of evaluating interim actions to any reports of violations of the new policy. Like the current policy, the new policy prohibits conduct that can be detrimental to the safety and well-being of the campus community and to the University's mission.

### **Recommendation 2. Involve Department Heads and Deans Early in the Interim Action Decision Process.**

Department heads and deans should be involved in interim action decisions. Though many interim action decisions (for example, those relating to no contact orders or work modifications) should be able to proceed expeditiously without that input, executive officers often have context-specific information about their units that may prove useful in fashioning interim actions to protect the campus community from risks during the course of an investigation. We understand that the Title IX Office and OAE have already begun to seek this input with respect to reports of violations of the current policy. The Committee supports that change and recommends its formalization with respect to the new policy.

### **Recommendation 3. Consider Faculty-Specific Interim Actions and Faculty Representation for Some Interim Actions.**

Deans or department heads should be consulted early in the process for suggestions regarding faculty-specific or unit-specific interim actions to consider. Some examples may include delaying consideration (when appropriate and consistent with both parties' rights to privacy and confidentiality) for some awards, chairs, leadership roles, or other honors pending the outcome of an investigation—especially if the faculty respondent would be rendered ineligible for the benefit or award or subject to revocation for misconduct. In any case where an interim action may burden a faculty member's academic freedom or burden conduct that is a valid exercise of academic freedom, the group should consult a member of CAFT or the FAC for advice to determine whether the interim action is likely to be reversed in a grievance.

Any interim decision to delay a deliberative process or an announcement of the conclusion of a deliberative process relating to a prospective award, role, or benefit should be taken without prejudice to the prospective decision if the fact-finding report issued by the OAE does not recommend further action. The delay

## REPORT ON FACULTY SEXUAL MISCONDUCT

should not in itself prejudice the outcome of any such prospective decision due to time constraints regarding the investigation. Decisions to take interim actions that may burden a faculty member should be stated in writing and provided to the respondent as part of the information received when notified of the complaint or as soon possible once the interim action has been decided. The Provost and Office of Human Resources should help to ensure uniformity of treatment between cases.

**Recommendation 4: Ensure Due Process, Shared Governance, and Academic Freedom when Imposing Paid Suspensions and Administrative Leaves.** The University should develop an explicit, precise, and clear suspension and administrative leave policy for faculty. The Provost's Office has been working on such a policy and consulting with faculty, the Senate, and other stakeholders about its proper content. Given the seriousness of imposing suspensions or administrative leaves even as an interim action, and in order to ensure shared governance and protect any academic freedom, we believe that any such policy must include faculty consultation—perhaps by including a member of FAC or CAFT on the decision committee as well as by allowing appeal to FAC and, should that not be satisfactory, to a Senate committee as stipulated in Article IX. To ensure expeditious action with rights to shared governance, the relevant CAFT or FAC representatives could be given a short, five-day turnaround to raise any concerns before implementation of a paid administrative leave and emergency removals could proceed even without any such delay.

If a case of interim suspension or administrative leave is appealed to CAFT or another Senate appointed committee, the procedures for handling the appeal should differ from the procedures currently used before severe sanctions can be imposed in order to ensure an expeditious and trauma-informed process. The committee should not allow for the cross-examination of any complainants and should allow for reinstatement during the course of an investigation only if the faculty member can show by a preponderance of the evidence that either (1) the conduct alleged is likely protected by academic freedom; (2) an administrative leave is unreasonably burdensome (to academic freedom or other faculty interests) given the nature of the allegations and the administrative leave is therefore serving an improper punitive function; or (3) the interim action is creating an undue burden arising from multiple extensions or delays that are not the faculty member's fault. When emergency removals or paid administrative leaves are used as interim actions, the office that imposes the emergency removal or paid administrative leave should always clarify that the actions are temporary and non-punitive.

It should be noted that the Department of Education's proposed Title IX regulations will likely require similar post-deprivation procedures to challenge emergency removals and temporary suspensions for students. OSCR already has internal procedures to allow for such challenges. Title IX does not require such procedures for faculty because Title IX is concerned with educational access, not academic freedom. Faculty members nevertheless have academic freedom rights that in our view warrant analogous procedural protections.



## REPORT ON FACULTY SEXUAL MISCONDUCT

**Recommendation 5: Allow for Simple Requests for Reconsideration within the OAE Process.** Without prejudice to any other appeal or grievance rights that a faculty respondent may have, the OAE should develop internal procedures that allow faculty respondents to make simple requests for reconsideration or modification of an interim action on the ground that the interim action is overly broad or unreasonably burdensome in the circumstances. For example, a no contact order may be overly broad if a student complainant sits on a committee with a faculty respondent, which warrants allowing committee-related group e-mails and responses to complete the committee's work. Requests for reconsideration should involve a simple paper process, which gives the respondent an opportunity to be heard before the interim action team. Interim actions should be modified or narrowed only if the interests of complainants and the University can be protected in ways that are less burdensome to the respondent. This process may moot the need for more extensive grievance or appeals proceedings in many cases.

### 2. Remedies

The term “remedy” refers to any non-disciplinary, non-punitive, individualized measures offered to a complainant by the University to redress or rectify alleged harms to the workplace or educational access sustained by a complainant due to a policy violation. Remedies are not sanctions. It is important to remedy harms created by violations of the new policy.

If a remedy is given as an interim action (and hence only on a temporary basis), then the above recommendations relating to interim actions should be followed. Remedies may, however, also be imposed as the result of an investigation, in which case they are not interim actions but final remedies. Because remedies are individualized, they may take a variety of forms. Examples of remedies may include final extensions of deadlines or other course-related adjustments, durable modifications of work or class schedules, durable changes in work or housing locations, academic assistance, and other similar measures.

**Recommendation 1: Extend Traditional Remedies to Violations of the New Policy.** The University should extend its current use and methods of deciding remedies to violations of the new policy. Conduct prohibited by the new policy can produce the same classes of harms to education and workplace as violations of the current policy.

**Recommendation 2: Embed More Confidential Advisors Who Can Help Coordinate Some Remedies without a Formal Report of Sexual Misconduct to the Title IX Office.** The University should explore mechanisms to embed

## REPORT ON FACULTY SEXUAL MISCONDUCT

additional confidential reporters within units and in geographically diverse locations to help with some remedies to educational or work access if a person who has experienced sexual misconduct does not want to file a report with the Title IX Office. These Confidential Advisors could provide a first line of access for the support of many potential complainants.

The 2017 Campus Climate Survey suggests that very few students who experience sexual harassment or misconduct ever make a formal report—a problem that is common in higher education around the nation. Regardless of whether a complainant decides to file a report with the Title IX Office, Confidential Advisors can provide confidential advocacy and support related to sexual misconduct including (but not limited to) crisis triage, safety planning, academic and employment needs, safe housing access, mental and physical health referrals, and support and advocacy with the criminal, employee, and student discipline systems. By increasing the amount and availability of Confidential Advisors across campus, the University would provide the community with greater access to time-sensitive services and support mechanisms and make accessibility less linked to decisions to report.

### 3. Supportive Measures

In addition to sanctions and remedies, the Committee has been asked to recommend what other supportive measures should be available for reported violations of the new policy. We will use the term “supportive measures” to refer to any non-disciplinary, non-punitive, individualized measures designed to assist parties with the impact, stress, or trauma resulting from alleged misconduct or from a report of misconduct or to help parties understand their rights and options or navigate an informal process or formal investigation. The Department of Education’s proposed Title IX regulations offer a broader, but in our view less clear, definition of “supportive measures” as any “non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge, to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.”<sup>56</sup>

The campus’s *WeCare* website currently lists a number of internal and external support services—both confidential and non-confidential—that people who believe they have experienced sexual misconduct may use. A list of these resources is given to complainants in their initial interview with an investigator. A list is also provided in e-mails and other forms of outreach and is provided by confidential resources if and when they are contacted. The list includes references to University counseling and mental health services, confidential resources and advisors, third party medical or mental health services, academic assistance, and other similar services. Unlike sanctions, support

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<sup>56</sup> Department of Education, *Notice of Proposed Rulemaking*, 34 C.F.R. 106, RIN 1870-AA14, at 133-134 (Nov. 18, 2018), available at <https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-nprm.pdf>.

## REPORT ON FACULTY SEXUAL MISCONDUCT

services can be and often are offered to complainants without the need for any finding of wrongdoing or other actions involving a respondent.

**Recommendation 1: Extend Traditional Supportive Measures to Reports of Violations of the New Policy.** Title IX Office should extend its use and methods of evaluating supportive measures to alleged violations of the new policy. The conduct prohibited by the new policy can produce the same types of harms and require the same classes of support services as conduct prohibited by the current policy.

**Recommendation 2: Create Adequate Staffing and Resources for Confidential Advisors and Support Services.** The University should ensure that sufficient funds and staffing are put into Confidential Advisors and other support services to meet the evolving needs of the campus community. Levels of funding and staffing should be tied to campus needs based on a periodic assessment of demand and wait times. The recent addition of staffing lines at the Women's Resource Center (from none to two staff members dedicated solely to providing confidential advising to survivors of sexual misconduct) is a step in the right direction, but the University should continue to check to ensure these resources are sufficient to meet campus needs. The University should create more Confidential Advisor positions, increase public awareness of this resource (especially with faculty and other employees), and possibly co-locate some within colleges or units to increase access to varied campus communities. Units could help by offering service credit to faculty or staff who work with Confidential Advisors and the Title IX Office to provide additional forms of support and education to people in their unit. For elaboration of these last recommendations, see Section III.C.1.

These recommendations are based on concerns that the Committee has heard from numerous students, faculty, senators, and people who provide support services to students about the wait times needed to access some support services. The University of Illinois at Urbana-Champaign is also located in a region with relatively few external resources for counseling or mental health or other resources given the size of its student population. A sizeable student population is largely reliant on support services offered by the University.

**Recommendation 3: Provide Access to Supportive Measures for Non-Parties and Non-Reporting Parties.** The University should make sure that the community knows that support services are available for non-reporting parties and for non-party witnesses or others who have been adversely affected by sexual misconduct.

## REPORT ON FACULTY SEXUAL MISCONDUCT

### 4. Protective Measures

The proposed Title IX regulations define “supportive measures” as measures offered only to complainants or respondents. Remedies are limited to people who have been harmed, and sanctions serve punitive functions. In some cases, the University may need to go beyond offering sanctions, remedies, and supportive measures, when construed as limited in these ways, to protect innocent third parties from the risks of some sexual misconduct. We will use the term “protective measures” to refer to measures designed for this purpose.

**Recommendation 1. Prioritize Broader Protective Measures.** The University should offer responsive measures designed to protect not only the parties involved in sexual misconduct cases but also innocent third parties from risks at all procedural stages. The University currently tries to do this, at or near the start of an investigation, by engaging in a safety and risk analysis to determine whether a formal investigation is needed and what interim actions should be taken to protect the educational and work environment for third parties. These decisions, which can involve paid administrative leaves, currently involve representatives from the Provost’s Office, the OAE, the Title IX Office, the Office of Human Resources, the Dean (or Associate Dean) of the college where the faculty respondent has a primary appointment, the Department Head, and, in some cases, the College’s Office of Human Resources. The Committee supports the formalization of that process for reported violations of the new policy, including an extension to determine any durable protective measures that should be imposed at the close of an informal process or formal investigation.

In cases where protective measures may raise academic freedom concerns, this decision team should include two faculty representatives from CAFT or FAC to determine whether the protective measures at issue are likely to be reversed on appeal or in a grievance. To ensure expeditious action, the relevant CAFT or FAC representatives could be invited to participate in the initial decision or, if they are unavailable, be given a short turnaround to raise any concerns before implementation (except in emergency cases). Faculty respondents should also be given a right to request modification or reconsideration before the same decision team on the grounds that a protective measure is overly broad or unreasonably burdensome.

### 5. Educational Measures and Counseling

In response to some reports of policy violations, the University employs educational measures or counseling (hereinafter “educational talks”). Educational talks are designed to remind individual respondents or groups who may need additional training about the content of campus policies or campus expectations of conduct. Educational talks may also convey information about the harms of sexual misconduct, the

## REPORT ON FACULTY SEXUAL MISCONDUCT

scope and limits of academic freedom and free speech; and the University's mission to cultivate the immense talent of a diverse community by creating a welcoming, safe, and supportive culture and climate.

Educational talks may sometimes be used in lieu of a formal investigation or sanctions, if warranted based on a complainant's desires and willingness to participate in a formal investigation, the nature and severity of the allegations, whether misconduct can be proved, the respondent's disciplinary history, and a safety and risk analysis. Educational talks may also be combined with sanctioning or other responsive measures. In either event, it is important for educational talks to be effective.

In many cases involving faculty respondents, the University's use of educational talks can be highly effective, but there are exceptions. A significant problem in the past has been that educational talks that reference the current Sexual Misconduct Policy's definition of "sexual harassment" can inadvertently teach some non-compliant, repeat offenders how to engage in recurrent behavior and avoid sanctions by staying just below the legal definition of a hostile environment. In addition, unlike most non-faculty employees, some faculty respondents do not feel as accountable to the OAE, the Office of Human Resources, or University legal counsel when told that their conduct falls short of the legal definition of "sexual harassment" but should nevertheless stop because it is unprofessional in the workplace. This section contains recommendations designed to make educational talks more effective in circumstances like these.

**Recommendation 1: Emphasize the New Policy Language, Coverage, and Responsive Measures in Educational Talks.** Educational talks should emphasize distinctions between the new policy and legal definitions of sexual harassment; clarify that the University expects behavior from its faculty members and employees that goes beyond what the law requires; and ensure that faculty understand the scheme of progressive sanctions and other responses that will be used to address misconduct.

**Recommendation 2: Emphasize Larger Efforts to Address Culture and Climate in Educational Talks.** Educational talks should be framed as one aspect of larger campus efforts, backed by senior leadership at all levels, to address culture and climate and meet aims that are central to the University's missions to educate and employ a diverse citizenry. The talks should indicate that the University seeks to (1) foster a healthy and supportive atmosphere for all members of the campus community, which is free from harassment of all forms; and (2) support the mental health, quality of life, and educational and professional development of all members of the campus community. The talks should (3) emphasize the harms created by harassment, including the special harms and vulnerabilities faced by some members of the community due to multiple forms of harassment; and (4), if applicable, help faculty understand the scope and limits of academic freedom and freedom of speech and how to discuss controversial topics in an academic context in respectful and civil manners.

## REPORT ON FACULTY SEXUAL MISCONDUCT

**Recommendation 3: Involve the Vice Chancellor for Research, the Vice Chancellor for Diversity, Equity, and Inclusion, and/or Deans or Department Heads in Educational Talks.** Educational talks should be provided by people to whom faculty members will listen. Even if an OAE investigator performs the talks, the processes leading to them should involve some formal participation of faculty leadership—such as the Vice Chancellor for Research, the Vice Chancellor for Diversity, Equity, and Inclusion, or Deans and/or Department Heads. Their participation should help ensure that educational messages are conveyed with sufficient institutional authority and backing and as aspects of the University’s larger mission. Senior leadership and executive officers should be trained by campus experts to ensure their participation is consistent with campus initiatives and best practices with respect to how values are to be communicated and implemented within departments.

**Recommendation 4: Implement a Formal System of Cautionary Notices.** Even without a formal investigation or finding of wrongdoing, educational talks should include a written “cautionary notice” when allegations have been substantiated to some degree. A cautionary notice is a notice that clearly indicates that (1) the conduct alleged in a report would violate the new policy if found; (2) there is credible evidence to support the allegation; (3) there has nevertheless been no formal investigation or finding of wrongdoing; (4) the existence of the cautionary notice will be taken into consideration when deciding whether to pursue formal investigations of any future reports of misconduct; and (5) the report in question may be reopened and investigated at a later date as part of a larger investigation. Cautionary notices need not be accompanied by educational measures or counseling, but an option to receive education or counseling should be given to respondents whenever a cautionary notice is issued. Cautionary notices should be noted in the internal Title IX database so that it is easier to identify and act upon repeat reports that have been substantiated to some degree.

**Recommendation 5: Document Educational Talks, Counseling, and Cautionary Notices.** Educational talks, counseling, and cautionary notices should be written, documented, and passed up the relevant supervisory chain.

**Recommendation 6: Track Units and Employ Unit Training When Needed.** The Title IX Office and OAE should track the number of cautionary notices or other adverse actions by unit or department and identify units or departments whose per capita rate of cautionary notices or other adverse actions suggests a need for group counseling to effect changes in climate. Those units or departments should be given official group training on the University’s policies, procedures and practices, which are led by a special faculty investigator or others

## REPORT ON FACULTY SEXUAL MISCONDUCT

who are specifically trained to educate faculty. Methods to ensure accountability for the training should be developed. The existence of this mechanism should incentivize deans and department heads to make combatting sexual harassment a high priority during their leadership.

### 6. Voluntary Mediation and Restorative Processes

The Department of Education's proposed Title IX regulations will require that parties be able choose mediation instead of a formal investigation to handle some complaints of sexual misconduct. Under these regulations, both parties must consent to mediation, and complainants will retain the right to leave mediation and ask for a formal investigation at any time prior to the conclusion of a mediation. Given these likely regulatory changes, the OAE should begin to build out a voluntary mediation option as part of its informal process.

A further question is whether the University should offer an option of restorative processes when handling some cases of sexual misconduct. Proponents of restorative processes point to the potential usefulness in some cases of consensual face-to-face meetings, which are managed by experts and aim to repair harms while transforming behavior and healing communities. Restorative processes can result in amends or other forms of apology or restitution that are not typically available through other means and can involve interactive processes designed to heal or offer reconciliation for offenders, survivors, and the communities in which they are embedded. Because sexual harassment and related improper behavior often occurs in work or social contexts that involve many individuals, the availability of restorative processes that engage key actors in direct dialogue may promote positive shifts in campus culture and greater shared understanding of sexual misconduct and its harms. Restorative processes may also promote transparency and accountability in some cases. Restorative processes have proven especially effective at preventing the recurrence of some behavior.

At the same time, the University should approach the use of restorative processes with caution in this context. Claims of sexual harassment, sexual misconduct, and related improper behavior can raise safety concerns that may preclude the use of face-to-face meetings. In addition, restorative processes must be genuinely voluntary (on both sides) to work. That precondition may not always be met in the context of sexual misconduct cases because of the power differentials that often accompany sexual misconduct and allow it to occur. Rather than try to decide these issues here, the Committee believes that a separate task force should be formed to consider these questions while the University develops its informal option for voluntary mediation.

Based on these considerations, the Committee recommends:

**Recommendation 1: Appoint a Task Force to Consider a Mediation Branch of Informal Process.** The University should form a task force to study and

## REPORT ON FACULTY SEXUAL MISCONDUCT

recommend the development of a voluntary mediation option within informal process. The task force should consider what models of mediation (or related forms of voluntary alternative dispute resolution), if any, might work best in the context of sexual misconduct cases within higher education. The task force should consider whether and how safety and mutual consent might be ensured in cases that can involve power imbalances. The task force should strongly consider disallowing binding non-disclosure agreements in cases where such agreements may create risks to the safety of third parties. Finally, the University should not allow such an option in cases involving sexual violence.

The Committee bases this recommendation in part on the fact that the Department of Education's forthcoming Title IX regulations will almost certainly require the University to make some voluntary alternative dispute resolution mechanisms available to parties. Though the Committee has not studied the different ways these regulations might be implemented, it is critical that the University begin to consider these issues with sufficient care to be able to respond to the upcoming regulatory changes in ways that reflect the University's values.

**Recommendation 2: Appoint a Task Force on Restorative Processes for Sexual Misconduct Cases.** Consistent with a growing literature, which suggests the potential usefulness of restorative process in a range of circumstances when safe and fully consensual, the University should form a task force to decide what restorative models, if any, should be integrated into the campus's informal processes for responding to sexual misconduct. The task force should consider whether and how safety and voluntary participation can be ensured in the special context of sexual misconduct cases in higher education. This work should begin while the University develops its informal processes relating to voluntary mediation or other voluntary alternative dispute resolution mechanisms needed to respond to the forthcoming Title IX regulations. Restorative processes will likely need to be an option within informal process that is distinct from voluntary mediation and will not be required by the Title IX regulations.

### 7. Broader Consequences of Sexual Misconduct in the Digital Age

Given advances in digital communication and changing public attitudes toward sexual misconduct, faculty should be made aware that sexual misconduct can have increasingly severe consequences that are not within the University's control. The informal sharing of information (whether by third party vendors, in on-line forums, or by people who have directly experienced misconduct) has begun to lead to increasingly large repercussions in the digital world. Social networks and online websites are beginning to distribute information about accusations or findings that can have a negative impact on an accused faculty member's ability to recruit and retain excellent graduate students, teach and interact effectively with colleagues, attain leadership positions, or make lateral



## **REPORT ON FACULTY SEXUAL MISCONDUCT**

moves. The University can maintain some degree of confidentiality over personnel files, but the Freedom of Information Act allows the public to access a faculty member's disciplinary record and many aspects of Title IX investigations. The University cannot control what third parties do with such information. These facts should be emphasized in communications to faculty, including when engaging in educational measures or counseling.

### **C. Coordination of Actors within the System**

The University's Title IX Coordinator is responsible for overseeing the University's compliance with Title IX as well as related state and federal laws, regulations, and guidance. These responsibilities include, among other things, overseeing the University's responses to all reports and complaints of sex discrimination and sexual misconduct. The Title IX Coordinator is responsible for monitoring outcomes, identifying and addressing any patterns or systemic problems, and assessing the effects any such patterns or problems on campus climate.

To implement the full recommendations in this report would require the cooperation and coordination of many actors throughout the campus (and sometimes even at the system-level or on other campuses when, for example, considering statutory changes). The new prohibitions nevertheless cover the same class of behavior that has traditionally fallen within the oversight of the Title IX Coordinator. Within this campus, we believe the Title IX Coordinator should therefore be responsible for overseeing the University's compliance with the new policy. This section contains additional recommendations to help coordinate the Title IX Office with other actors critical to an effective response system.

#### **1. Survivor Support and Problems of Underreporting**

Sanctioning and many other responsive measures depend on the reporting of misconduct to campus officials. Without a report, there can be no investigation, and without an investigation, there can be no findings of policy violations or sanctions. Empirical evidence suggests that sexual harassment in higher education is widely underreported. National evidence is consistent with evidence from the 2017 Campus Climate Survey, which suggests that only 1.6% of students facing gender-based or sexual hostility by faculty report the incident to the Title IX Office or an employee who is required to make such a report. Only 6.1% ask for help from the University. Experiences of sexual coercion and quid pro quo sexual harassment are rare, but only 3.4% of students who experience it report the incident.

Survivors of sexual misconduct may not report it for many reasons, but policies, processes, and practices should be designed not to discourage reporting or have a chilling effect on reporting. Reporting can be discouraged by many factors including perceived deficits in policy coverage, perceptions of futility, fears of retaliation, and concerns about the traumatizing, burdensome, or time-consuming nature of process.

## REPORT ON FACULTY SEXUAL MISCONDUCT

**Recommendation 1: Communicate New Policies to Address Reporting Concerns.** As part of the larger roll out of the new policy, the University should actively communicate the content of the new policy to the campus community. Many complainants do not report incidents of sexual harassment or related improper behavior because they do not believe what they experienced was severe enough to report or because they believe that reporting will be futile. The University should explain why it has chosen to offer more protections under campus policy than is required by law and that the new policy prohibits sexual harassment that is not necessarily severe or pervasive enough to create a hostile environment. The University should explain how it will respond to reports of violations of the new policy using a system of progressive responses (including some non-punitive response, when appropriate) and should invite reporting of violations regardless of severity. When features of the new system address reasons some complainants may fear reporting, those features should be widely communicated and understood by the campus community.

**Recommendation 2: Create More Confidential Advisors and Support.** The University should create more Confidential Advisor positions, increase public awareness of this resource (especially with faculty and other employees), and possibly co-locate some within colleges or units. Many victims of sexual misconduct do not want to report through formal reporting mechanisms because they are afraid of or misunderstand the process and/or find it difficult to talk to campus officials with whom they are unfamiliar. It might facilitate reporting—and would certainly help with support—if some Confidential Advisors were embedded within units to allow students to become more familiar with co-located Confidential Advisors. This would create a more accessible and streamlined referral process for people who believe they have experienced sexual misconduct to access additional support systems, both within the University and beyond. An option like this would require an ongoing financial commitment from academic units and/or the institution. Units could help by offering service credit to faculty or staff who work with Confidential Advisors and the Title IX Office to provide additional forms of support and education to people in their unit.

**Recommendation 3: Study and Consider for Adoption Evolving Forms of Informal Support and Coordination.** The University should create mechanisms to study periodically the evolving landscape of approaches to supporting survivors of sexual misconduct and make periodic reforms to reflect best practices as they evolve. The third-party service *Project Callisto* and recent appointment of ombudspersons in some professional societies now enable survivors to report incidents confidentially to these other resources before deciding whether to report to a Title IX Office. These resources can give people information about options for coordination if other survivors have reported the same person. The University should explore these and other ways of using Confidential Advisors or other databases or technical resources to facilitate the informal coordination and mutual support of people who may want to report but

## REPORT ON FACULTY SEXUAL MISCONDUCT

are reluctant to act alone.

### **Recommendation 4: Address Prospective Retaliation More Aggressively.**

The University should study and create mechanisms to mitigate retaliation prospectively and more aggressively. Title IX requires the University to respond to reports of retaliation, and retaliation is specifically prohibited by internal policy. But more targeted, transparent, and affirmative actions to protect complainants against retaliation would address some reasons for underreporting. For example, if a graduate student requires letters of recommendation from a former advisor, mechanisms might be created to have those letters reviewed by a department head before being sent out. Methods of addressing retaliation should be clearly communicated on the *WeCare* website and in other public materials.

**Recommendation 5: Increase Transparency of the Response System.** The Title IX Office and the OAE should engage in efforts to increase the transparency of its processes for handling reports of sexual misconduct, including transparency about the types of outcomes that are possible with different options and procedures. Even if the University is responding in numerous, active manners to individual reports and cases, those responses will have a maximally positive impact on campus climate only if the campus community widely understands the response system and is regularly informed about how the University is handling reports of sexual misconduct. More specific recommendations relating to transparency can be found below in Section III.C.5 and in Section IV.

## **2. Use of a Special Faculty Investigator**

Because of the special procedural safeguards that faculty are given and special academic freedom concerns, investigations into faculty misconduct must be handled with special care to survive internal and external review process.

**Recommendation 1: Train Special Faculty Investigator(s).** The University should devote resources to train and/or hire one or more Special Faculty Investigators. Those investigators should be trained on the special procedural issues required for faculty sanctioning or other responsive measures and the types of procedural and substantive problems that might prevent a finding from surviving review by CAFT or in a legal dispute or other grievance. The Special Investigator should be well versed in the norms of higher education, including the positions of the AAUP on the scope and importance of academic freedom in higher education. Special Faculty Investigators should be excellent at writing and explaining decisions in ways necessary to survive internal and external review. It is possible that the Special Investigator should be a member of the faculty.

## REPORT ON FACULTY SEXUAL MISCONDUCT

### 3. Shared Governance and Faculty Review Boards

When the University seeks to impose severe sanctions on a faculty member, that faculty member is currently provided with pre-imposition procedural rights to a hearing before a faculty review board under Article IX or X of the University Statutes. Earlier sections have recommended procedures to obtain advice from CAFT or the FAC before deciding on sanctions and have spelled out procedures to handle appeals and grievances of non-severe sanctions and progressive sanctions short of dismissal. Procedures like these help to ensure a proper role for shared governance and protection of faculty respondents' rights to due process, academic freedom, and tenure unless there are grounds for revocation with cause. But these processes can also delay some processes or create coordination problems within the response system that should be addressed.

**Recommendation 1: Provide Sexual Misconduct Training to Campus and Faculty Review Committees.** Before serving on a subcommittee to hear a case involving sexual misconduct, members of internal faculty grievance committees and appeals panels should be provided with training on sexual misconduct, contemporary understandings of trauma-informed and other best practices, the intersection of sexual misconduct and misconduct based on other protected classifications, and how sexual misconduct cases are investigated and handled.

**Recommendation 2: Minimize Retraumatization.** To the extent possible, CAFT or other internal review boards (including the Board of Trustees), under the advisement of sexual misconduct content experts, should develop procedures to minimize the retraumatization of victims due to multiple stages of cross-examination or other procedural hurdles.

### 4. Coordinating Timely Action at All Stages

One of the most common complaints heard nationally about investigations into sexual misconduct by faculty members in higher education is that processes leading to sanctions or dismissal take far too long. The problem is twofold. First, in the case of repeat offenders, traditional Title IX systems coupled with traditional, two-tiered sanctioning systems often lack the intermediate sanctioning resources needed to identify and correct repeat offenders early enough. Second, the sanctioning of faculty only within a traditional, two-tiered system often requires lengthy pre-imposition processes for sanctioning that make severe sanctions for severe violations take too long.

Implementing a progressive system of sanctions for faculty, as discussed in Section III.A, along with our earlier recommendations for using cautionary notices and more authoritative educational talks, should help the University identify and address

## REPORT ON FACULTY SEXUAL MISCONDUCT

some repeat conduct (that is, conduct that is not yet severe enough to warrant dismissal) much more quickly and effectively. In addition, the University has recently allocated more funds to the OAE to hire additional investigators. That additional funding, along with the training and use of a Special Faculty Investigator, should help to expedite some parts of the process. Our recommendations would also help with timeliness by allowing for the imposition of non-severe sanctions and progressive sanctions short of dismissal without prior review by a faculty review board.<sup>57</sup>

**Recommendation 1. Ensure that the OAE has Sufficient Funds, Staffing, and Methods of Coordinating with Other Actors to Investigate Reports Expeditiously.**

The University should make sure that the OAE has sufficient funds and staffing to engage in prompt investigations of reports of faculty misconduct. Currently, the OAE has four EEO Investigators, an Interim Assistant Director, and a Sr. EEO Investigator who will start on July 1, 2019. A search will be completed for a permanent Assistant/Associate Director later this year. With the recent addition of a Sr. EEO Investigator and these additional hires, the OAE believes that investigations into employee misconduct should generally be completed within 60 days of an initial report. Some cases will inevitably require extensions, but the OAE has protocols to determine when extensions should be granted. While implementing the recommendations in this report, the University should monitor OAE caseloads and ensure that staffing and timeliness do not become an issue.

When interim or investigatory decisions require the involvement of other offices, those offices should deputize enough people with the authority to act on their behalf for prompt decision-making. Scheduling issues should not create impediments to timely investigations or action, and may require additional funding to support the appropriate staffing of Confidential Advisors and/or other support persons for parties involved, and may require additional funding to support the appropriate staffing of Confidential Advisors and/or other support persons for parties involved. Complainants should not be forced to choose between participation in an investigatory process, and support from a Confidential Advisor, due to insufficient staffing. If a decision requires the input of several offices or stakeholders, meetings should be conducted quickly by a smaller group when necessary and allow for the timely ratification, support, or objection of those who cannot be immediately present.

**Recommendation 2. Facilitate Prompt and Coordinated Action by Executive Officers.**

Executive officers in coordination with their colleges and the Provost's Office should impose sanctions or other measures in a timely fashion. Any deliberations needed to decide whether to begin dismissal proceedings or impose other severe sanctions short of dismissal should be engaged in expeditiously. Actions that are taken should be promptly communicated back to the Title IX Office for entry into its databases. Ideally, these decisions would be made before a report and recommendation is even issued, so that the OAE's report and

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<sup>57</sup> See Section III.A, *supra*.

## REPORT ON FACULTY SEXUAL MISCONDUCT

recommendation could be accompanied by a letter from an executive officer informing the respondent of what actions will be taken.

**Recommendation 3. Facilitate Prompt Review by Grievance Committees.** In cases where the University brings proceedings that may lead to severe sanctions and require a pre-imposition hearing before a Senate-appointed review panel or subsequent Board review, these processes should take place as quickly as is reasonably possible and—whenever possible—without having to reconvene witnesses who have already been cross-examined. In most other cases under the new system, non-severe sanctions and many other responsive measures would be impossible while any grievances or appeals are being pursued. Hence, those grievances or appeals should not interfere with an expeditious response. Still, those processes should also be handled expeditiously.

**Recommendation 4. Foster Early Communication among Different Actors Within the Response System.** The OAE should provide advance notice to other parts of the response system when there is a substantial likelihood that other actors may have to make a sanctioning decision or handle a faculty review hearing. Advance notice will help other actors with scheduling to foster prompt action. Other appeals or review boards should do the same if their actions may allow for subsequent grievances or proceedings.

### 5. Communications with the Campus Community, the Public, and the Media

When it comes to sexual misconduct, members of the campus community want to know, above all else, that they are safe. Even when the University responds aggressively to sexual misconduct by faculty, many of its responses are confidential personnel matters. Confidentiality can make it difficult to communicate effectively just how seriously the University takes sexual misconduct and just how aggressively it responds to reports of sexual misconduct using a wide variety of tools. These problems can limit the potential of a response system to impact campus climate in positive ways. To foster a climate that is widely perceived as intolerant of sexual harassment, the campus community must not only respond to individual cases fairly and effectively but also generate widespread understanding that under its policies, processes, and practices: (1) targets of sexual harassment are supported and protected; (2) instances of harassment are investigated fairly and in a timely way, with due process for both targets and alleged harassers; (3) those found to have committed harassment are held accountable or punished appropriately; and (4) the campus community is regularly informed about how the institution is handling/attending to claims and disciplining those who have violated policies. The recommendations in this section are designed to ensure that the campus community can better understand the University's response system.

## REPORT ON FACULTY SEXUAL MISCONDUCT

**Recommendation 1. Create More OAE/Title IX Transparency.** The OAE and Title IX Offices should revise and publish clear explanations of its internal processes relating to how reports of sexual misconduct will be handled. These documents should be understandable to non-specialists and should clearly explain the relationship between what the Title IX Office and OAE do and what other departments and/or review processes may do after an informal process or formal investigation has been concluded.

**Recommendation 2. Create a Single, Coherent Description of Response Processes.** A task force that includes representation by the OAE, the Title IX Office, the Provost's Office, CAFT, OSCR, the Women's Resource Center, and the FAC should be formed to create a unified explanation of how reports of sexual misconduct will be handled under the new policy. That document should be publicized on-line at the *WeCare* website and be updated periodically when there are procedural changes. The document should be understandable to non-specialists and should contain all the steps in the response process, not just those that are conducted by OAE or within the Title IX Office. It should offer a single description that can be accessed by complainants regardless of whether the respondent is a student, faculty member, or non-faculty employee. Many of the current descriptions of rights and options or other aspects of the response system on the *WeCare* website are currently focused on student complainants and OSCR processes.

**Recommendation 3. Create a Simple Flowchart of the Entire Response Process.** The same task force should create a simple flowchart for members of the campus community to understand how reports of sexual misconduct will be handled. That document should be publicized on-line at the *WeCare* website and distributed to executive officers, deans, and faculty. It should be updated periodically if there are relevant procedural changes and should be understandable to non-specialists. The flowcharts in Appendix A may provide a useful starting point in this process. But those flowcharts were created to exhibit how the package of recommendations in this report would interact with current procedures—not to speak to the non-specialists who will need to interact with the system. Those flowcharts are also focused only on how reports against faculty respondents will be handled. The campus community needs a single resource that explains how all processes will work, regardless of whether the case is handled by OAE, OSCR, or Human Resources.

**Recommendation 4: Begin Regular Public Reporting on Complaints of Sexual Misconduct and How They Have Been Handled.** The Title IX Office or the Provost Office should adopt a system of regular reporting about how the

## REPORT ON FACULTY SEXUAL MISCONDUCT

University has been handling reports of sexual misconduct. The reports should describe in general terms the classes of reports that have been handled and what responses were taken (e.g., formal investigation v. informal process of various kinds, what the findings were, whether cautionary notices, educational measures, supportive measures, protective measures, remedies, sanctions, or interim actions were taken and what kinds, and any settlement agreements that were entered into and their basic terms). University leadership should be able to point to this general information when asked about how the University is handling particular cases that cannot be discussed publicly. The frequency of the reports should be based on an assessment of the benefits of regular information for promoting a campus climate that is widely perceived as intolerant of sexual misconduct and to show a clear commitment to transparency—but also not so frequently that personally revealing information about complainants might be revealed or inferred by the public. For one example of such a reporting system adopted by Yale University, see <https://provost.yale.edu/title-ix/reports>.

### IV. REVIEW OF CONFIDENTIALITY AND TRANSPARENCY

The third part of the Committee’s charge asks it to “[i]dentify norms and practices to govern confidentiality around investigations and findings.” Given the sensitive nature of sexual misconduct cases, there are strong reasons to respect complainants’ desires to preserve confidentiality over their personal experiences and identities. Breaches of confidentiality can retraumatize people who experience sexual misconduct and can chill reporting, thus making it difficult for the University to respond to sexual misconduct effectively. At the same time, the campus community has a legitimate interest in knowing that the University is working vigorously to protect the community from sexual misconduct. The campus community needs to know how the response system works and should also be given regular, summary information about investigations and outcomes, presented in a form designed to protect the privacy and confidentiality of particular persons, especially complainants.

During the course of an investigation, confidentiality can help protect the integrity of investigations and prevent premature judgment. Once a policy violation is found (and in some cases of informal resolutions), a respondent’s rights to confidentiality must nevertheless be balanced against safety and risk considerations that may require the dissemination of some information in some circumstances. Even then, information should be communicated only in ways that respect complainants’ privacy concerns to every extent possible along with any other governing legal requirements. The purpose of this section is to identify norms and practices to help the University meet these competing concerns for confidentiality and transparency effectively when handling cases of sexual misconduct.

To shape the recommendations in this section, the Committee has adopted the following guiding principles:



## REPORT ON FACULTY SEXUAL MISCONDUCT

### Guiding Principles and Goals

The recommendations in this section are designed to:

- Promote the availability of sufficient confidential resources for people who have experienced sexual misconduct to discuss their experiences, rights, and options in a timely and confidential manner and to obtain support—whether or not they decide to report the incident;
- Inform the campus community about confidentiality policies in multiple, comprehensive, repeat, accurate, intentional, easily accessible, and easily digestible ways so that complainants can make well-informed decisions about whether to report incidents and how to obtain other forms of confidential advice and support;
- Ensure that the University’s public confidentiality policies address common confidentiality concerns that may otherwise discourage reporting or prevent people who have experienced sexual misconduct from getting the support they need;
- Prioritize complainants’ desires for confidentiality over sensitive information both before and after a report has been filed and consider complainant safety and well-being crucial priorities in all decisions regarding confidentiality and other actions taken by the University;
- Respect due process, especially during the course of an investigation, and protect the fairness and integrity of investigations;
- Provide parties with sufficient information and resources to make responsible decisions about information sharing during the course of an investigation;
- Promote a climate of trust among complainants that the University has taken their reports seriously by providing them with notice prior to communicating any complaints to a respondent, regular updates about their cases, and adequate information about findings and outcomes;
- Promote a climate of trust that the University is handling reports of sexual misconduct in a fair and expeditious manner by publishing regular, summary information about the outcomes of sexual misconduct cases and clear notice about the consequences of sexual misconduct;

## REPORT ON FACULTY SEXUAL MISCONDUCT

- Protect the larger campus community against any safety or risk issues that may affect their well-being;
- Provide sufficient information, which is sensitive to complainants' concerns for confidentiality, to supervisors, executive officers, and other University officials to administer the University's policies, protect complainants from retaliation, provide for the well-being of students and employees, and promote a healthy climate and culture surrounding issues of sexual misconduct; and
- Ensure that confidentiality and non-disclosure policies do not prevent the University from sharing information in appropriate ways, which protect the confidentiality of complainants to every extent possible, when needed to address safety or risk concerns.

### A. Confidentiality Prior to a Report

Confidentiality concerns can prevent some people who have experienced sexual misconduct from reporting the incident to a University employee or from otherwise seeking support or aid from the University. Under current University policy, which was crafted to respond in part to historical Title IX guidance, all University employees—other than a very few who have been specially trained and authorized to act as a “Confidential Advisor”—must report incidents of sexual misconduct to the Title IX Office. The Title IX Office prioritizes confidentiality requests made by complainants but cannot strictly guarantee confidentiality in all circumstances. These facts can lead some people who experience sexual misconduct to feel uncomfortable seeking advice or support from University officials, thus making it difficult for the University to combat sexual misconduct effectively.

The three most direct ways to address this problem are to (1) ensure that students have broader and easier access to Confidential Advisors located throughout campus (as recommended in prior sections and repeated below); (2) reconsider the breadth of mandatory reporting requirements in light of the language of the new policy and other empirical evidence once the Department of Education's new Title IX regulations go into effect; and (3) create a comprehensive and easily accessible and digestible confidentiality policy that addresses confidentiality concerns that may arise at any stage of a process. People who have experienced sexual misconduct should be able to understand the University's confidentiality policies well enough to make informed and responsible decisions about whether to report an incident and whether or how to participate in an investigation. The comprehensive policy should be drafted to address common confidentiality concerns that may discourage reporting.

The University currently conveys information about confidentiality policies in a number of forms. Much of this information is, however, located in different documents

## REPORT ON FACULTY SEXUAL MISCONDUCT

that are prepared by different offices or is conveyed only orally or in communications made to parties during an investigation. This disperse information has not yet been collected in one comprehensive and easily accessible document for people who may have confidentiality concerns that may prevent them from reporting but who are unfamiliar with how the University delegates responsibility among offices for handling reports. Some public confidentiality statements that are currently widely available are stated in overly general terms (or, alternatively, in ways that are too limited in scope) to meet the guiding principles described at the beginning of this section.

For example, the current public information that purports to describe complainants' "rights and options" relating to confidentiality on the *WeCare* website (and in other public materials that repeat this information) says only that:

You have the **right to understand your privacy rights if you report sexual misconduct**. You may request that your identity be kept private and/or that U of I not investigate your allegations. The Title IX Coordinator, or a designated staff member, will evaluate your request, taking into account your desires, U of I's responsibility to provide a safe and nondiscriminatory environment for all students and employees, and other relevant factors.

Some other documents, like the OAE's procedural documents, go into considerably more detail. These policies are nevertheless limited to questions about how confidentiality will be treated by OAE, which is not the only office with information relevant to confidentiality concerns. We therefore recommend:

**Recommendation 1. Create a Comprehensive, Public Confidentiality Policy that Enables Parties to Make Well-Informed Decisions at Any Stage of a Process While Addressing Common Confidentiality Concerns.** The University should create a public and easily accessible link on the *WeCare* website to a comprehensive confidentiality policy relating to sexual misconduct. This comprehensive policy should be distributed in other materials that are easily accessible and provided to complainants or potential complainants in multiple and repeat forms.

The comprehensive policy should collect information that is relevant to confidentiality but is currently dispersed in different documents prepared by different offices and/or is being communicated only in limited forms or venues. The policy should aim to be holistic and understandable by people who are not experts in how the University structures offices or divides authority for different aspects of the University's response system. When drafting the document, the University should prioritize placing complainants who may know little about the University's response system in a position to make well-informed decisions about whether to report and whom to confide in at different stages of a process. The document should be carefully drafted to address common confidentiality concerns that may chill reporting. The document should prioritize communications that will help the campus community understand it has an

## REPORT ON FACULTY SEXUAL MISCONDUCT

active partner in investigating and responding fairly to sexual misconduct reports and not contain only statements that meet legal compliance requirements or avoid legal risk to the University.

More specifically, the comprehensive policy might begin by stating—as some official documents already do—that most employees at the University, including most faculty and staff, are currently required by University policy to report any incidents of sexual misconduct that they may learn about to the Title IX Office. The comprehensive policy might then state—as some official documents already do—that the University has nevertheless designated several confidential resources, which can provide people who have experienced sexual misconduct with confidential advice and support, including support as a complainant weighs the option whether to file a report with the Title IX Office. Those confidential resources should be clearly listed, with contact numbers and addresses, and with brief descriptions of the support services available from each. (All of this information can currently found in some form on the current *WeCare* website.) The policy should make it clear that complainants may speak with Confidential Advisors openly, without fear that information about their cases will be distributed any further.

The comprehensive policy should then state how the University—and not just any one single office—will handle sensitive information if and when a report is made to the Title IX Office. Unless directed by law or as necessary to provide notice of allegations to a respondent, the University's general policy should be to share information about sexual misconduct cases that may be personally revealing about a complainant only with University officials who must participate in the investigation, adjudication, or response to a report. Even in that context, only information needed for an effective response should be shared. When information about a complaint is first shared with a respondent, OAE should adopt the procedures used by OSCR, which limit preliminary disclosure to facts about the section of the Sexual Misconduct Policy that the respondent has been accused of violating, a short summary of the accusation, and the alleged timing, alleged location, and alleged subject of the violation. The disclosure should be designed to place the respondent on sufficient notice to respond to the allegations, consistent with a respondent's rights to due process, without giving the respondent special access to all the details of a complainant's testimony before the respondent has been independently interviewed.

Findings relating to policy violations by respondents may, on the other hand, be shared more broadly with appropriate officials as needed to prevent the recurrence of sexual misconduct and to help monitor for threats of retaliation or other risks. In such cases, every effort should be made to withhold or redact any personally revealing details about complainants. Complainants should be informed that the University will be producing regular, summary reports on how it handles sexual misconduct cases but that those reports will be written in ways that are designed to prevent public disclosure of any personally revealing information.

Complainants should also be told that under the Illinois Freedom of Information Act, any documents regarding university business are considered public records and may be subject to public disclosure. These records can include the

## REPORT ON FACULTY SEXUAL MISCONDUCT

disciplinary records of public employees, including faculty respondents, whereas information about investigations and disciplinary matters relating to students is typically protected by FERPA. When replying to FOIA requests relating to sexual misconduct cases that may involve a complainant, the University will make every effort consistent with law to remove any personally identifying or revealing information about complainants so as to avoid retraumatization.

The current *WeCare* page states that once a report has been filed, complainants may request that their identities not be revealed to a respondent (currently dubbed a “request for confidentiality”) and/or that no action be taken against a respondent. The comprehensive confidentiality policy should contain that same information and should clearly describe the criteria that will be used to decide such requests. As a general matter, every effort should be made to respect a complainant’s desires for confidentiality and to protect the safety and well-being of complainants consistent with the law and with the University’s obligation to protect the safety and well-being of the larger campus community. This respect and protection should occur both in cases where a report and formal investigation occur and in cases where an educational conversation or other informal outcome is selected as the course of action.

The comprehensive policy should state that no one who has experienced sexual misconduct will be required to participate in a formal investigation or informal process. Granting requests for confidentiality and decisions not to participate in an investigation may, however, limit the actions that the University can take against a respondent. The policy should describe what those limitations are (including any that may be specific to limiting responses to faculty misconduct if the respondent is a faculty member) and should identify what resources will be available to complainants who wish to remain anonymous. (Some of these limitations suggest the need for developing restorative justice options—as described in other recommendations.) Complainants should be specifically told that informal processes do not typically lead to findings of fact, and so cannot consistent with due process usually serve as bases for any sanctioning or punitive responses or create a record that may allow for effective progressive sanctioning for repeat offenders.

Consistent with governing Title IX guidance, the comprehensive policy should tell complainants that if the University must proceed to a formal investigation to protect larger safety concerns on campus, complainants will be notified before any such action, including any correspondence with the respondent, is taken. The policy should state clearly that complainants will be provided with confidential support services, regardless of whether they participate in an investigation, and will have the right to have the University notify the respondent that the University has taken action against the complainant’s desire if the complainant chooses.

The comprehensive policy should state that the University will maintain confidentiality over any supportive measures offered to any party at any time, except to the extent that maintaining such confidentiality will impair the University’s ability to provide the supportive measures.

## REPORT ON FACULTY SEXUAL MISCONDUCT

The comprehensive policy should then explain how confidentiality will be treated by various actors during the course of an investigation. It should describe the importance of confidentiality for an impartial investigation but should contain accurate information about the rights that parties have to discuss aspects of their personal experiences with others. The policy should clearly identify the possible outcomes of informal processes and formal investigations and let parties know what information about outcomes they will be given. When there are special confidentiality rules pertaining to any possible grievance or other review processes, those confidentiality rules should be described as well.

As noted, much of this information is already being conveyed in some form, but the University should develop a single, comprehensive document that is easily accessible and collects all of this information (along with any other information that may be relevant to confidentiality concerns of complainants) in one place. Creating this document will require the collaboration of different offices responsible for different aspects of the response system, as well as careful attention to the needs and concerns of potential complainants.

**Recommendation 2 (REPEAT): Embed More Confidential Advisors Who Can Help Coordinate Some Remedies without a Formal Report of Sexual Misconduct to the Title IX Office.** The University should embed additional confidential reporters within units and in geographically diverse locations to help with some remedies to educational or work access if a person who has experienced sexual misconduct does not want to file a report with the Title IX Office. These Confidential Advisors could provide a first line of access for the support of many potential complainants.

The 2017 Campus Climate Survey suggests that very few students who experience sexual harassment or misconduct ever make a formal report—a problem that is common in higher education around the nation. Regardless of whether a complainant decides to file a report with the Title IX Office, Confidential Advisors can provide confidential advocacy and support related to sexual misconduct including, but not limited to: crisis triage; safety planning; academic and employment needs; safe housing access; mental and physical health referrals; and support and advocacy with the criminal, employee, and student discipline systems. By increasing the amount and availability of Confidential Advisors across campus, the University would provide the community with greater access to time-sensitive services and support mechanisms and make accessibility less linked to decisions to report.

It would facilitate reporting in many cases—and would certainly help with support—if some Confidential Advisors were embedded within units to allow students to become more familiar with co-located Confidential Advisors. This would create a more accessible and streamlined referral process for people who believe they have experienced sexual misconduct to access additional support systems, both within the University and beyond. An option like this would require an ongoing financial commitment from the institution and/or academic

## REPORT ON FACULTY SEXUAL MISCONDUCT

unites. Units could help by offering service credit to faculty or staff who work with Confidential Advisors and the Title IX Office to provide additional forms of support and education to people in their unit.

**Recommendation 3. Reconsider the Legal and Policy Landscape Relevant to Employee Mandatory Reporting Obligations Once the New Title IX Regulations Have Been Passed.** The Department of Education's proposed Title IX regulations limit the circumstances in which information about sexual misconduct that is conveyed to an employee (including a faculty member) will be attributed to the University for purposes of withdrawing federal funding if there is an insufficient institutional response. The new regulatory landscape may give the University greater flexibility to decide when, as a matter of organizational policy, employees who learn of such information must report the information to the Title IX Office.

Though Title IX regulations are not the only legal or policy considerations that bear on this question, not all universities have as broad mandatory reporting requirements as the University of Illinois. Many have experimented with more exceptions, and many more are likely to begin experimenting with broader exceptions once the new regulations come into existence. In addition, the new policy covers broader forms of misconduct, not all of which may require the same balancing of considerations that produced the current organizational decision to require broad mandatory reporting by almost all employees of any and all information that may be relevant to a possible claim under the Sexual Misconduct Policy.

When implementing the new Title IX regulations, the University should begin to study, empirically, the question of what mandatory reporting obligations will best serve the guiding principles stated at the start of this section, consistent with the law and other governing regulations, while reducing the potential for institutional intimidation of individuals who report to any such newly designated non-mandatory reporters. In studying this question, the University should distinguish between being a non-mandatory reporter and being a Confidential Advisor. Whereas a Confidential Advisor is someone who is held out by the University as offering a guarantee of confidentiality and as having special training and expertise in how to respond to sexual misconduct cases, a non-mandatory reporter is an employee who is not obligated by organizational policy to report all incidents of sexual misconduct to the Title IX Office. The University should consider not just all or nothing options but also different classes of information that employees may or may not be obligated to report and whether it might make sense to obligate employees to report some information only to a Confidential Advisor who can help complainants decide whether they wish to report. The University should also consider whether there are sufficient Confidential Advisors or non-mandatory reporters who fall into specific protected classifications and/or intersections between protected classifications to allow all members of the campus community sufficiently relatable resources

## REPORT ON FACULTY SEXUAL MISCONDUCT

with whom to discuss sensitive matters. The University should also consider its own data to understand any shifts in levels of reporting, uses of confidential services, and/or numbers of reports that have led to formal as opposed to informal outcomes based on different mandatory reporting rules.

Any policy changes should be based on a careful consideration of how those changes would likely aid in meeting the guiding principles outlined at the beginning of this section along with governing laws and regulations. The University should be careful to consider possible improvements but also not to jettison aspects of organizational policy that may be working well.

### B. Confidentiality During the Course of an Investigation

Once a report has been filed and an investigation or informal process is in progress, the question arises what confidentiality requirements should govern various actors pending the outcome of an investigation. The OAE currently seeks to complete informal resolutions within 30 days and formal investigations within 60 days. Extensions can be granted when necessary to ensure a thorough and fair investigation.

The period between a report and an outcome raises special confidentiality concerns relevant to preserving the fairness, integrity, and impartiality of an investigation. As a general matter, University officials should not comment publicly on ongoing investigations.

Parties and witnesses are in a different category. The Department of Education's proposed Title IX regulations state that universities may "[n]ot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence."<sup>58</sup> Empirical research suggests that overly broad confidentiality policies can prevent people who have experienced sexual misconduct from obtaining needed support and can contribute to their isolation and institutional withdrawal.<sup>59</sup> Given the special considerations that govern during the period between a report and an investigatory outcome, parties and witnesses should be provided with accurate information and support services to help them decide responsibly how to exercise their discretion whether to participate in an investigation and/or whether or how to discuss personal experiences with others that may be relevant to an investigation.

**Recommendation 1. University Officials Should Not Comment on Ongoing Investigations.** Out of fairness to all parties and to ensure a reliable and neutral investigation, the University should not comment on ongoing investigations. Sometimes, unofficial sources of information will begin to percolate about a case before the case has been decided. Though this information is rarely

<sup>58</sup> Department of Education, *Notice of Proposed Rulemaking*, 34 C.F.R. 106, RIN 1870-AA14, at 133-134 (Nov. 18, 2018), available at <https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-nprm.pdf>.

<sup>59</sup> See, e.g., THE SEXUAL HARASSMENT OF WOMEN, *supra* note 1, at 136 ("Isolation . . . results from confidentiality and nondisclosure agreements that limit sexual harassment targets' ability to speak with others about their experiences and can serve to shield perpetrators who have harassed people repeatedly.").



## REPORT ON FACULTY SEXUAL MISCONDUCT

complete and often contains inaccuracies, it is generally best for the University to resist commenting on particulars of ongoing investigations.

University officials should, on the other hand, feel free to point to general information that may help address general concerns about how the University responds to reports of sexual misconduct. University officials should be ready to point, first, to the comprehensive new policies that will be in place if the current package of recommendations is implemented (including to the new and more transparent descriptions of the response system), and, second, to the regular publications of information regarding reports and outcomes that will also be available if the current package of recommendations is implemented.

University officials should also feel free to indicate that unofficial reports rarely capture a complete picture of a situation and often contain inaccuracies. Still, the University should understand that this answer will likely be satisfying only to the extent that the University offers a more complete and reliable picture of its response system along with regular, summary information about reports of sexual misconduct and outcomes, which are designed to prevent the disclosure of any personally revealing or confidential details.

**Recommendation 2. Give Parties and Witnesses Accurate Information and Sufficient Resources to Make Well-Informed Decisions about How to Discuss Their Own Experiences with Others But Do Not Place Them Under General Confidentiality Requirements about Those Experiences.** The University should not make any statements relating to confidentiality that leave parties or witnesses with the impression that they cannot discuss their own experiences with others. The forthcoming Title IX regulations state that Universities may “[n]ot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.”<sup>60</sup> Hence, during the course of an investigation, parties have the discretion to discuss the allegations under investigation and to gather and present relevant evidence.

Still, the University should make every effort to place parties and witnesses in a position to make well-informed decisions about how to exercise that discretion. The University should, for example, let parties and witnesses know that sexual misconduct cases involve sensitive information, much of which is often in dispute. The public disclosure of sensitive information during the course of an investigation can cause undue (and often unintended) harm to complainants, respondents, larger communities, and an investigation process. The public disclosure of information may subject some individuals to legal liability. When parties or witnesses discuss sensitive matters with other participants in an investigation, that fact may undermine the credibility of one or both parties’ testimony. As a result, parties and witnesses should exercise care when deciding whether to discuss issues relevant to an ongoing investigation with others except as necessary to contribute to a fair and reliable investigation or seek

<sup>60</sup> Department of Education, *Notice of Proposed Rulemaking*, 34 C.F.R. 106, RIN 1870-AA14, at 50 (Nov. 18, 2018), available at <https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-nprm.pdf>.

## REPORT ON FACULTY SEXUAL MISCONDUCT

needed support.

The University should provide information of this kind to parties and witnesses and should consider drafting a formal statement that contains this information and can be disseminated to people who participate in an investigation. These communications should make clear that nothing in the University's confidentiality advice or policies should be interpreted to prevent parties or witnesses from obtaining support they need (whether confidential or otherwise) to deal with the impact, stress, or trauma resulting from sexual misconduct or allegations thereof. Parties and witnesses should be informed that there is a general expectation that all persons present at any time during a resolution process will maintain the confidentiality of any information disclosed in that process in accordance with the University's confidentiality policies. Parties and witnesses should, however, also be given accurate information about the fact that they have the discretion to share their own experiences with others if they choose. The University may nevertheless encourage parties and witnesses who are considering how to exercise that discretion to discuss their options with a Confidential Advisor. A Confidential Advisor may have valuable information that may help individuals decide whether and how to discuss sensitive matters in ways that are least likely to interfere with an ongoing investigation or to cause undue harm to individuals. Some parties or witnesses may also have special roles within the University that might limit the degree to which they can or should share their experiences outside of an investigation.

### **C. Confidentiality and Transparency about Outcomes**

The final question to address is how the University should handle information about the outcomes of formal investigations and informal processes. In order to foster a campus climate that is widely perceived as intolerant of sexual misconduct, the campus community must be given reliable, thorough, and up-to-date information about how the University has been handling reports of sexual misconduct. At the same time, information about outcomes should not be publicly disclosed in ways that may reveal personal details about complainants or support improper inferences about any party based on insufficient evidence. Sexual misconduct cases can be especially complex because information about a respondent's disciplinary record can sometimes allow for inferences about complainants that complainants would prefer to keep private and confidential. Complainants, on the other hand, have a special interest in understanding how the University responds to their particular reports of sexual misconduct.

Additional complexities arise from the fact that the human resources community has traditionally supported strong and general norms of confidentiality over personnel matters. Although these human resources norms were not crafted to address sexual misconduct cases specifically, they are currently being applied to such reports on this campus. Sexual misconduct cases need to be treated in a more nuanced manner because they raise special safety and risk concerns. An overly broad commitment to confidentiality over personnel matters can prevent the University from engaging in some actions needed to ensure the safety and well-being of the campus community.

## REPORT ON FACULTY SEXUAL MISCONDUCT

In any event, the University does not really have control over whether disciplinary information becomes public. Under the Illinois Freedom of Information Act (FOIA), any documents regarding university business are considered public records and may be subject to public disclosure. The disciplinary records of public employees are generally FOIA'ble for up to four years. Recently, we have entered into a period in which FOIA'd material is increasingly becoming part of public discourse, often painting a partial, haphazard, and sometimes misleading picture of events. Yet overly broad interpretations of confidentiality norms are preventing the University from correcting public misperceptions, providing the community with common sense updates and assurances, and ensuring the safety and wellbeing of the campus community as well as it could. These facts are unfortunate because the community's needs for transparency, which are currently being met in part through FOIA requests, could be met in much more reliable and affirmative ways, which would better protect the confidentiality and privacy concerns of all parties, including complainants. Though every attempt is made within the law to redact personally revealing information about complainants in response to FOIA requests, redacted responses to FOIA requests are obviously an imperfect mechanism for the University to communicate about sensitive matters or provide the campus community with thorough and reliable information about its response system.

To address these issues, the Committee offers the following recommendations:

**Recommendation 1. Provide Parties with Complete Information about the Status and Outcomes of Formal Investigations and Informal Processes.** The University should provide both complainants and respondents with regular updates about the status of investigations and with complete information about the University's responses. If this information is not provided to complainants, then complainants can leave their experiences with OAE and the Title IX Office with an incomplete understanding of the University's responses. That perception can make it harder to foster a climate that is widely perceived as intolerant of sexual misconduct, which is the most potent empirical predictor of fewer incidents of sexual misconduct.

In particular, complainants should be provided with information about any interim actions taken against a respondent; about any cautionary notices provided to a respondent; about any educational talks that a respondent has undergone; about any protective measures that have been put into place; about any non-punitive outcomes of an investigation; and about any sanctions that have been imposed on a respondent. Complainants should be provided with clear information about any appeals or grievance processes that may be available to a respondent both prior to the filing of a complaint and after the completion of an investigation. Complainants should be provided with timely and accurate information about the outcomes of any such processes.

When it comes to information about outcomes, current policies distinguish complainants who have participated in a formal investigation from complainants who have not. Whether or not a person has participated in a formal investigation people who believe they have experienced sexual misconduct have a special interest in knowing how the University has handled the allegation. Outcomes

## REPORT ON FACULTY SEXUAL MISCONDUCT

should be shared with complainants, regardless of their decision to participate in a formal investigation, thought the University should feel free to let complainants who have not participated know that that decision may have limited the University's ability to respond in other ways. Respondents should also be informed of all outcomes.

**Recommendation 2 (REPEAT): Begin Regular Public Reporting on Complaints of Sexual Misconduct and How They Have Been Handled.** The Title IX Office or the Provost Office should adopt a system of regular reporting about how the University has been handling reports of sexual misconduct. The reports should describe in general terms the classes of reports that have been handled and what responses were taken (e.g., formal investigation v. informal process of various kinds, what the findings were, whether cautionary notices, educational measures, supportive measures, protective measures, remedies, sanctions, or interim actions were taken and what kinds, and any settlement agreements that were entered into and their basic terms). University leadership should be able to point to this general information when asked about how the University is handling particular cases that cannot be discussed publicly. The frequency of the reports should be based on an assessment of the benefits of regular information for promoting a campus climate that is widely perceived as intolerant of sexual misconduct and to show a clear commitment to transparency—but also not so frequently that personally revealing information about complainants might be revealed or inferred by the public. For one example of such a reporting system adopted by Yale University, see <https://provost.yale.edu/title-ix/reports>.

**Recommendation 3. Share Information about Findings of Fact (of Either a Policy Violation or No Policy Violation) Selectively within the Institution But As Needed To Meet Any Relevant Safety, Risk, or Perception Concerns.** Generally speaking, when there has been a finding of sexual misconduct or no sexual misconduct, information about that finding and any accompanying sanctions or other responsive measures should be shared with the complainant, the respondent, and the respondent's department head or supervisor as well as any other officials up the supervisory chain. This information should be placed the unit's personnel file and any personnel files maintained at higher levels of the supervisory chain so that it can be accessed through supervisory transitions and by other University officials who may need to make decisions where facts about sexual misconduct are relevant.

Although personnel matters are generally treated as confidential, sexual misconduct raises special safety and risk concerns. General confidentiality norms pertaining to personnel matters cannot be interpreted so broadly as to impair the ability of the University to ensure the safety and welfare of its campus community or the integrity of its decision-making processes. When information about discipline relating to sexual misconduct is placed in a personnel file, it should be

## REPORT ON FACULTY SEXUAL MISCONDUCT

stored in a form that avoids containing any personally revealing information or facts about complainants. Information about the disciplinary records of public employees lasting up to four years is subject to FOIA and can be readily obtained by the public.

In order that information is not lost in during supervisory transitions or due to problems with record retention, department heads and other officials above them within a supervisory chain should be able to make reasonable requests when necessary for the operations of the unit from OAE and the Title IX Office to ensure the unit has accurate information about reports and outcomes relevant to a particular unit or employee. This mechanism will allow department heads and others to update personnel files and ensure the accuracy of their personnel files in any cases of problems with record retention and can also give department heads a clear sense of the current state of their unit. Whenever information is placed in a respondent's personnel file, every effort should be made to withhold any personally revealing details about a complainant.

### **Recommendation 4. Begin a Pilot Program Designed to Avoid Future Employment Decisions Being Made with Insufficient Knowledge of Risk.**

Some institutions of higher education are moving toward a model in which some hiring decisions will only be made if a candidate waives his or her right to confidentiality over disciplinary records relating to sexual misconduct. For a recent example, see the pilot program adopted by UC Davis, found here: <https://academicaffairs.ucdavis.edu/reference-checks>.

The University currently interprets the general confidentiality norms that govern personnel matters to prevent the disclosure of an employee's disciplinary history relating to sexual misconduct even to other units within the University. This can lead to poor hiring decisions. One way to address this problem, without changing any official rules relating to personnel files, is to adapt UC Davis's pilot program and consider applications for some positions—including tenured faculty positions—to be incomplete without a waiver of confidentiality relating to disciplinary actions relating to sexual misconduct. The University should begin a similar pilot program here and review its success, usefulness, and/or need for any exceptions one year and then three years out. As part of the pilot program, the University should announce that it will respond to such requests both internally and from other institutions if a University of Illinois employee or faculty waives such confidentiality. The University should begin requiring such waivers when considering internal transitions between units and external hires, and should prioritize thorough reference checks (including from a direct supervisor), as well.

**Recommendation 5. Avoid Binding Non-Disclosure Agreements.** As a general matter, the University should not enter into any binding nondisclosure agreements related to negotiated agreements. Though nondisclosure agreements can offer powerful incentives for some respondents who have engaged in sexual misconduct to agree to outcomes without the need for a formal investigation or

## REPORT ON FACULTY SEXUAL MISCONDUCT

lengthy investigations or appellate processes, sexual misconduct cases contain special safety and risk issues that warrant a policy against the University entering into any agreements that may prevent it from addressing such issues in appropriate manners. The fact that the University has a policy against binding nondisclosure agreements would not mean that the University would disseminate information haphazardly, without careful caveats, or in ways that may reveal confidential and personal information about complainants.

**Recommendation 6. Maintain Heightened Confidentiality over any Supportive Measures Offered.** The University should use the standard set forth in the Department of Education’s proposed Title IX regulations to ensure heightened confidentiality over any supportive measures offered. These regulations state that universities that receive federal funding “must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality will not impair the ability of the institution to provide the supportive measures.”<sup>61</sup> The University should extend that rule to supportive measures offered to witnesses and non-parties.

**Recommendation 7. Employ a “Safety-Risk-Perception” Analysis to Determine When Information about Responses that Do Not Include Formal Findings of Fact (of Either a Policy Violation or no Policy Violation) Should be Provided to a Respondent’s Supervisor or Other University Officials.** Currently, most reports of sexual misconduct are handled through informal resolution processes, which do not produce any formal findings of fact. In cases that do not produce any formal fact finding, the University may nevertheless engage in various informal measures, including, but not limited to: cautionary notices, educational talks, non-punitive letters of expectation, and protective measures. In such cases, OAE and the Title IX Office should engage in a safety-risk-perception analysis—which will be described below—to determine whether to provide information about reports or informal outcomes to other University officials.

The University must be careful before acting on or disseminating information about reports of sexual misconduct that have not led to formal findings of fact. At the same time, reports of sexual misconduct may not lead to any formal fact finding for many reasons that are unrelated to whether sexual misconduct occurred. For example, a person who has experienced the sexual misconduct may be unwilling to participate in a formal investigation for fear of retaliation or due to concerns for confidentiality or privacy. For another example, a complainant may prefer an informal process to a formal investigation, even if an informal process will not produce a formal finding of fact, because an informal process will avoid the need for a lengthy and time consuming formal investigation. For yet another example, some reports of sexual misconduct are filed anonymously and may

<sup>61</sup> Department of Education, *Notice of Proposed Rulemaking*, 34 C.F.R. 106, RIN 1870-AA14, at 133-134 (Nov. 18, 2018), available at <https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-nprm.pdf>.

## REPORT ON FACULTY SEXUAL MISCONDUCT

contain credible information that is nevertheless insufficient to base a formal finding of misconduct. When coupled with low reporting levels and the fact that many people who report sexual misconduct prefer an informal process to a formal investigation, OAE and the Title IX Office will often possess credible information about possible sexual misconduct that suggests the need for a wider institutional response, even without any formal finding of a policy violation. Sometimes, preliminary information may need to be disclosed to a department head or appropriate supervisor in order to allow the official responsible for a unit to remain abreast of the concern or monitor the situation without taking any punitive action against a respondent.

There are also cases in which a department head or other University official has prior information about allegations or reports that have been filed with the Title IX Office and is likely to be left with a misleading perception of the situation without information about an informal outcome. This can also happen in cases where informal information has been disseminated that may be partial or misleading. In some cases, complainants and respondents may both prefer that the University make some official information about an informal outcome public or disseminate it confidentially to some audiences.

Because of the sensitivities involved with sharing information about reports or outcomes absent a formal finding of fact, OAE and the Title IX Office should share such information with department heads, supervisors, or other University officials selectively and only in three circumstances: (1) if the expected protective value of doing so outweighs the potential harm to all parties concerned, considering the degree to which the allegations have been substantiated; (2) the recipient is already in possession of information about a report or allegations that would leave an improper and substantially harmful misperception absent the new information about outcomes; or (3) the parties agree that they would prefer an official statement about the outcome to be distributed publicly or confidentially to some more limited audience.

When information of this kind is shared, it should be shared only in limited circumstances, only confidentially on an as-need basis, only with careful and explicit caveats, and only after notification has been provided to both the complainant and the respondent.

Unless otherwise agreed to by the parties, information of this kind should always be accompanied by an explicit disclaimer that there has been no formal finding of either a violation or no violation. Recipients of the information should be warned that further dissemination of sensitive information about sexual misconduct cases can be damaging not only to respondents but also to complainants. Recipients should be given explicit confidentiality instructions about the information and should be told to share it further only with the same confidentiality limitations and only as needed to address the original safety-risk-perception issues that produced the initial decision to share the information beyond OAE and the Title IX Office. Recipients of this information should be informed that no punitive action can be taken against a faculty respondent for sexual misconduct without a formal finding of sexual misconduct. Recipients or others who may know about a complaint should also be told that they should make every effort to treat the complainants the same as if no complaint had ever been filed, and that changes in behavior or

## REPORT ON FACULTY SEXUAL MISCONDUCT

reaction toward a complainant can amount to retaliation. Complainants should be made to feel welcome in the units and groups within which they work and participate.

### V. CONCLUSION AND NEED FOR ONGOING REVIEW

In developing the package of recommendations described above, the Committee has drawn on extensive literature, empirical findings, and operational experience to design a regime that might best serve the guiding principles stated throughout this document. At the same time, no system of comprehensive reform can be implemented without raising new questions or creating some unintended consequences for complainants, respondents, the campus community, responding offices, or the institution. Changes in policy, procedure, and practice within a complex system should always be based on the best available information, including, for example, empirical literature on effective responses to sexual misconduct and lessons learned from peer institutions. Though we have tried to be clear about the guiding principles that shaped our recommendations, and should guide further questions that arise during implementation, the University should adopt a regular plan to monitor implementation and allow for adjustments as needed to promote those guiding principles.

**Recommendation 1. Commit to Ongoing Review and Analysis of the Implementation of the Package of Recommendations in this Report.** The University should institute a process of regular review and adjustment when implementing the package of recommendations found in this report. That process could take a number of different forms.

For example, the University might engage in **periodic case reviews**, where key stakeholders (e.g., OAE, the Title IX Office, Human Resources, the Women's Resource Center, administrators, unit heads, and faculty representatives from FAC, CAFT, or the Senate) convene to discuss recent cases and examine the degree to which changing policies and procedures are working as intended or are causing unintended problems. This style of case review might be modeled after other, well-known models like the Child Fatality or Domestic Violence Fatality Review Processes (see, for example, <https://ndvfri.org/>). Unlike a formal audit process, these models involve confidentiality agreements relating to cases discussed to incentivize the honest sharing of information, including any problems.

For another model, the University might engage in **aggregate data collection and analysis** to examine statistical information about reports, confidentiality requests, uses of formal as opposed to informal process, appeals, and outcomes, including sanctions. Statistical analysis may help identify associations between different aspects of the responding system(s), which may produce ideas for adjustments. Yet another model would include **evaluation by a third party** who can examine particular facets of the reforms to policy, procedure, and practice. This last approach might be especially valuable if information is needed about the perspectives of parties and witnesses, who might be willing to speak more freely with confidentiality assurances from a third party evaluator.



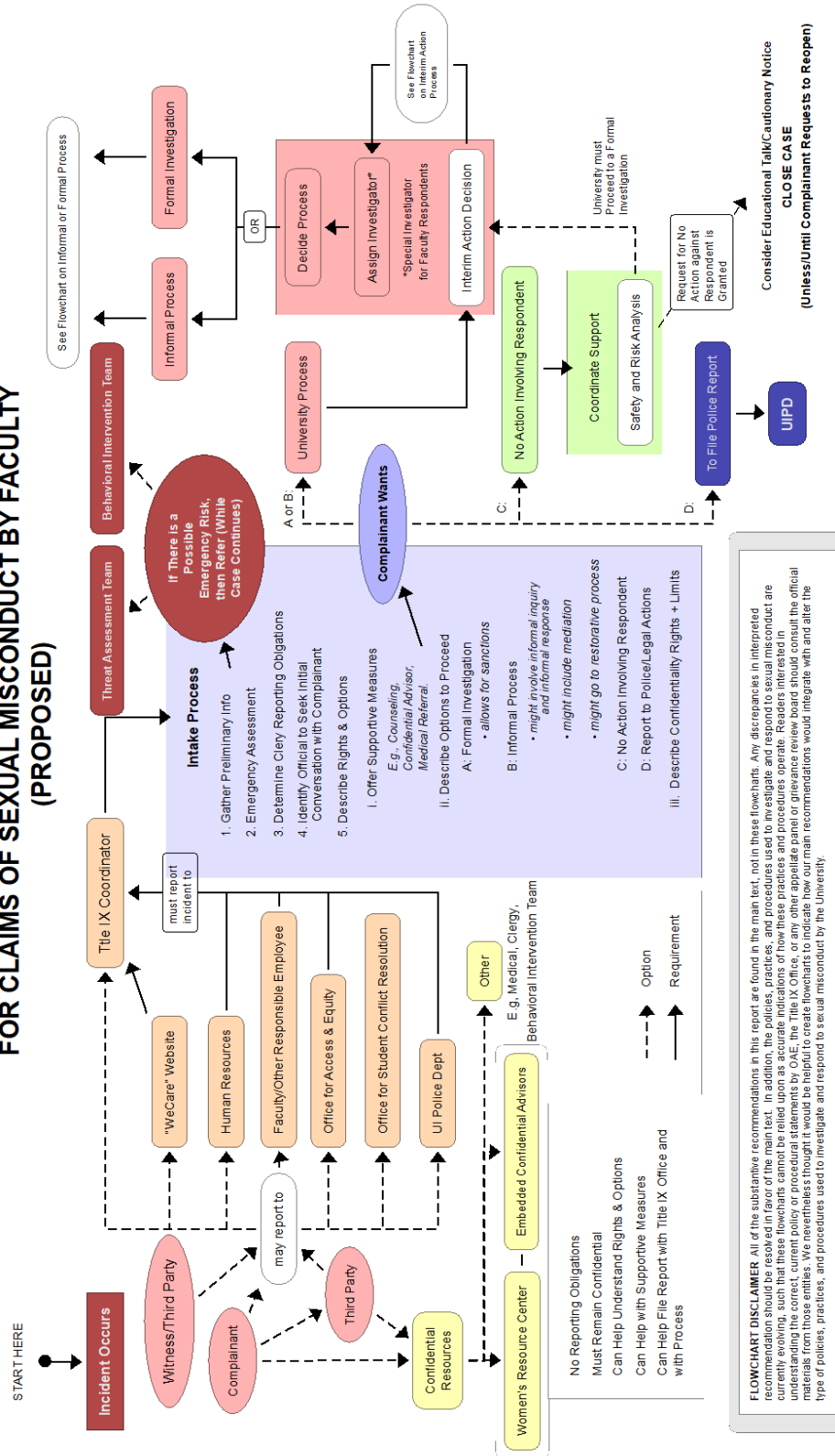
## REPORT ON FACULTY SEXUAL MISCONDUCT

Strategies like these need not be mutually exclusive. As a general matter, the first two strategies will tend to be more useful for the regular monitoring of activities and outcomes, whereas the third might can be more useful when trying to address targeted concerns raised by the first two methods. While engaging in regular review and evaluation of these reforms, the University should refrain from making overly hasty adjustments. Any comprehensive set of reforms is likely to produce some short-term implementation challenges, which may work themselves out over time. Adjustments should be based on clear evidence that they are required to solve long-term problems, and not just transitional issues, and that their implementation will improve the system.

# REPORT ON FACULTY SEXUAL MISCONDUCT

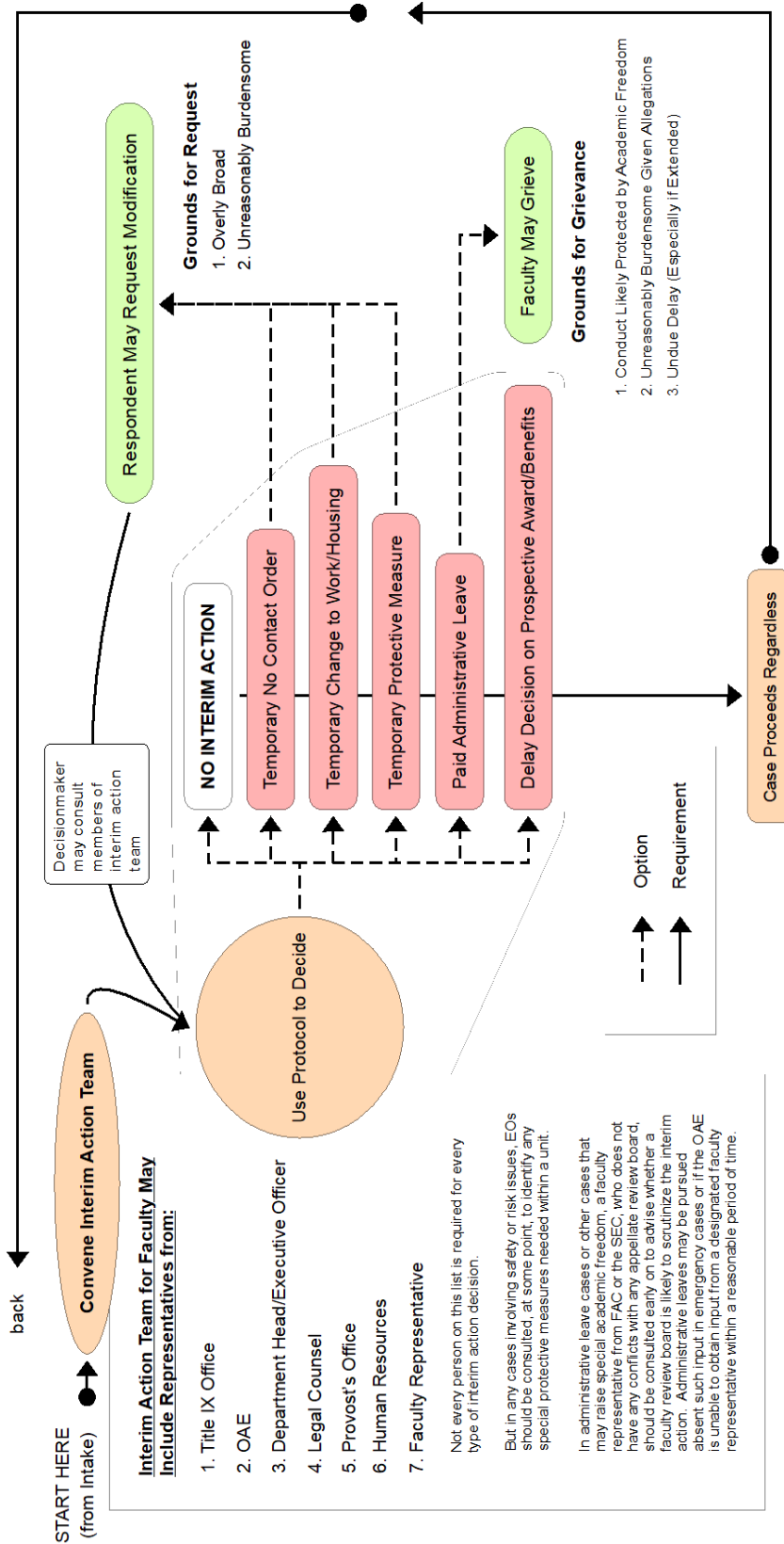
## APPENDIX A: FLOWCHARTS OF PROPOSED PROCESSES

### INTAKE PROCESS FOR CLAIMS OF SEXUAL MISCONDUCT BY FACULTY (PROPOSED)



# REPORT ON FACULTY SEXUAL MISCONDUCT

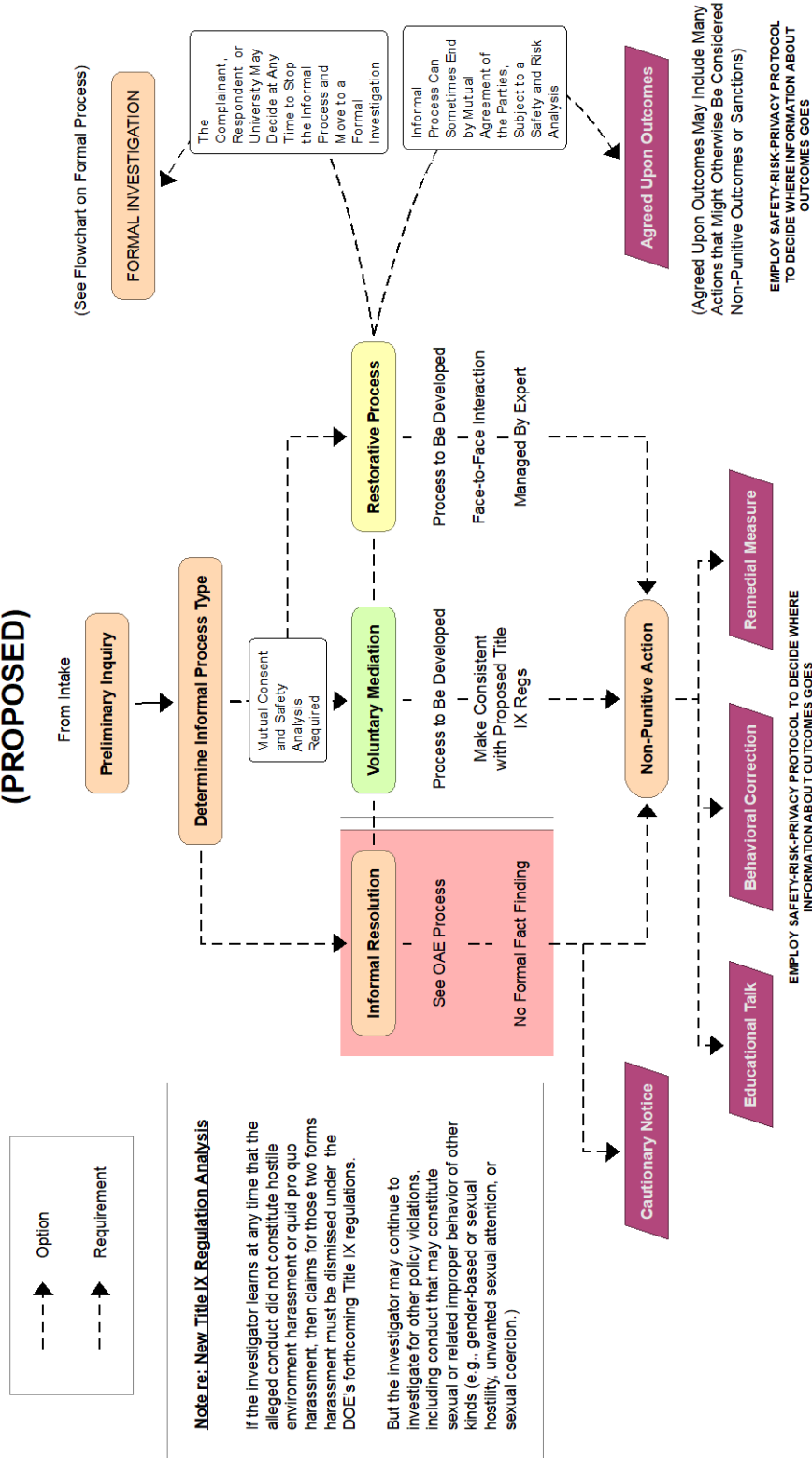
## INTERIM ACTION PROCESS FOR FACULTY RESPONDENTS (PROPOSED)



**FLOWCHART DISCLAIMER** All of the substantive recommendations in this report are found in the main text; not in these flowcharts. Any discrepancies in interpreted recommendation should be resolved in favor of the main text. In addition, the policies, practices, and procedures used to investigate and respond to sexual misconduct are currently evolving, such that these flowcharts cannot be relied upon as accurate indications of how these practices and procedures operate. Readers interested in understanding the correct, current policy or procedural statements by OAE, the Title IX Office, or any other appellate panel or grievance review board should consult the official materials from those entities. We nevertheless thought it would be helpful to create flowcharts to indicate how our main recommendations would integrate with and alter the type of policies, practices, and procedures used to investigate and respond to sexual misconduct by the University.

# REPORT ON FACULTY SEXUAL MISCONDUCT

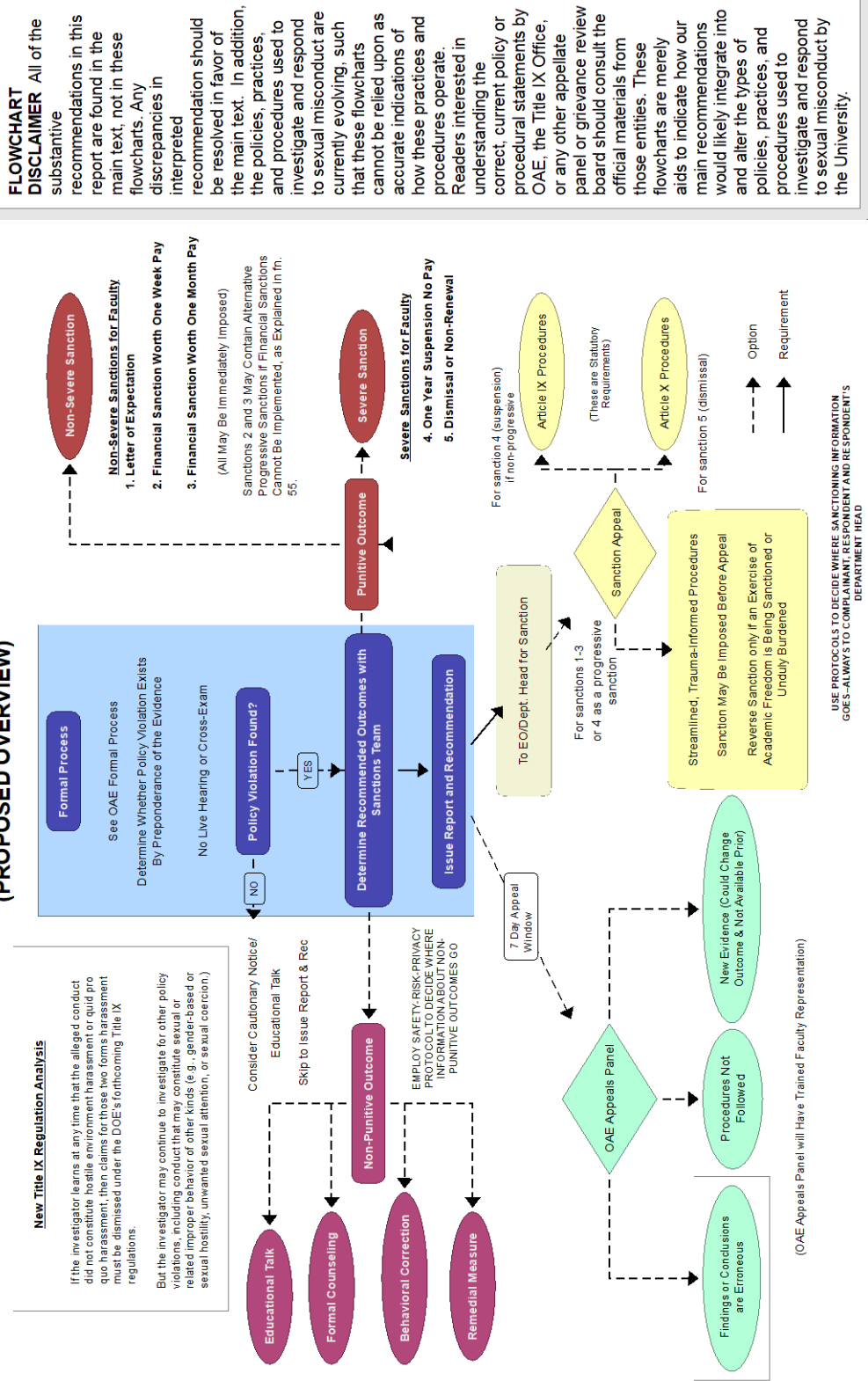
## OAE INFORMAL PROCESS (PROPOSED)



**FLOWCHART DISCLAIMER** All of the substantive recommendations in this report are found in the main text, not in these flowcharts. Any discrepancies in interpreted recommendation should be resolved in favor of the main text. In addition, the policies, practices, and procedures used to investigate and respond to sexual misconduct are currently evolving, such that these flowcharts cannot be relied upon as accurate indications of how these practices and procedures operate. Readers interested in understanding the correct, current policy or procedural statements by OAE, the Title IX Office, or any other appellate panel or grievance review board should consult the official materials from those entities. These flowcharts are merely aids to indicate how our main recommendations would likely integrate into and alter the types of policies, practices, and procedures used to investigate and respond to sexual misconduct by the University.

# REPORT ON FACULTY SEXUAL MISCONDUCT

## FORMAL PROCESS AND APPEAL (PROPOSED OVERVIEW)



# REPORT ON FACULTY SEXUAL MISCONDUCT

## APPENDIX B

### SHORT FORM RECOMMENDATIONS BY SECTION

#### I. INTRODUCTION

SHORT FORM RECOMMENDATION	EXPLANATION / LONG FORM
<p><b>Recommendation 1: Consider Recommendations in This Report to Play an Important but Limited Role within Larger Campus and System-Wide Efforts to Address Sexual Harassment.</b> This report is focused on developing a comprehensive package of recommendations to respond to incidents of sexual harassment and sexual misconduct by faculty. The most potent predictor of sexual harassment within an organization is whether there is a climate of perceived tolerance of sexual harassment. “Climate” is defined as an experientially-based description of what people in the organization “see” and report happening to them within the organization, including perceptions of what the organization is like in terms of practices, policies, procedures, routines, and rewards. A climate is perceived as intolerant of sexual harassment to the extent that (1) targets of sexual harassment are supported and protected; (2) instances of harassment are investigated fairly and in a timely way—with due process for both targets and alleged harassers; (3) those found to have committed harassment are held accountable or punished appropriately; and (4) the campus community is regularly informed about how the institution is handling/attending to claims and disciplining those who have violated policies. The recommendations in this report were designed to allow for significant improvements on all four of these factors.</p> <p>Problems of sexual harassment cannot, however, be fully addressed in this backward looking way or without profound changes in culture and climate that go well beyond the recommendations in this report. Culture—which includes widely shared beliefs, ideologies, and assumptions within an organization—is often highly resistant to change. The recommendations in this report should be understood as only one part (albeit an important part) of broader campus and system-wide efforts that will be needed to foster a positive culture and climate relating to sexual harassment and misconduct. Those broader efforts will likely include the use of diversity initiatives, sustained attention from leadership, multimodal educational programming, techniques for early intervention, a culture of collective responsibility, opportunities for engagement and trust building, new policies to govern faculty-student consensual relations, and special policies and practices that focus on settings that create special vulnerabilities. Some of those efforts have already begun.</p>	<p>See pp. 11-13.</p>

#### II. POLICY REVIEW

##### II.A. Revised Sexual Harassment Policy

SHORT FORM RECOMMENDATION	EXPLANATION / LONG FORM
<p><b>Recommendation 1: Adopt a New Policy to Govern Sexual Harassment and Related Improper Behavior.</b> The University should change the current policy language relating to sexual harassment, which is found in the Campus Administrative Manual’s Sexual Misconduct Policy, to the policy language found in the box on pp. 21-22. This new policy language would explicitly prohibit all major</p>	<p>See pp. 6-10, 17-36.</p>

## REPORT ON FACULTY SEXUAL MISCONDUCT

forms of sexual harassment studied by national experts on the topic. It would remove the “severe or pervasive” requirement—which originated in legal standards defining a “hostile environment” but has created undue obstacles to combatting some sexual harassment in higher education. The new policy would allow for a broad range of responses to different classes of violations, not all of which need be punitive.	
<b>Recommendation 2: Place New Long-Form Policy in Provost Communication and Distribute to Units for Further Targeted Communication.</b> The University should consider placing a new long-form sexual harassment policy for faculty, like that found on pp. 28-35, in a Provost Communication that is directed specifically at faculty. That long-form policy should be distributed to units for inclusion in faculty handbooks, unit websites, and/or other materials given to faculty and appointment candidates. The long-form policy should be distributed and discussed at new faculty, staff, and teaching assistant trainings. It may also help for the Campus Administrative Manual to link to this long-form policy for faculty. The University should consider developing analogous long-form versions of the policy that could be linked to and would speak more directly to other members of the campus community, like employees, students, or other third parties to whom the policy may apply.	<i>See</i> pp. 28-35.
<b>Recommendation 3: Charge Committee to Decide How Broadly to Apply the New Policy to Students.</b> The University should form a committee with the appropriate expertise and representation to decide whether and how to apply the new policy to discipline broader forms of misconduct by students. The new policy language was crafted to allow for implementation without creating any immediate changes to how the University responds to sexual misconduct by students. Sexual harassment policies raise distinctive first amendment and policy concerns when student conduct is in question. A subsequent committee will need to consider if and when broader forms of sexual harassment by students should be disciplined under the new policy and how students and investigators can distinguish harassment from free speech. Throughout these deliberations, the committee should explore how accountability through restorative practices or education might be incorporated into any broader applications of the new policy to students. We refrain from commenting on these questions out of deference to these further processes – not because we believe the new policy should never be applied to address broader forms of sexual harassment or related improper behavior by students.	<i>See</i> pp. 22-28, including especially the footnotes.
<b>Recommendation 4: Charge Committee to Address any Special Questions of Implementation Relating to Non-Faculty Employees or Specialized Faculty.</b> Although the new policy would immediately apply to all employees, the University should consider charging a committee to develop any specialized documents or policies needed to ensure consistency of treatment among classes of employees. This committee has focused primarily on faculty respondents, but another committee might consider creating long-form versions of the new policy for non-faculty employees, who may not have the same academic freedom concerns and for whom other examples or explanations may be more relevant. Creation of a subsequent committee may also help ensure that any sanctions used across classes of employees are transparent, fair, and consistent with governing collective bargaining agreements.	<i>Cf.</i> pp. 22-35.

### II.B. Compound Harms and Consequences for the Nondiscrimination Policy

SHORT FORM RECOMMENDATION	EXPLANATION / LONG FORM
<b>Recommendation 1: Charge Committee to Decide Whether and How to Extend the New Sexual Harassment Policy to Other Forms of Harassment.</b> The University should form a committee with the appropriate expertise and representation to consider whether and how to extend some changes found in the new sexual harassment policy to address other forms of harassment. The new policy	<i>See</i> pp. 36-39.

## REPORT ON FACULTY SEXUAL MISCONDUCT

<p>in this report addresses harassment based on sex, gender (including gender identity and gender expression), and sexual orientation. Due to the Committee's charge and representation, this new policy does not address harassment based on other protected classifications including race, color, religion, pregnancy, disability, national origin, ancestry, age, order of protection status, genetic information, marital status, disability, arrest record status, unfavorable discharge from the military, or status as a protected veteran. The policy language in this report might provide a useful template for such extensions, but a committee with the right expertise and representation is needed to draft the appropriate policy language for those extensions.</p>	
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### II.C. Revised Policy on Relationship Violence and Domestic Violence

SHORT FORM RECOMMENDATION	EXPLANATION / LONG FORM
<p><b>Recommendation 1: Adopt a New Policy to Govern Domestic Abuse and Dating Abuse.</b> The University should change the current policy language relating to domestic violence and dating violence, as found in the Sexual Misconduct Policy, to the language found in the box on pp. 40-41. This new policy language would prohibit the same classes of behavior as the current policy but would extend further to some forms of domestic and dating abuse that involve coercive control without physical violence to a partner.</p>	<p>See pp. 39-41.</p>

## III. REVIEW OF SANCTIONS AND OTHER RESPONSIVE MEASURES

### III.A. Progressive Sanctions for Faculty and Other Consequences for Professional Development

SHORT FORM RECOMMENDATION	EXPLANATION / LONG FORM
<p><b>Recommendation 1: Adopt an Explicit System of Progressive Sanctions for Faculty Violations.</b> The University should adopt an explicit system of progressive sanctions for faculty, which is broader in scope than the sanctions that are currently available and includes some non-severe sanctions. The schedule should include, in order of increasing severity: (1) a formal letter of expectation (which functions as a recorded reprimand); (2) a temporary reduction in salary corresponding to a loss of one week salary; (3) a temporary reduction in salary corresponding to a loss of one month salary; (4) suspension without pay for a one-year period (or a one-year suspension from teaching with concomitant reduction of pay) with a requirement of proof of rehabilitation prior to any return to full employment; and (5) dismissal. In addition to sanctions that fall on this formal schedule, sexual misconduct may have other consequences for prospective benefits, merit salary increases, awards, honors, positions, discretionary funds, or other aspects of professional development—as described more fully below in recommendations 7 and 8. For a description of which tier of sanction to choose in response to different policy violations and when lower tiers should be skipped altogether, see recommendation 2 below.</p> <p>The schedule proposed in this recommendation contains two monetary sanctions (see tiers (2) and (3)). Both of these sanctions have been carefully designed to be “non-severe” for purposes of Article IX of the University Statutes and to avoid raising any special academic freedom concerns. Those facts should obviate the</p>	<p>See pp. 41-56, Flowcharts on Formal Process, pp. 95 &amp; 127.</p>



## REPORT ON FACULTY SEXUAL MISCONDUCT

<p>need for following the cumbersome Article IX procedures that must currently be followed before a severe sanction short of dismissal can be imposed. Although the University might in principle try to implement a monetary sanction in different ways (e.g., as a fine, a furlough, a reduction in salary, or an automatic payroll deduction), the easiest path to implementation would appear to involve modifying future notices of appointment to include both a promised annual salary and a warning that violations of the Sexual Misconduct or Nondiscrimination Policy may lead to temporary reductions in salary corresponding to one week or one month of salary—or to an unpaid suspension or dismissal in cases that are sufficiently severe. To implement a monetary sanction in this way (and as a reduction in salary) would avoid problems associated with seeking to garnish wages; with requiring faculty members to work for any period of time without compensation; and with contracts that may be in place.</p> <p>Though this list of progressive sanctions includes monetary sanctions, the University should emphasize in all public communications and discussions of these non-severe sanctions that their purpose is not to measure or remedy harms to a complainant but rather to create a progressive system of discipline with sufficient force, proportionality, and flexibility to correct some classes of misconduct when behavior may be correctible. If the misconduct in question is sufficiently severe or suggestive of safety or other risks to the campus community, then the faculty member should be placed on immediate administrative leave and the University should begin removal proceedings in addition to imposing these immediate reductions in salary. In other cases, progressive sanctions can provide an opportunity for learning and improvement within a context that clearly signifies that failures to correct the behavior will lead to a limited number of increasingly severe sanctions on the road to dismissal.<sup>62</sup></p>	
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<sup>62</sup> In developing this proposed schedule of sanctions, the Committee considered other options, which may be easier to implement but which we believe should be considered only if monetary sanctions prove impossible to implement. For example, the University might use an alternative schedule of progressive sanctions that includes: (1) a letter of expectation; (2) ineligibility for a merit raise for one year; (3) ineligibility for a merit raise for two years; (4) suspension without pay for a one-year period (or a one-year suspension from teaching with concomitant reduction of pay) with a requirement of proof of rehabilitation prior to any return to full employment; and (5) dismissal. Our primary recommendation is for the University to find a way to implement financial sanctions of some kind (perhaps as a reduction in salary or perhaps as a furlough or even as an unpaid leave of absence in some cases if necessary), in part because the severity of ineligibility for merit raises depends on the annual salary program, which could be zero. If the University finds a way to impose financial sanctions and does not treat ineligibility for a merit increase as part of this formal schedule of sanctions, then we recommend that ineligibility for a merit increase still be treated as a non-punitive consequence of sexual misconduct for prospective honors and professional advancement, under the aegis of Recommendation 8 below. That treatment would obviate the need for ineligibility to appear as a part of a formal scheme of progressive sanctions, and would allow for sexual misconduct to prompt both immediate financial sanctions and other non-punitive consequences for prospective merit salary increases.

As yet another alternative, the Committee considered the option of using letters of expectation that are more and more strongly worded before turning to Article IX or Article X proceedings. These letters might be given specific names, like an initial letter of expectation, a probationary warning, and a letter of final warning. Use of such an option would, however, hardly differ from the system that is currently in place and so would not create much of an advance in the University's ability to respond effectively to sexual harassment or related improper behavior. Any increased effectiveness that this option might have over the current system would depend in large part on whether the statutory changes proposed in recommendation 5 are implemented. There is no guarantee that that will happen, and we do not believe this option would be nearly as effective as a schedule that includes increasing monetary sanctions in addition to increasingly severe warnings. Finally, although we will be proposing the use of interim actions and protective measures to protect other interests in various ways in the recommendations below, monetary sanctions do not have any academic freedom issues associated with them that might suggest a need for Article IX procedures. Sanctions that involve removing faculty members from teaching or some other duties can prove more controversial in that regard. We recommend engaging in such actions as interim actions or protective measures in the appropriate circumstances, but not as part of any formal schedule of sanctions. For our short form recommendations relating to interim actions and protective measures, see pp. 104-105 and 106-106.

## REPORT ON FACULTY SEXUAL MISCONDUCT

<p><b>Recommendation 2. Clarify How the University will Respond to Sexual Misconduct.</b> The University should place faculty and employees on notice that when responding to policy violations, the University will progress in its responses using the above-mentioned system of progressive sanctions. Choice of response should be based on the frequency and severity of the misconduct and the harm caused and on the potential to correct misconduct without significantly disrupting the academic or work environment. In some cases, responses should be non-punitive and may involve educational measures or counseling—as discussed more fully below in Section III.B. In cases of sufficient severity, the University should, however, begin suspension or dismissal proceedings immediately and should not be required to progress through lesser tiers of sanctions. Note, finally, that in addition to generating sanctions, sexual misconduct may have other effects on prospective faculty awards and benefits as described more fully in recommendations 7 and 8.</p>	<p><i>See pp. 41-56, Flowcharts on Formal Process, pp. 95 &amp; 127.</i></p>
<p><b>Recommendation 3. Ensure Uniformity of Sanctioning.</b> For any sanctions of faculty members that go above a letter of expectation, the University should place the sanctioning decision with the Provost. The effectiveness of a progressive system of sanctions depends in large part on the predictability of sanctions for repeat violations. Predictability can also strengthen confidence in a system’s fairness by allowing for sanctions to be implemented in a uniform manner across units. Having a single person decide sanctions relating to faculty members will help to produce a fair and effective sanctioning regime.</p> <p>In making these decisions, the Provost should confer with a larger “sanctioning team” that includes the Vice Provost for Academic Affairs, the College Dean, the Executive Officer of the faculty member’s department, a representative from Human Resources, a representative from OAE and the Title IX Office, a representative from legal counsel, and a special Senate or faculty representative. These representatives may have special knowledge about how like cases have been treated or about any other legal or factual issues that may be relevant to a particular case. Ideally, sanctioning decisions would take place quickly, before an initial report and recommendation is issued by OAE, so that the sanctioning decision could be communicated simultaneously with the OAE’s report and recommendation.</p> <p>The decision to sanction and the nature of the sanction should then be conveyed to the faculty member by the appropriate unit executive officer, who should retain continued (but reviewable) discretionary power in relation to other protective measures and non-punitive actions as necessary for the successful operation of the unit. The effective and fair implementation of the progressive sanction system should respect and leave in full force the statutory powers currently vested in all the officers of the University.</p>	<p><i>See pp. 41-56, Flowcharts on Formal Process, pp. 95 &amp; 127.</i></p>
<p><b>Recommendation 4. Clarify Procedures for Imposing Non-Severe Sanctions and Progressive Sanctions Short of Dismissal.</b> Before any sanctions are imposed on faculty, the choice of sanction should be considered by a group to consist, at minimum, of the Vice Provost for Academic Affairs, the College Dean, the Executive Officer of the faculty member’s department, representatives from OAE and the Title IX Office, the Office of Legal Counsel, and at least one faculty member who will not provide any conflicts of interest with respect to any future grievance processes (e.g., the Chair of FAC). The purpose of faculty representation at this early stage should be to advise as to whether any contemplated sanctions are likely to be deemed disproportionate on appeal or reversed because the conduct was a valid exercise of academic freedom. To prevent delay, the faculty representative could be given a short but reasonable turnaround time to raise any</p>	<p><i>See pp. 44-56, Flowcharts on Formal Process, pp. 95 &amp; 127.</i></p>

## REPORT ON FACULTY SEXUAL MISCONDUCT

<p>objections and advise as to how a faculty review board might view the matter. Absent a timely objection, the sanctioning group could proceed without such input. Letters of expectation could be issued without Provost input, though the Provost should be responsible for deciding to impose or pursue any larger or progressive sanctions on faculty members for reasons discussed in the last recommendation.</p> <p>Non-severe sanctions and progressive sanctions short of dismissal should be imposable without any further review by a faculty review board. (For progressive sanctions that are severe but short of dismissal, this procedural innovation would require a change to the statutes, as described more fully in recommendation 5 below.) Faculty members should, however be given the right to appeal to a panel that includes faculty representation. Current OAE procedures already include such a right, and the appeal panel includes faculty representation with special training to handle sexual misconduct cases. The panel is authorized to affirm, reverse, or remand findings relating to policy violations due to errors in factual findings or conclusions, procedural errors, or new evidence that is material but could not have been presented earlier. The Committee recommends formalizing this procedure, including a requirement of faculty representation and special training on sexual misconduct for any appeal within OAE of a sexual misconduct case involving a faculty respondent. The forthcoming OAE procedures have taken steps to do this.</p> <p>Under Article X, Section 2, faculty respondents have a further right to bring a grievance before the Committee on Academic Freedom and Tenure if they believe that they “do not enjoy the academic freedom which it is the policy of the University to maintain and encourage.” The statutes specify that “[t]he several committees may from time to time establish their own rules of procedure.” In cases where a non-severe sanction or progressive sanction short of dismissal is being imposed for sexual misconduct, CAFT should consider developing special, streamlined procedures to hear any challenges to such sanctions and recommend reversal only if the conduct found in the OAE process was protected by academic freedom or is being sanctioned in ways that unreasonably burden academic freedom. To decide these questions, CAFT should not engage in any new fact-finding or conduct any new hearings that require cross-examination of a complainant in the context of sexual misconduct cases. The proceedings could happen only after the OAE appeals process has been exhausted, such that the existence of the conduct has been established and the only remaining check is for a violation of academic freedom assuming those facts.</p> <p>If, however, the University brings either dismissal proceedings against a faculty respondent or seeks to impose a severe sanction short of dismissal without violation of a prior letter of expectation, then the sanction can only be imposed after the University has followed the more extensive pre-imposition proceedings before CAFT or a Senate-appointed review board as described in Articles IX or X of the University Statutes.</p>	
<p><b>Recommendation 5. Revise Article IX’s Definition of “Severe Sanctions Other than Dismissal.”</b> An ad hoc Senate committee should be formed to develop and propose changes to Article IX of the University of Illinois Statutes to address its overly narrow limitation on the “severe sanctions other than dismissal” that are available.</p> <p>Article IX currently allows only one severe sanction other than dismissal: “suspension with or without salary (full or partial) for a period not to exceed one-half of the individual’s normal appointment period.” A one-term suspension with salary can function more like a free unpaid sabbatical than a severe sanction short of dismissal. This limitation also prevents the University from imposing other severe sanctions short of dismissal that may be necessary in a fair and effective</p>	<p>See pp. 44-56, Flowcharts on Formal Process, pp. 95 &amp; 127.</p>

## REPORT ON FACULTY SEXUAL MISCONDUCT

<p>system of progressive sanctioning. Before seeking to dismiss a faculty member, the University may need to be able impose a year-long suspension without pay along with a requirement of proof of counseling and rehabilitation prior to rejoining.</p> <p>Article IX does not appear to be functional with its limited definition of “severe sanctions other than dismissal.” One sign that it is not functioning is that no one on the Committee remembers Article IX ever having been invoked in any case on this campus.</p> <p>An ad hoc Senate committee could be formed to address these problems. Without judging the work of that committee, one way to do this would be to amend Article IX, Section 6(e) to read:</p> <p style="padding-left: 40px;">When misconduct is determined to have occurred, a severe sanction other than dismissal may consist of a suspension without pay not to exceed the individual’s normal appointment period or long-term relief from teaching with a concomitant reduction in pay along with proof of counseling and rehabilitation before rejoining. During the period of any sanctions other than dismissal, health and retirement benefits shall be maintained.</p> <p>In order to align Article IX with the needs of a system of progressive sanctioning that is sufficiently expeditious and trauma-informed in the context of repeat misconduct, the following language (or some near variant of it) should be included in any revision of Article IX:</p> <p style="padding-left: 40px;">If the cause for initiating the procedures in this Article is a violation of the Sexual Misconduct Policy or Nondiscrimination and Harassment Policy for which prior sanctions have been imposed, then the initial grounds for imposing the sanction shall require only a finding, based on the preponderance of evidence, that the respondent failed to comply with the prior letter of expectation. The faculty member shall have a right to appeal the sanction before a Senate-appointed review board, which may reverse the sanction or require a lesser progressive sanction but only if the respondent can show by a preponderance of the evidence, and without a live hearing that requires cross-examination of any complainant, either that (1) the conduct described in the report was protected by academic freedom or (2) is being sanctioned in ways that unreasonably burden academic freedom.</p> <p>This change would allow for a more rapid and trauma-informed system of progressive sanctioning, including the immediate imposition of severe sanctions short of dismissal in cases of sufficiently severe and repeat misconduct.</p> <p>Statutory changes are difficult to achieve and would require the coordination of three campus Senates as well as the Board of Trustees. There is no guarantee that this change is possible. Without such a change, however, the only functional severe sanction that the University will have to respond to sufficiently severe or repeat misconduct by faculty is dismissal with revocation of tenure. Dismissal proceedings are lengthy and difficult at any University because of the procedural protections granted to tenure. Dismissal proceedings can involve retraumatization of complainants and dismissal may not always be the best response if something less severe might still be effective. Complainants, faculty, the Provost’s Office, the</p>	
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## REPORT ON FACULTY SEXUAL MISCONDUCT

<p>Board of Trustees, and other campuses in the system may therefore find they agree that it would be more fair and effective to allow one-year unpaid suspensions (or one-year suspensions from teaching with concomitant reductions in pay) with proof of rehabilitation before returning to full service in some cases.</p>	
<p><b>Recommendation 6. Consider Trauma-Informed Methods when Revising Articles IX and Any Related Grievance or Review Procedures.</b> Balancing the obligations of due process and protection of victims is a delicate challenge. Involving members of FAC or CAFT early in the development of a case, as proposed in recommendation 3, may help reduce the need for repetitive collection of evidence and help minimize the retraumatization of complainants due to multiple stages of lengthy review or cross-examination. The need to minimize retraumatization should be considered throughout University processes that deal with sexual misconduct.</p>	<p>See pp. 44-56, Flowcharts on Formal Process, pp. 95 &amp; 127.</p>
<p><b>Recommendation 7. Clarify Other Consequences of Misconduct for Awards, Honors, Prospective Benefits, and Professional Development.</b> In addition to any sanctions that may fall into the system of progressive sanctions described in recommendation 1, faculty should be made aware that many administrative decisions include reflections about how a faculty member's reputation for integrity or fitness for certain roles fit into the University's missions. The University reserves the right, which it currently exercises in many such contexts, to examine an individual's disciplinary record when making such decisions. These outcomes are not punitive but can have impacts on professional development.</p>	<p>See pp. 44-56.</p>
<p><b>Recommendation 8. Incorporate Expectations about Faculty Conduct into Materials Distributed at Hiring or when Describing Some Awards or Other Forms of Professional Advancement.</b> The University should make its expectations concerning sexual misconduct by faculty clear when extending offers of appointment, awards, honors, and other forms of professional development. The University could do this in much the way it makes its expectations of tenure clear to incoming faculty when making tenure-stream hires, in materials provided to lateral hires, and in other similar communications. The University should provide faculty with notice when some honors and awards may be subject to revocation in case of violations of the new policy. Though many of these prospective benefits have traditionally been decided without consideration of a disciplinary history relating to sexual misconduct, the Committee believes that it would be appropriate and send the right signal throughout campus to make it clear that sexual misconduct will render a person ineligible (either for some time or permanently) for many of these prospective awards and benefits.</p> <p>In some cases, there will be difficult questions of what awards should be subject to conditions or eligibility constraints of this particular kind. To address these issues with appropriate shared governance, the University should facilitate the creation of a joint senate-administration committee to determine when, as a matter of general educational policy and mission, faculty who engage in sexual misconduct should be ineligible for some prospective awards, rewards, or grants offered by the University and for how long. Examples might include temporary ineligibility for merit salary increases, honors, promotion, chairs, leadership roles, sabbaticals, and other discretionary grants. Units or other granting committees should engage in similar reevaluations, using appropriate procedures to ensure shared governance over any decisions about any academic matters at the college level.</p> <p>These recommendations would bring the University in line with recent developments in higher education. Increasingly, external institutions—such as the AAUP, the American Academy of Arts and Sciences (AAAS), the National Science Foundation, the American Economic Association, the American Geophysical Union, and the American Mathematical Society—have begun to develop explicit policies that recognize that sexual misconduct interferes with the</p>	<p>See pp. 44-56.</p>

## REPORT ON FACULTY SEXUAL MISCONDUCT

academic mission of research, teaching, and service. Professional organizations have increasingly begun to state that some grants or honorary recognitions are dependent on a record of integrity that includes a history of refraining from sexual harassment. Several of these organizations have developed procedures that allow for the revocation of some grants or honors in the event of sexual misconduct. Examples include the honors of being an AAAS Fellow or an American Mathematical Society Fellow.	
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### III.B. Non-Punitive Responsive Measures

#### *III.B.1. Interim Actions*

SHORT FORM RECOMMENDATION	EXPLANATION / LONG FORM
<b>Recommendation 1. Extend Traditional Interim Actions to the New Policy.</b> The University should extend its current use and methods of evaluating interim actions to any reports of violations of the new policy.	See pp. 56-59.
<b>Recommendation 2. Involve Department Heads and Deans Early in Decision-Making Processes.</b> Best practices suggest that department heads and deans should be brought in early in the process when considering interim actions in relation to policy violations. The Title IX Office and OAE have already begun to do this with respect to current policy, and these developments should be formalized with respect to the new policy.	See pp. 56-59, Flowcharts on Interim Action Decisions, pp. 93 & 125.
<b>Recommendation 3. Consider Faculty-Specific Interim Actions.</b> Deans or department heads may have useful suggestions for faculty-specific interim actions to consider. Some examples may include, when appropriate and consistent with concerns for privacy and confidentiality, delaying consideration for some awards, chairs, leadership roles, or other honors pending the outcome of an investigation. The Provost and Office of Human Resources should help to ensure uniformity of treatment between cases. Whenever an interim action might burden a faculty member's academic freedom or respond to conduct that is likely an exercise of academic freedom or free speech, the group should consult a member of CAFT or the FAC for advice to determine whether an interim action is likely to be deemed unreasonably burdensome in a grievance process. Appropriate process should be followed to give respondents notice and an opportunity to be heard on such decisions.	See pp. 56-59, Flowcharts on Interim Action Decisions, pp. 93 & 125.
<b>Recommendation 4: Ensure Due Process and Shared Governance when Issuing Suspensions and Administrative Leaves.</b> The University should develop an explicit, precise, and clear suspension and administrative leave policy for faculty. The Provost's Office has been working on such a policy and consulting with faculty, the Senate, and other stakeholders about its proper content. We believe it is essential that any such policy include faculty consultation and allowance of an appeal to a faculty appeal board. For further elaboration of these process recommendations, see the long form of this recommendation.	See pp. 56-59, Flowcharts on Interim Action Decisions, pp. 93 & 125.
<b>Recommendation 5: Allow for Simple Requests for Reconsideration within the OAE Process.</b> Without prejudice to any other appeal or grievance rights that a faculty respondent may have, the OAE should develop internal procedures that allow faculty respondents to make simple requests for reconsideration or modification of an interim action on the ground that the interim action is overly broad or unreasonably burdensome in the circumstances. Requests for reconsideration should involve a simple paper process, which gives the respondent an opportunity to be heard by the OAE in consultation with any members of the interim action team if needed. Interim actions should be modified or narrowed only if the interests of complainants and the University can be protected in ways that are less burdensome to the respondent. This process may moot the need for more extensive grievance or	See pp. 56-59, Flowcharts on Interim Action Decisions, pp. 93 & 125.

## REPORT ON FACULTY SEXUAL MISCONDUCT

appeals proceedings in many cases.	
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### *III.B.2. Remedies*

SHORT FORM RECOMMENDATION	EXPLANATION / LONG FORM
<b>Recommendation 1: Extend Traditional Remedies to Violations of the New Policy.</b> The University should extend its current use and methods of deciding remedies to violations of the new policy.	See pp. 59-60.
<b>Recommendation 2: Embed More Confidential Advisors Who Can Help Coordinate Some Remedies without a Formal Report of Sexual Misconduct to the Title IX Office.</b> The University should explore mechanisms to embed additional confidential reporters within units and in geographically diverse locations to help with some remedies to educational or work access if a person who has experienced sexual misconduct does not want to file a report with the Title IX Office. These Confidential Advisors could provide a first line of access for the support of many potential complainants.  The 2017 Campus Climate Survey suggests that very few students who experience sexual harassment or misconduct ever make a formal report—a problem that is common in higher education around the nation. Regardless of whether a complainant decides to file a report with the Title IX Office, Confidential Advisors can provide confidential advocacy and support related to sexual misconduct including (but not limited to) crisis triage, safety planning, academic and employment needs, safe housing access, mental and physical health referrals, and support and advocacy with the criminal, employee, and student discipline systems. By increasing the amount and availability of Confidential Advisors across campus, the University would provide the community with greater access to time-sensitive services and support mechanisms and make accessibility less linked to decisions to report.	See pp. 59-60, Flowcharts on Intake Processes, pp. 92 & 124.

### *III.B.3. Supportive Measures*

SHORT FORM RECOMMENDATION	EXPLANATION / LONG FORM
<b>Recommendation 1: Extend Traditional Supportive Measures to Reports of Violations of the New Policy.</b> The University should extend its use and methods of evaluating supportive measures to alleged violations of the new policy.	See pp. 60-62.
<b>Recommendation 2: Create Adequate Staffing and Resources for Support Services.</b> <b>Recommendation</b> The University should ensure that sufficient funds and staffing are put into Confidential Advisors and other support services to meet the evolving needs of the campus community. Levels of funding and staffing should be tied to campus needs based on a periodic assessment of demand and wait times. The recent addition of staffing lines at the Women's Resource Center (from none to two staff members dedicated solely to providing confidential advising to survivors of sexual misconduct) is a step in the right direction, but the University should continue to check to ensure these resources are sufficient to meet campus needs. The University should create more Confidential Advisor positions, increase public awareness of this resource (especially with faculty and other employees), and possibly co-locate some within colleges or units to increase access to varied campus communities. Units could help by offering service credit to faculty or staff who work with Confidential Advisors and the Title IX Office to provide additional forms of support and education to people in their unit. For elaboration of these last recommendations, see Section III.C.1 (recommendation 2).	See pp. 60-62.
<b>Recommendation 3: Provide Access to Supportive Measures for Non-Parties and Non-Reporting Parties.</b> The University should make sure that the community	See pp. 60-62.

## REPORT ON FACULTY SEXUAL MISCONDUCT

knows that support services are available for non-reporting parties and for non-party witnesses or others who have been adversely affected by an episode of sexual misconduct.	
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### *III.B.4. Protective Measures*

SHORT FORM RECOMMENDATION	EXPLANATION / LONG FORM
<p><b>Recommendation 1. Prioritize Broader Protective Measures.</b> The University should offer responsive measures designed to protect not only the parties involved in sexual misconduct cases but also innocent third parties from risks at all procedural stages. The University currently tries to do this, at or near the start of an investigation, by engaging in a safety and risk analysis to determine whether a formal investigation is needed and what interim actions should be taken to protect the educational and work environment for third parties. These decisions, which can involve paid administrative leaves, currently involve representatives from the Provost's Office, the OAE, the Title IX Office, the Office of Human Resources, the Dean (or Associate Dean) of the college where the faculty respondent has a primary appointment, the Department Head, and, in some cases, the College's Office of Human Resources. The Committee supports the formalization of that process for reported violations of the new policy, including an extension to determine any durable protective measures that should be imposed at the close of an informal process or formal investigation. In cases where protective measures may raise academic freedom concerns, this decision team should include two faculty representatives from CAFT or FAC to determine whether the protective measures at issue are likely to be reversed on appeal or in a grievance. To ensure expeditious action, the relevant CAFT or FAC representatives could be invited to participate in the initial decision or, if they are unavailable, be given a short turnaround to raise any concerns before implementation (except in emergency cases). Faculty respondents should also be given a right to request modification or reconsideration before the same decision team on the grounds that a protective measure is overly broad or unreasonably burdensome.</p>	<p>See pp. 62-62, Flowcharts on Interim Action Decisions, pp. 93 &amp; 125.</p>

### *III.B.5. Educational Measures*

SHORT FORM RECOMMENDATION	EXPLANATION / LONG FORM
<p><b>Recommendation 1: Emphasize the New Policies and University Missions in Educational Talks.</b> Educational talks should (1) emphasize distinctions between the new policy and legal definitions of sexual harassment; (2) clarify that the University expects behavior from its faculty members and employees that goes beyond what the law requires; and (3) ensure that faculty are aware of the system of progressive sanctions that would be in place.</p>	<p>See pp. 62-65.</p>
<p><b>Recommendation 2: Emphasize Larger Efforts to Address Culture and Climate in Educational Talks.</b> Educational talks should be framed as one aspect of larger campus efforts, backed by senior leadership at all levels, to address culture and climate and meet aims that are central to the University's missions to educate and employ a diverse citizenry. The talks should indicate that the University seeks to (1) foster a healthy and supportive atmosphere for all members of the campus community, which is free from harassment of all forms; and (2) support the mental health, quality of life, and educational and professional development of all members of the campus community. The talks should (3) emphasize the harms created by harassment, including the special harms and vulnerabilities faced by some members of the community due to multiple forms of harassment; and (4), if applicable, help faculty understand the scope and limits of academic freedom and freedom of speech</p>	<p>See pp. 62-65.</p>



## REPORT ON FACULTY SEXUAL MISCONDUCT

and how to discuss controversial topics in an academic context in respectful and civil manners.	
<b>Recommendation 3: Involve the Vice Chancellor for Research, the Vice Chancellor for Diversity, Equity, and Inclusion, and/or Deans or Department Heads in Educational Talks.</b> Educational talks should be provided by people to whom faculty members will listen. Even if an OAE investigator performs the talks, in the processes leading up to them, the OAE should be given a mechanism to request formal participation of faculty leadership—such as the Vice Chancellor for Research, the Vice Chancellor for Diversity, Equity, and Inclusion, or Deans and/or Department Heads—on an as need basis. Their participation—whether through a formal letter or invitation to discuss the training further—can in some cases help ensure that educational messages are conveyed with sufficient institutional authority and backing and as aspects of the University’s larger mission. Senior leadership and executive officers should be trained by campus experts to ensure their participation is consistent with campus initiatives and best practices with respect to how values are to be implemented and communicated within departments.	See pp. 62-65.
<b>Recommendation 4: Implement a Formal System of Cautionary Notices.</b> Even without a formal investigation or finding of wrongdoing, educational measures and counseling should be accompanied by a written “cautionary notice” when allegations have been substantiated to some degree. A cautionary notice is a written notice that clearly indicates that (1) the conduct alleged in a report would violate the new policy if found; (2) there is credible evidence to support the allegation; (3) there has nevertheless been no formal investigation or finding of wrongdoing; (4) the existence of the cautionary notice will be taken into consideration when deciding whether to pursue formal investigations of any future reports of misconduct; and (5) the report in question may be reopened and investigated at a later date as part of a larger investigation. Cautionary notices need not be accompanied by educational measures or counseling, but an option to receive education or counseling should be given to respondents whenever a cautionary notice is issued. Cautionary notices should be noted in the internal Title IX database so that it is easier to identify and act upon repeat reports that have been substantiated to some degree. In response to a cautionary notice, a respondent should be given the right to respond with a statement, not to exceed five pages, providing his or her account of the alleged incident. That response should be kept on file with the cautionary notice and should accompany any sharing of the cautionary notice consistent with governing confidentiality rules.	See pp. 62-65, Flowcharts on Informal Processes, pp. 94 & 126, Flowcharts on Intake Processes, pp. 92 & 124.
<b>Recommendation 5: Document Educational Talks, Counseling, and Cautionary Notices.</b> Educational talks and cautionary notices should be written and documented.	See pp. 62-65.
<b>Recommendation 6: Track Units and Employ Unit Training When Needed.</b> The Title IX Office and OAE should track the number of cautionary notices or other adverse actions by unit or department and identify units or departments whose per capita rate of cautionary notices or other adverse actions suggests a need for group counseling to effect changes in climate. Those units or departments should be given official group training on the University’s policies, procedures and practices, which is led by a special faculty investigator or others who are specifically trained to educate faculty. The methods of trainings should be customized to the needs and characteristics of a department or unit, and methods to ensure accountability for the training should be developed. The existence of this mechanism should incentivize deans and department heads to make combatting sexual harassment a high priority during their leadership.	See pp. 62-65.

### *III.B.6. Voluntary Mediation and Restorative Processes*

SHORT FORM RECOMMENDATION	EXPLANATION / LONG FORM
<b>Recommendation 1: Appoint a Task Force to Consider Developing a</b>	See pp. 65-66,

## REPORT ON FACULTY SEXUAL MISCONDUCT

<p><b>Mediation Branch of Informal Process.</b> The University should form a task force to study and recommend the development of a voluntary mediation option within informal process. The task force should consider what models of mediation (or related forms of voluntary alternative dispute resolution), if any, might work best in the context of sexual misconduct cases within higher education. The task force should consider whether and how safety and mutual consent might be ensured in cases that can involve power imbalances. The task force should strongly consider disallowing binding non-disclosure agreements in cases where such agreements may create risks to the safety of third parties. Finally, the University should not allow such an option in cases involving sexual violence.</p> <p>The Committee bases this recommendation in part on the fact that the Department of Education's forthcoming Title IX regulations will almost certainly require the University to make some voluntary alternative dispute resolution mechanisms available to parties. Though the Committee has not studied the different ways these regulations might be implemented, it is critical that the University begin to consider these issues with sufficient care to be able to respond to the upcoming regulatory changes in ways that reflect the University's values.</p>	<p>Flowcharts on Informal Processes, pp. 94 &amp; 126.</p>
<p><b>Recommendation 2: Appoint a Task Force on Sexual Misconduct and Restorative Process.</b> Consistent with a growing literature, which suggests the potential usefulness of restorative process in a range of circumstances when safe and fully consensual, the University should form a task force to decide what restorative models, if any, should be integrated into the campus's informal processes for responding to sexual misconduct. The task force should consider whether and how safety and voluntary participation can be ensured in the special context of sexual misconduct cases in higher education. This work should begin while the University develops its informal processes relating to voluntary mediation or other voluntary alternative dispute resolution mechanisms needed to respond to the forthcoming Title IX regulations. Restorative processes will likely need to be an option within informal process that is distinct from voluntary mediation and will not be required by the Title IX regulations.</p>	<p>See pp. 65-66, Flowcharts on Informal Processes, pp. 94 &amp; 126.</p>

### *III.B.7. Broader Consequences of Sexual Misconduct in the Digital Age*

SHORT FORM RECOMMENDATION	EXPLANATION / LONG FORM
<p><b>Recommendation 1: Educate Faculty About the Evolving Consequences of Sexual Misconduct in the Digital Age.</b> Given advances in digital communication and changing public attitudes toward sexual misconduct, faculty should be made aware that sexual misconduct can have increasingly severe consequences that are not within the University's control. The informal sharing of information (whether by third party vendors, in on-line forums, or by people who have directly experienced misconduct) has begun to lead to increasingly large repercussions in the digital world. Social networks and online websites are beginning to distribute information about accusations or findings that can have negative impact on an accused faculty member's ability to recruit and retain excellent graduate students, teach and interact effectively with colleagues, attain leadership positions, or make lateral moves. The University can maintain some degree of confidentiality over personnel files, but the Freedom of Information Act allows the public to access a faculty member's disciplinary record and many aspects of Title IX investigations. The University cannot control what third parties do with such information. These facts should be emphasized in communications to faculty, including when engaging in educational measures or counseling.</p>	<p>See p. 66.</p>

## REPORT ON FACULTY SEXUAL MISCONDUCT

### III.C. Coordination of Actors within the System

SHORT FORM RECOMMENDATION	EXPLANATION / LONG FORM
<b>Recommendation 1: Extend the Title IX Coordinator's Oversight Role to the New Policy.</b> The Title IX Coordinator should be responsible for overseeing the University's compliance with the new policy. Especially during the implementation phase and to allow for regular reporting of outcomes, the University should ensure that the Title IX Office has sufficient funding and support to allow for effective implementation of the recommendations in this report.	See p. 67.

#### *III.C.1. Survivor Support and Problems of Underreporting*

SHORT FORM RECOMMENDATION	EXPLANATION / LONG FORM
<b>Recommendation 1: Communicate New Policies to Address Reporting Concerns.</b> As part of the larger roll out of the new policy, the University should actively communicate the content of the new policy to the campus community. Many complainants do not report incidents of sexual harassment or related improper behavior because they do not believe what they experienced was severe enough to report or because they believe that reporting will be futile. The University should explain why it has chosen to offer more protections under campus policy than is required by law and that the new policy prohibits sexual harassment that is not necessarily severe or pervasive enough to create a hostile environment. The University should explain how it will respond to reports of violations of the new policy using a system of progressive responses (including some non-punitive response, when appropriate) and should invite reporting of violations regardless of severity. When features of the new system address reasons some complainants may fear reporting, those features should be widely communicated and understood by the campus community.	See pp. 67-69.
<b>Recommendation 2: Create More Confidential Advisors and Support.</b> The University should create more Confidential Advisor positions, increase public awareness of this resource (especially with faculty and other employees), and possibly co-locate some within colleges or units. Many victims of sexual misconduct do not want to report through formal reporting mechanisms because they are afraid of or misunderstand the process and/or find it difficult to talk to campus officials with whom they are unfamiliar. It might facilitate reporting—and would certainly help with support—if some Confidential Advisors were embedded within units to allow students to become more familiar with co-located Confidential Advisors. This would create a more accessible and streamlined referral process for people who believe they have experienced sexual misconduct to access additional support systems, both within the University and beyond. An option like this would require an ongoing financial commitment from academic units and/or the institution. Units could help by offering service credit to faculty or staff who work with Confidential Advisors and the Title IX Office to provide additional forms of support and education to people in their unit.	See pp. 67-69, Flowcharts on Intake Processes, pp. 92 & 124.
<b>Recommendation 3: Study and Consider for Adoption Evolving Forms of Informal Support and Coordination.</b> The University should create mechanisms to study periodically the evolving landscape of approaches to supporting survivors of sexual misconduct and make periodic reforms to reflect best practices as they evolve. The third-party service <i>Project Callisto</i> and recent appointment of ombudspersons in some professional societies now enable survivors to report incidents confidentially to these other resources before deciding whether to report to a Title IX Office. These resources can give people information about options for coordination if other survivors have reported the same person. The University	See pp. 67-69.

## REPORT ON FACULTY SEXUAL MISCONDUCT

should explore these and other ways of using Confidential Advisors or other databases or technical resources to facilitate the informal coordination and mutual support of people who may want to report but are reluctant to act alone.	
<b>Recommendation 4: Address Prospective Retaliation More Aggressively.</b> The University should study and create mechanisms to mitigate retaliation prospectively and more aggressively. Title IX requires the University to respond to reports of retaliation, and retaliation is specifically prohibited by internal policy. But more targeted, transparent, and affirmative actions to protect complainants against retaliation would address some reasons for underreporting. For example, if a graduate student requires letters of recommendation from a former advisor, mechanisms might be created to have those letters reviewed by a department head before being sent out. Methods of addressing retaliation should be clearly communicated on the <i>WeCare</i> website and in other public materials.	See pp. 67-69.
<b>Recommendation 5: Increase Transparency of the Response System.</b> The Title IX Office and the OAE should engage in efforts to increase the transparency of its processes for handling reports of sexual misconduct, including transparency about the types of outcomes that are possible with different options and procedures. Even if the University is responding in numerous, active manners to individual reports and cases, those responses will have a maximally positive impact on campus climate only if the campus community widely understands the response system and is regularly informed about how the University is handling reports of sexual misconduct. More specific recommendations relating to transparency can be found below in Section III.C.5 and in Section IV.	See pp. 67-69.

### *III.C.2. Special Faculty Investigator*

SHORT FORM RECOMMENDATION	EXPLANATION / LONG FORM
<b>Recommendation 1: Train Special Faculty Investigator(s).</b> The University should devote resources to train and/or hire one or more Special Faculty Investigator. Those investigators should be trained on the special procedural issues required for faculty sanctioning or other responsive measures and the types of procedural and substantive problems that might prevent a finding from surviving review by CAFT or in a legal dispute or other grievance. The Special Investigator should be well versed in the norms of higher education, including the positions of the AAUP on the scope and importance of academic freedom in higher education. Special Faculty Investigators should be excellent at writing and explaining decisions in ways necessary to survive internal and external review. It is possible that the Special Investigator should be a member of the faculty.	See p. 69, Flowcharts on Intake Processes, pp. 92 & 124.

### *III.C.3. Shared Governance and Faculty Review Boards*

SHORT FORM RECOMMENDATION	EXPLANATION / LONG FORM
<b>Recommendation 1: Provide Sexual Misconduct Training to Campus and Faculty Review Committees.</b> Before serving on a subcommittee to hear a case involving sexual misconduct, members of internal faculty grievance committees and appeals panels should be provided with training on sexual misconduct, contemporary understandings of trauma-informed practices and other best practices, the intersection of sexual misconduct and misconduct based on other protected classifications, and how sexual misconduct cases are investigated and handled.	See pp. 70-70.
<b>Recommendation 3: Minimize Retraumatization.</b> To the extent possible, CAFT or other internal review boards (including the Board of Trustees), under the advisement of sexual misconduct content experts, should develop procedures to	See pp. 70-70.

## REPORT ON FACULTY SEXUAL MISCONDUCT

minimize the retraumatization of victims due to multiple stages of cross-examination or other procedural hurdles. In many cases we have refrained from proposing specific procedures out of respect for faculty governance. But we regard trauma-informed procedures as critically important for addressing sexual misconduct.	
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### *III.C.4. Coordinating Expeditious Action at All Stages*

SHORT FORM RECOMMENDATION	EXPLANATION / LONG FORM
<p><b>Recommendation 1. Ensure that the OAE has Sufficient Funds, Staffing, and Methods of Coordinating with Other Actors to Investigate Reports Expeditiously.</b> The University should make sure that the OAE has sufficient funds and staffing to engage in prompt investigations of reports of faculty misconduct. Currently, the OAE has four EEO Investigators, an Interim Assistant Director, and a Sr. EEO Investigator. A search will be completed for a permanent Assistant/Associate Director later this year. With the recent addition of a Sr. EEO Investigator and these additional hires, the OAE believes that investigations into employee misconduct should generally be completed within 60 days of an initial report. Some cases will inevitably require extensions, but the OAE has protocols to determine when extensions should be granted. While implementing the recommendations in this report, the University should monitor OAE caseloads and ensure that staffing and timeliness do not become an issue.</p> <p>When interim or investigatory decisions require the involvement of other offices, those offices should deputize enough people with the authority to act on their behalf for prompt decision-making. Scheduling issues should not create impediments to timely investigations or action, and may require additional funding to support the appropriate staffing of Confidential Advisors and/or other support persons for parties involved, and may require additional funding to support the appropriate staffing of Confidential Advisors and/or other support persons for parties involved. Complainants should not be forced to choose between participation in an investigatory process, and support from a Confidential Advisor, due to insufficient staffing. If a decision requires the input of several offices or stakeholders, meetings should be conducted quickly by a smaller group when necessary and allow for the timely ratification, support, or objection of those who cannot be immediately present.</p>	See pp. 70-72.
<p><b>Recommendation 2. Facilitate Prompt and Coordinated Action by Executive Officers.</b> Executive officers in coordination with their colleges and the Provost's Office should impose sanctions or other measures in a timely fashion. Any deliberations needed to decide whether to begin dismissal proceedings or impose other severe sanctions short of dismissal should be engaged in expeditiously. Actions that are taken should be promptly communicated back to the Title IX Office for entry into its databases. Ideally, these decisions would be made before a report and recommendation is even issued, so that the OAE's report and recommendation could be accompanied by a letter from an executive officer informing the respondent of what actions will be taken.</p>	See pp. 70-72.
<p><b>Recommendation 3. Facilitate Prompt Review by Grievance Committees.</b> In cases where the University brings proceedings that may lead to severe sanctions and require a pre-imposition hearing before a Senate-appointed review panel or subsequent Board review, these processes should take place as quickly as is reasonably possible and—whenever possible—without having to reconvene witnesses who have already been cross-examined. In most other cases under the new system, non-severe sanctions and many other responsive measures would be imposable while any grievances or appeals are being pursued. Though those</p>	See pp. 70-72.

## REPORT ON FACULTY SEXUAL MISCONDUCT

sanctions would not have to await the outcome of a grievance, any such grievance processes should be handled expeditiously.	
<b>Recommendation 4. Foster Early Communication among Different Actors Within the Response System.</b> The OAE should provide advance notice to other parts of the response system when there is a substantial likelihood that other actors may have to make a sanctioning decision or handle a faculty review hearing. Advance notice will help other actors with scheduling to foster prompt action. Other appeals or review boards should do the same if their actions may allow for subsequent grievances or proceedings.	See pp. 70-72.

### *III.C.5. Communications with the Campus Community, the Public, and the Media*

SHORT FORM RECOMMENDATION	EXPLANATION / LONG FORM
<b>Recommendation 1. Create More OAE/Title IX Transparency.</b> The OAE and Title IX Offices should revise and publish clear explanations of its internal processes relating to how reports of sexual misconduct will be handled. These documents should be understandable to non-specialists and should clearly explain the relationship between what the Title IX Office and OAE do and what other departments and/or review processes may do after an informal process or formal investigation has been concluded.	See pp. 72-74.
<b>Recommendation 2. Create a Single, Coherent Description of Response Processes.</b> A task force that includes representation by the OAE, the Title IX Office, the Provost's Office, CAFT, OSCR, the Women's Resource Center, and the FAC should be formed to create a unified explanation of how reports of sexual misconduct will be handled under the new policy. That document should be publicized on-line at the <i>WeCare</i> website and be updated periodically when there are procedural changes. The document should be understandable to non-specialists and should contain all the steps in the response process, not just those that are conducted by OAE or within the Title IX Office. It should offer a single description that can be accessed by complainants regardless of whether the respondent is a student, faculty member, or non-faculty employee. Many of the current descriptions of rights and options or other aspects of the response system on the <i>WeCare</i> website are currently focused on student complainants and OSCR processes.	See pp. 72-74.
<b>Recommendation 3. Create a Simple Flowchart of the Entire Response Process.</b> The same task force should create a simple flowchart for members of the campus community to understand how reports of sexual misconduct will be handled. That document should be publicized on-line at the <i>WeCare</i> website and distributed to executive officers, deans, and faculty. It should be updated periodically if there are relevant procedural changes and should be understandable to non-specialists. The flowcharts in Appendix A may provide a useful starting point in this process. But those flowcharts were created to exhibit how the package of recommendations in this report would interact with current procedures—not to speak to the non-specialists who will need to interact with the system. Those flowcharts are also focused only on how reports against faculty respondents will be handled. The campus community needs a single resource that explains how all processes will work, regardless of whether the case is handled by OAE, OSCR, or Human Resources.	See pp. 72-74.
<b>Recommendation 4. Begin Regular Public Reporting on Complaints of Sexual Misconduct and How They Have Been Handled.</b> The Title IX Office or the Provost Office should adopt a system of regular reporting about how the University has been handling reports of sexual misconduct. The reports should describe in general terms the classes of reports that have been handled and what responses were taken (e.g., formal investigation v. informal process of various kinds, what the	See pp. 72-74.

## REPORT ON FACULTY SEXUAL MISCONDUCT

findings were, whether cautionary notices, educational measures, supportive measures, protective measures, remedies, sanctions, or interim actions were taken and what kinds, and any settlement agreements that were entered into and their basic terms). University leadership should be able to point to this general information when asked about how the University is handling particular cases that cannot be discussed publicly. The frequency of the reports should be based on an assessment of the benefits of regular information for promoting a campus climate that is widely perceived as intolerant of sexual misconduct and to show a clear commitment to transparency—but also not so frequently that personally revealing information about complainants might be revealed or inferred by the public. For one example of such a reporting system adopted by Yale University, see <a href="https://provost.yale.edu/title-ix/reports">https://provost.yale.edu/title-ix/reports</a> .	
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### IV. REVIEW OF CONFIDENTIALITY AND TRANSPARENCY

#### IV.A. Confidentiality Prior to a Report

SHORT FORM RECOMMENDATION	EXPLANATION / LONG FORM
<p><b>Recommendation 1. Create a Comprehensive, Public Confidentiality Policy that Enables Parties to Make Well-Informed Decisions at Any Stage of a Process While Addressing Common Confidentiality Concerns.</b> The University should create a public and easily accessible link on the <i>WeCare</i> website to a comprehensive confidentiality policy relating to sexual misconduct. This comprehensive policy should be distributed in other materials that are easily accessible and provided to complainants or potential complainants in multiple and repeat forms.</p> <p>The comprehensive policy should collect information that is relevant to confidentiality but is currently dispersed in different documents prepared by different offices and/or is being communicated only in limited forms or venues. The policy should aim to be holistic and understandable by people who are not experts in how the University structures offices or divides authority for different aspects of the University's response system. When drafting the document, the University should prioritize placing complainants who may know little about the University's response system in a position to make well-informed decisions about whether to report and whom to confide in at different stages of a process. The document should be carefully drafted to address common confidentiality concerns that may chill reporting. The document should prioritize communications that will help the campus community understand it has an active partner in investigating and responding fairly to sexual misconduct reports and not contain only statements that meet legal compliance requirements or avoid legal risk to the University.</p> <p>More specifically, the comprehensive policy might begin by stating—as some official documents already do—that most employees at the University, including most faculty and staff, are currently required by University policy to report any incidents of sexual misconduct that they may learn about to the Title IX Office. The comprehensive policy might then state—as some official documents already do—that the University has nevertheless designated several confidential resources, which can provide people who have experienced sexual misconduct with confidential advice and support, including support as a complainant weighs the option whether to file a report with the Title IX Office. Those confidential resources should be clearly listed, with contact numbers and addresses, and with brief descriptions of the support services available from each. (All of this information can currently found in some form on the current <i>WeCare</i> website.) The policy should make it clear that complainants may speak with Confidential Advisors openly, without fear that information about their cases will be distributed any further.</p> <p>The comprehensive policy should then state how the University—and not just any one single office—will handle sensitive information if and when a report is made to the Title IX Office. Unless directed by law or as necessary to provide notice of allegations to a respondent, the</p>	<p>See pp. 74-82.</p>

## REPORT ON FACULTY SEXUAL MISCONDUCT

<p>University's general policy should be to share information about sexual misconduct cases that may be personally revealing about a complainant only with University officials who must participate in the investigation, adjudication, or response to a report. Even in that context, only information needed for an effective response should be shared. When information about a complaint is first shared with a respondent, OAE should adopt the procedures used by OSCR, which limit preliminary disclosure to facts about the section of the Sexual Misconduct Policy that the respondent has been accused of violating, a short summary of the accusation, and the alleged timing, alleged location, and alleged subject of the violation. The disclosure should be designed to place the respondent on sufficient notice to respond to the allegations, consistent with a respondent's rights to due process, without giving the respondent special access to all the details of a complainant's testimony before the respondent has been independently interviewed.</p> <p>Findings relating to policy violations by respondents may, on the other hand, be shared more broadly with appropriate officials as needed to prevent the recurrence of sexual misconduct and to help monitor for threats of retaliation or other risks. In such cases, every effort should be made to withhold or redact any personally revealing details about complainants. Complainants should be informed that the University will be producing regular, summary reports on how it handles sexual misconduct cases but that those reports will be written in ways that are designed to prevent public disclosure of any personally revealing information.</p> <p>Complainants should also be told that under the Illinois Freedom of Information Act, any documents regarding university business are considered public records and may be subject to public disclosure. These records can include the disciplinary records of public employees, including faculty respondents, whereas information about investigations and disciplinary matters relating to students is typically protected by FERPA. When replying to FOIA requests relating to sexual misconduct cases that may involve a complainant, the University will make every effort consistent with law to remove any personally identifying or revealing information about complainants so as to avoid retraumatization.</p> <p>The current <i>WeCare</i> page states that once a report has been filed, complainants may request that their identities not be revealed to a respondent (currently dubbed a "request for confidentiality") and/or that no action be taken against a respondent. The comprehensive confidentiality policy should contain that same information and should clearly describe the criteria that will be used to decide such requests. As a general matter, every effort should be made to respect a complainant's desires for confidentiality and to protect the safety and well-being of complainants consistent with the law and with the University's obligation to protect the safety and well-being of the larger campus community. This respect and protection should occur both in cases where a report and formal investigation occur and in cases where an educational conversation or other informal outcome is selected as the course of action.</p> <p>The comprehensive policy should state that no one who has experienced sexual misconduct will be required to participate in a formal investigation or informal process. Granting requests for confidentiality and decisions not to participate in an investigation may, however, limit the actions that the University can take against a respondent. The policy should describe what those limitations are (including any that may be specific to limiting responses to faculty misconduct if the respondent is a faculty member) and should identify what resources will be available to complainants who wish to remain anonymous. (Some of these limitations suggest the need for developing restorative justice options—as described in other recommendations.) Complainants should be specifically told that informal processes do not typically lead to findings of fact, and so cannot consistent with due process usually serve as bases for any sanctioning or punitive responses or create a record that may allow for effective progressive sanctioning for repeat offenders.</p> <p>Consistent with governing Title IX guidance, the comprehensive policy should tell complainants that if the University must proceed to a formal investigation to protect larger safety concerns on campus, complainants will be notified before any such action, including any correspondence with the respondent, is taken. The policy should state clearly that complainants will be provided with confidential support services, regardless of whether they participate in an investigation, and will have the right to have the University notify the respondent that the University has taken action against the complainant's desire if the complainant chooses.</p>	
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## REPORT ON FACULTY SEXUAL MISCONDUCT

<p>The comprehensive policy should state that the University will maintain confidentiality over any supportive measures offered to any party at any time, except to the extent that maintaining such confidentiality will impair the University’s ability to provide the supportive measures.</p> <p>The comprehensive policy should then explain how confidentiality will be treated by various actors during the course of an investigation. It should describe the importance of confidentiality for an impartial investigation but should contain accurate information about the rights that parties have to discuss aspects of their personal experiences with others. The policy should clearly identify the possible outcomes of informal processes and formal investigations and let parties know what information about outcomes they will be given. When there are special confidentiality rules pertaining to any possible grievance or other review processes, those confidentiality rules should be described as well.</p> <p>As noted, much of this information is already being conveyed in some form, but the University should develop a single, comprehensive document that is easily accessible and collects all of this information (along with any other information that may be relevant to confidentiality concerns of complainants) in one place. Creating this document will require the collaboration of different offices responsible for different aspects of the response system, as well as careful attention to the needs and concerns of potential complainants.</p>	
<p><b>Recommendation 2 (REPEAT): Embed More Confidential Advisors Who Can Help Coordinate Some Remedies without a Formal Report of Sexual Misconduct to the Title IX Office.</b> The University should embed additional confidential reporters within units and in geographically diverse locations to help with some remedies to educational or work access if a person who has experienced sexual misconduct does not want to file a report with the Title IX Office. These Confidential Advisors could provide a first line of access for the support of many potential complainants.</p> <p>The 2017 Campus Climate Survey suggests that very few students who experience sexual harassment or misconduct ever make a formal report—a problem that is common in higher education around the nation. Regardless of whether a complainant decides to file a report with the Title IX Office, Confidential Advisors can provide confidential advocacy and support related to sexual misconduct including, but not limited to: crisis triage; safety planning; academic and employment needs; safe housing access; mental and physical health referrals; and support and advocacy with the criminal, employee, and student discipline systems. By increasing the amount and availability of Confidential Advisors across campus, the University would provide the community with greater access to time-sensitive services and support mechanisms and make accessibility less linked to decisions to report.</p> <p>It would facilitate reporting in many cases—and would certainly help with support—if some Confidential Advisors were embedded within units to allow students to become more familiar with co-located Confidential Advisors. This would create a more accessible and streamlined referral process for people who believe they have experienced sexual misconduct to access additional support systems, both within the University and beyond. An option like this would require an ongoing financial commitment from the institution and/or academic units. Units could help by offering service credit to faculty or staff who work with Confidential Advisors and the Title IX Office to provide additional forms of support and education to people in their unit.</p>	<p>See pp. 74-82, Flowcharts on Intake Processes, pp. 92 &amp; 124.</p>
<p><b>Recommendation 3. Reconsider the Legal and Policy Landscape Relevant to Employee Mandatory Reporting Obligations Once the New Title IX</b></p>	<p>See pp. 74-82.</p>

## REPORT ON FACULTY SEXUAL MISCONDUCT

<p><b>Regulations Have Been Passed.</b> The Department of Education’s proposed Title IX regulations limit the circumstances in which information about sexual misconduct that is conveyed to an employee (including a faculty member) will be attributed to the University for purposes of withdrawing federal funding if there is an insufficient institutional response. The new regulatory landscape may give the University greater flexibility to decide when, as a matter of organizational policy, employees who learn of such information must report the information to the Title IX Office.</p> <p>Though Title IX regulations are not the only legal or policy considerations that bear on this question, not all universities have as broad mandatory reporting requirements as the University of Illinois. Many have experimented with more exceptions, and many more are likely to begin experimenting with broader exceptions once the new regulations come into existence. In addition, the new policy covers broader forms of misconduct, not all of which may require the same balancing of considerations that produced the current organizational decision to require broad mandatory reporting by almost all employees of any and all information that may be relevant to a possible claim under the Sexual Misconduct Policy.</p> <p>When implementing the new Title IX regulations, the University should begin to study, empirically, the question of what mandatory reporting obligations will best serve the guiding principles stated at the start of this section, consistent with the law and other governing regulations, while reducing the potential for institutional intimidation of individuals who report to any such newly designated non-mandatory reporters. In studying this question, the University should distinguish between being a non-mandatory reporter and being a Confidential Advisor. Whereas a Confidential Advisor is someone who is held out by the University as offering a guarantee of confidentiality and as having special training and expertise in how to respond to sexual misconduct cases, a non-mandatory reporter is an employee who is not obligated by organizational policy to report all incidents of sexual misconduct to the Title IX Office. The University should consider not just all or nothing options but also different classes of information that employees may or may not be obligated to report and whether it might make sense to obligate employees to report some information only to a Confidential Advisor who can help complainants decide whether they wish to report. The University should also consider whether there are sufficient Confidential Advisors or non-mandatory reporters who fall into specific protected classifications and/or intersections between protected classifications to allow all members of the campus community sufficiently relatable resources with whom to discuss sensitive matters. The University should also consider its own data to understand any shifts in levels of reporting, uses of confidential services, and/or numbers of reports that have led to formal as opposed to informal outcomes based on different mandatory reporting rules.</p> <p>Any policy changes should be based on a careful consideration of how those changes would likely aid in meeting the guiding principles outlined at the beginning of this section along with governing laws and regulations. The University should be careful to consider possible improvements but also not to jettison aspects of organizational policy that may be working well.</p>	
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### IV.B. Confidentiality During the Course of an Investigation

SHORT FORM RECOMMENDATION	EXPLANATION / LONG FORM
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## REPORT ON FACULTY SEXUAL MISCONDUCT

<p><b>Recommendation 1. University Officials Should Not Comment on Ongoing Investigations.</b> Out of fairness to all parties and to ensure a reliable and neutral investigation, the University should not comment on ongoing investigations. Sometimes, unofficial sources of information will begin to percolate about a case before the case has been decided. Though this information is rarely complete and often contains inaccuracies, it is generally best for the University to resist commenting on particulars of ongoing investigations. University officials should, on the other hand, feel free to point to general information that may help address general concerns about how the University responds to reports of sexual misconduct. University officials should be ready to point, first, to the comprehensive new policies that will be in place if the current package of recommendations is implemented (including to the new and more transparent descriptions of the response system), and, second, to the regular publications of information regarding reports and outcomes that will also be available if the current package of recommendations is implemented.</p> <p>University officials should also feel free to indicate that unofficial reports rarely capture a complete picture of a situation and often contain inaccuracies. Still, the University should understand that that answer will likely be satisfying only to the extent that the University offers a more complete and reliable picture of its response system along with regular, summary information about reports of sexual misconduct and outcomes, which are designed to prevent the disclosure of any personally revealing or confidential details.</p>	<p>See pp. 82-84.</p>
<p><b>Recommendation 2. Give Parties and Witnesses Accurate Information and Sufficient Resources to Make Well-Informed Decisions about How to Discuss Their Own Experiences with Others But Do Not Place Them Under General Confidentiality Requirements about Those Experiences.</b> The University should not make any statements relating to confidentiality that leave parties or witnesses with the impression that they cannot discuss their own experiences with others. The forthcoming Title IX regulations state that Universities may “[n]ot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.”<sup>63</sup> Hence, during the course of an investigation, parties have the discretion to discuss the allegations under investigation and to gather and present relevant evidence.</p> <p>Still, the University should make every effort to place parties and witnesses in a position to make well-informed decisions about how to exercise that discretion. The University should, for example, let parties and witnesses know that sexual misconduct cases involve sensitive information, much of which is often in dispute. The public disclosure of sensitive information during the course of an investigation can cause undue (and often unintended) harm to complainants, respondents, larger communities, and an investigation process. The public disclosure of information may subject some individuals to legal liability. When parties or witnesses discuss sensitive matters with other participants in an investigation, that fact may undermine the credibility of one or both parties’ testimony. As a result, parties and witnesses should exercise care when deciding whether to discuss issues relevant to an ongoing investigation with others except as necessary to contribute to a fair and reliable investigation or seek needed support.</p> <p>The University should provide information of this kind to parties and witnesses and should consider drafting a formal statement that contains this information and can be disseminated to people who participate in an investigation. These</p>	<p>See pp. 82-84.</p>

<sup>63</sup> Department of Education, *Notice of Proposed Rulemaking*, 34 C.F.R. 106, RIN 1870-AA14, at 50 (Nov. 18, 2018), available at <https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-nprm.pdf>.

## REPORT ON FACULTY SEXUAL MISCONDUCT

<p>communications should make clear that nothing in the University’s confidentiality advice or policies should be interpreted to prevent parties or witnesses from obtaining support they need (whether confidential or otherwise) to deal with the impact, stress, or trauma resulting from sexual misconduct or allegations thereof. Parties and witnesses should be informed that there is a general expectation that all persons present at any time during a resolution process will maintain the confidentiality of any information disclosed in that process in accordance with the University’s confidentiality policies. Parties and witnesses should, however, also be given accurate information about the fact that they have the discretion to share their own experiences with others if they choose. The University may nevertheless encourage parties and witnesses who are considering how to exercise that discretion to discuss their options with a Confidential Advisor. A Confidential Advisor may have valuable information that may help individuals decide whether and how to discuss sensitive matters in ways that are least likely to interfere with an ongoing investigation or to cause undue harm to individuals. Some parties or witnesses may also have special roles within the University that might limit the degree to which they can or should share their experiences outside of an investigation.</p>	
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### IV.C. Confidentiality and Transparency about Outcomes

SHORT FORM RECOMMENDATION	EXPLANATION / LONG FORM
<p><b>Recommendation 1. Provide Parties with Complete Information about the Status and Outcomes of Formal Investigations and Informal Processes.</b> The University should provide both complainants and respondents with regular updates about the status of investigations and with complete information about the University’s responses. If this information is not provided to complainants, then complainants can leave their experiences with OAE and the Title IX Office with an incomplete understanding of the University’s responses. That perception can make it harder to foster a climate that is widely perceived as intolerant of sexual misconduct, which is the most potent empirical predictor of fewer incidents of sexual misconduct.</p> <p>In particular, complainants should be provided with information about any interim actions taken against a respondent; about any cautionary notices provided to a respondent; about any educational talks that a respondent has undergone; about any protective measures that have been put into place; about any non-punitive outcomes of an investigation; and about any sanctions that have been imposed on a respondent. Complainants should be provided with clear information about any appeals or grievance processes that may be available to a respondent both prior to the filing of a complaint and after the completion of an investigation. Complainants should be provided with timely and accurate information about the outcomes of any such processes.</p> <p>When it comes to information about outcomes, current policies distinguish complainants who have participated in a formal investigation from complainants who have not. Whether or not a person has participated in a formal investigation people who believe they have experienced sexual misconduct have a special interest in knowing how the University has handled the allegation. Outcomes should be shared with complainants, regardless of their decision to participate in a formal investigation, though the University should feel free to let complainants who have not participated know that that decision may have limited the University’s ability to respond in other ways. Respondents should also be informed of all outcomes.</p>	<p>See pp. 84-90.</p>
<p><b>Recommendation 2 (REPEAT): Begin Regular Public Reporting on Complaints of Sexual Misconduct and How They Have Been Handled.</b> The</p>	<p>See pp. 84-90.</p>

## REPORT ON FACULTY SEXUAL MISCONDUCT

<p>Title IX Office or the Provost Office should adopt a system of regular reporting about how the University has been handling reports of sexual misconduct. The reports should describe in general terms the classes of reports that have been handled and what responses were taken (e.g., formal investigation v. informal process of various kinds, what the findings were, whether cautionary notices, educational measures, supportive measures, protective measures, remedies, sanctions, or interim actions were taken and what kinds, and any settlement agreements that were entered into and their basic terms). University leadership should be able to point to this general information when asked about how the University is handling particular cases that cannot be discussed publicly. The frequency of the reports should be based on an assessment of the benefits of regular information for promoting a campus climate that is widely perceived as intolerant of sexual misconduct and to show a clear commitment to transparency—but also not so frequently that personally revealing information about complainants might be revealed or inferred by the public. For one example of such a reporting system adopted by Yale University, see <a href="https://provost.yale.edu/title-ix/reports">https://provost.yale.edu/title-ix/reports</a>.</p>	
<p><b>Recommendation 3. Share Information about Findings of Fact (of Either a Policy Violation or No Policy Violation) Selectively within the Institution But As Needed To Meet Any Relevant Safety, Risk, or Perception Concerns.</b> Generally speaking, when there has been a finding of sexual misconduct or no sexual misconduct, information about that finding and any accompanying sanctions or other responsive measures should be shared with the complainant, the respondent, and the respondent's department head or supervisor as well as any other officials up the supervisory chain. This information should be placed the unit's personnel file and any personnel files maintained at higher levels of the supervisory chain so that it can be accessed through supervisory transitions and by other University officials who may need to make decisions where facts about sexual misconduct are relevant.</p> <p>Although personnel matters are generally treated as confidential, sexual misconduct raises special safety and risk concerns. General confidentiality norms pertaining to personnel matters cannot be interpreted so broadly as to impair the ability of the University to ensure the safety and welfare of its campus community or the integrity of its decision-making processes. When information about discipline relating to sexual misconduct is placed in a personnel file, it should be stored in a form that avoids containing any personally revealing information or facts about complainants. Information about the disciplinary records of public employees lasting up to four years is subject to FOIA and can be readily obtained by the public.</p> <p>In order that information is not lost in during supervisory transitions or due to problems with record retention, department heads and other officials above them within a supervisory chain should be able to make reasonable requests when necessary for the operations of the unit from OAE and the Title IX Office to ensure the unit has accurate information about reports and outcomes relevant to a particular unit or employee. This mechanism will allow department heads and others to update personnel files and ensure the accuracy of their personnel files in any cases of problems with record retention and can also give department heads a clear sense of the current state of their unit. Whenever information is placed in a respondent's personnel file, every effort should be made to withhold any personally revealing details about a complainant.</p>	<p>See pp. 84-90.</p>
<p><b>Recommendation 4. Begin a Pilot Program Designed to Avoid Future Employment Decisions Being Made with Insufficient Knowledge of Risk.</b> Some institutions of higher education are moving toward a model in which some hiring decisions will only be made if a candidate waives his or her right to confidentiality over disciplinary records relating to sexual misconduct. For a recent example, see</p>	<p>See pp. 84-90.</p>

## REPORT ON FACULTY SEXUAL MISCONDUCT

<p>the pilot program adopted by UC Davis, found here: <a href="https://academicaffairs.ucdavis.edu/reference-checks">https://academicaffairs.ucdavis.edu/reference-checks</a>.</p> <p>The University currently interprets the general confidentiality norms that govern personnel matters to prevent the disclosure of an employee’s disciplinary history relating to sexual misconduct even to other units within the University. This can lead to poor hiring decisions. One way to address this problem, without changing any official rules relating to personnel files, is to adapt UC Davis’s pilot program and consider applications for some positions—including tenured faculty positions—to be incomplete without a waiver of confidentiality relating to disciplinary actions relating to sexual misconduct. The University should begin a similar pilot program here and review its success, usefulness, and/or need for any exceptions one year and then three years out. As part of the pilot program, the University should announce that it will respond to such requests both internally and from other institutions if a University of Illinois employee or faculty waives such confidentiality. The University should begin requiring such waivers when considering internal transitions between units and external hires, and should prioritize thorough reference checks (including from a direct supervisor), as well.</p>	
<p><b>Recommendation 5. Avoid Binding Non-Disclosure Agreements.</b> As a general matter, the University should not enter into any binding nondisclosure agreements related to negotiated agreements. Though nondisclosure agreements can offer powerful incentives for some respondents who have engaged in sexual misconduct to agree to outcomes without the need for a formal investigation or lengthy investigations or appellate processes, sexual misconduct cases contain special safety and risk issues that warrant a policy against the University entering into any agreements that may prevent it from addressing such issues in appropriate manners. The fact that the University has a policy against binding nondisclosure agreements would not mean that the University would disseminate information haphazardly, without careful caveats, or in ways that may reveal confidential and personal information about complainants.</p>	<p>See pp. 84-90.</p>
<p><b>Recommendation 6. Maintain Heightened Confidentiality over any Supportive Measures Offered.</b> The University should use the standard set forth in the Department of Education’s proposed Title IX regulations to ensure heightened confidentiality over any supportive measures offered. These regulations state that universities that receive federal funding “must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality will not impair the ability of the institution to provide the supportive measures.”<sup>64</sup> The University should extend that rule to supportive measures offered to witnesses and non-parties.</p>	<p>See pp. 84-90.</p>
<p><b>Recommendation 7. Employ a “Safety-Risk-Perception” Analysis to Determine When Information about Responses that Do Not Include Formal Findings of Fact (of Either a Policy Violation or no Policy Violation) Should be Provided to a Respondent’s Supervisor or Other University Officials.</b> Currently, most reports of sexual misconduct are handled through informal resolution processes, which do not produce any formal findings of fact. In cases that do not produce any formal fact finding, the University may nevertheless engage in various informal measures, including, but not limited to: cautionary notices, educational talks, non-punitive letters of expectation, and protective measures. In such cases, OAE and the Title IX Office should engage in a safety-risk-perception analysis—which will be described below—to determine whether to provide information about reports or informal outcomes to other University officials.</p>	<p>See pp. 84-90.</p>

<sup>64</sup> Department of Education, *Notice of Proposed Rulemaking*, 34 C.F.R. 106, RIN 1870-AA14, at 133-134 (Nov. 18, 2018), available at <https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-nprm.pdf>.

## REPORT ON FACULTY SEXUAL MISCONDUCT

The University must be careful before acting on or disseminating information about reports of sexual misconduct that have not led to formal findings of fact. At the same time, reports of sexual misconduct may not lead to any formal fact finding for many reasons that are unrelated to whether sexual misconduct occurred. For example, a person who has experienced the sexual misconduct may be unwilling to participate in a formal investigation for fear of retaliation or due to concerns for confidentiality or privacy. For another example, a complainant may prefer an informal process to a formal investigation, even if an informal process will not produce a formal finding of fact, because an informal process will avoid the need for a lengthy and time consuming formal investigation. For yet another example, some reports of sexual misconduct are filed anonymously and may contain credible information that is nevertheless insufficient to base a formal finding of misconduct. When coupled with low reporting levels and the fact that many people who report sexual misconduct prefer an informal process to a formal investigation, OAE and the Title IX Office will often possess credible information about possible sexual misconduct that suggests the need for a wider institutional response, even without any formal finding of a policy violation. Sometimes, preliminary information may need to be disclosed to a department head or appropriate supervisor in order to allow the official responsible for a unit to remain abreast of the concern or monitor the situation without taking any punitive action against a respondent.

There are also cases in which a department head or other University official has prior information about allegations or reports that have been filed with the Title IX Office and is likely to be left with a misleading perception of the situation without information about an informal outcome. This can also happen in cases where informal information has been disseminated that may be partial or misleading. In some cases, complainants and respondents may both prefer that the University make some official information about an informal outcome public or disseminate it confidentially to some audiences.

Because of the sensitivities involved with sharing information about reports or outcomes absent a formal finding of fact, OAE and the Title IX Office should share such information with department heads, supervisors, or other University officials selectively and only in three circumstances: (1) if the expected protective value of doing so outweighs the potential harm to all parties concerned, considering the degree to which the allegations have been substantiated; (2) the recipient is already in possession of information about a report or allegations that would leave an improper and substantially harmful misperception absent the new information about outcomes; or (3) the parties agree that they would prefer an official statement about the outcome to be distributed publicly or confidentially to some more limited audience.

When information of this kind is shared, it should be shared only in limited circumstances, only confidentially on an as-need basis, only with careful and explicit caveats, and only after notification has been provided to both the complainant and the respondent.

Unless otherwise agreed to by the parties, information of this kind should always be accompanied by an explicit disclaimer that there has been no formal finding of either a violation or no violation. Recipients of the information should be warned that further dissemination of sensitive information about sexual misconduct cases can be damaging not only to respondents but also to complainants. Recipients should be given explicit confidentiality instructions about the information and should be told to share it further only with the same confidentiality limitations and only as needed to address the original safety-risk-perception issues that produced the initial decision to share the information beyond OAE and the Title IX Office.

## REPORT ON FACULTY SEXUAL MISCONDUCT

Recipients of this information should be informed that no punitive action can be taken against a faculty respondent for sexual misconduct without a formal finding of sexual misconduct. Recipients or others who may know about a complaint should also be told that they should make every effort to treat the complainants the same as if no complaint had ever been filed, and that changes in behavior or reaction toward a complainant can amount to retaliation. Complainants should be made to feel welcome in the units and groups within which they work and participate.	
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### V. CONCLUSION AND NEED FOR ONGOING REVIEW

SHORT FORM RECOMMENDATION	EXPLANATION / LONG FORM
<p><b>Recommendation 1. Commit to Ongoing Review and Analysis of the Implementation of the Package of Recommendations in this Report.</b> The University should institute a process of regular review and adjustment when implementing the package of recommendations found in this report. That process could take a number of different forms.</p> <p>For example, the University might engage in <b>periodic case reviews</b>, where key stakeholders (e.g., OAE, the Title IX Office, Human Resources, the Women's Resource Center, administrators, unit heads, and faculty representatives from FAC, CAFT, or the Senate) convene to discuss recent cases and examine the degree to which changing policies and procedures are working as intended or are causing unintended problems. This style of case review might be modeled after other, well-known models like the Child Fatality or Domestic Violence Fatality Review Processes (see, for example, <a href="https://ndvfri.org/">https://ndvfri.org/</a>). Unlike a formal audit process, these models involve confidentiality agreements relating to cases discussed to incentivize the honest sharing of information, including any problems.</p> <p>For another model, the University might engage in <b>aggregate data collection and analysis</b> to examine statistical information about reports, confidentiality requests, uses of formal as opposed to informal process, appeals, and outcomes, including sanctions. Statistical analysis may help identify associations between different aspects of the responding system(s), which may produce ideas for adjustments. Yet another model would include <b>evaluation by a third party</b> who can examine particular facets of the reforms to policy, procedure, and practice. This last approach might be especially valuable if information is needed about the perspectives of parties and witnesses, who might be willing to speak more freely with confidentiality assurances from a third party evaluator.</p> <p>Strategies like these need not be mutually exclusive. As a general matter, the first two strategies will tend to be more useful for the regular monitoring of activities and outcomes, whereas the third might can be more useful when trying to address targeted concerns raised by the first two methods. While engaging in regular review and evaluation of these reforms, the University should refrain from making overly hasty adjustments. Any comprehensive set of reforms is likely to produce some short-term implementation challenges, which may work themselves out over time. Adjustments should be based on clear evidence that they are required to solve long-term problems, and not just transitional issues, and that their implementation will improve the system.</p>	See pp. 90-91.



# REPORT ON FACULTY SEXUAL MISCONDUCT

## APPENDIX C: GLOSSARY

**Cautionary Notice:** a written notice that clearly indicates to a respondent that (1) conduct alleged in a report would violate the new policy if found; (2) there is credible evidence to support the allegations in a report; (3) there has nevertheless been no formal investigation or finding of wrongdoing; (4) the existence of the cautionary notice will be taken into consideration when deciding whether to pursue formal investigations of any future reports of misconduct; and (5) the report in question may be reopened and investigated at a later date as part of a larger investigation. Cautionary notices do not require formal investigations or findings of responsibility, though they do require that a report of misconduct has been substantiated to some degree.

**Educational Measure (Educational Talk or Counseling):** a responsive measure designed to remind individual respondents or groups who may need additional training about the content of campus policies or campus expectations of conduct. Educational measures may also convey information about the harms of sexual misconduct, the scope and limits of academic freedom and free speech, and the University's mission to cultivate talent of a diverse community by creating a welcoming, safe, and supportive culture and climate.

**Interim Action:** any temporary, non-punitive action taken prior to the completion of an informal processes or formal investigation to address concerns during an investigation about either party's safety or well-being, continued access to the University's employment or education programs and activities, the safety of the educational or work environment for third parties, and/or the integrity of the investigative process.

**Protective Measure:** a non-disciplinary, non-punitive measure designed to protect either the parties or innocent third parties from risks of sexual misconduct at any procedural stage.

**Remedy:** a non-disciplinary, non-punitive, individualized measure offered to a complainant by the University to redress or rectify alleged harms to the workplace or educational access sustained by a complainant due to a policy violation.

**Restorative Process:** an informal alternative to a formal investigation, which typically involves face-to-face meetings, managed by experts, which aim to repair harms while transforming behavior and healing communities.

**Sanction:** an official measure imposed on a respondent after a finding of a campus policy violation in order to penalize the respondent, express official disapproval of misconduct, rehabilitate the respondent when possible, and deter future instances of misconduct.

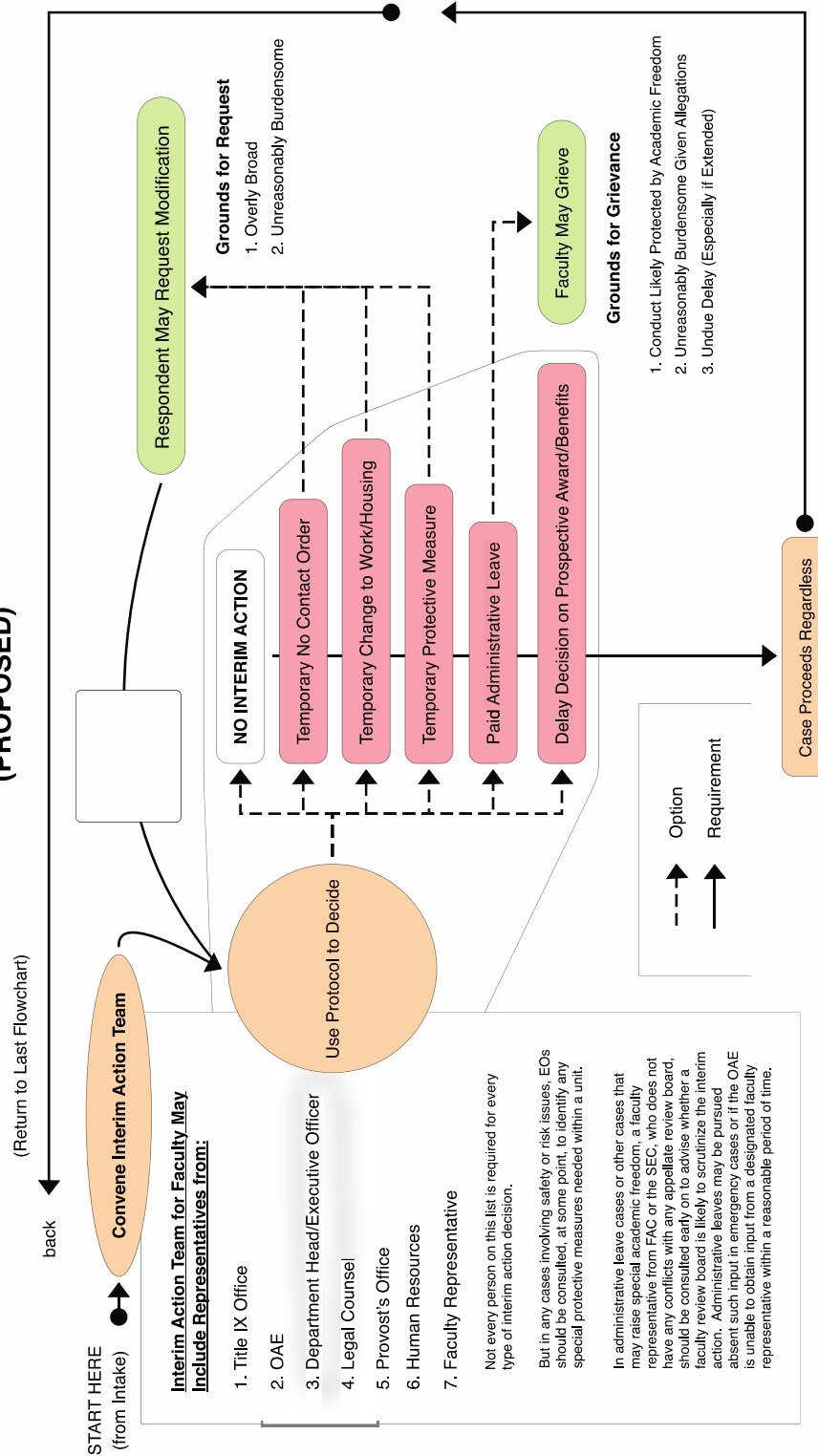
**Supportive Measure:** a non-disciplinary, non-punitive, individualized measure designed to assist parties with the impact, stress, or trauma resulting from alleged misconduct or from a report of misconduct or to help parties understand their rights and options or navigate an informal process or formal investigation.

**Voluntary Mediation:** a mutually consensual, informal process through which parties can resolve disputes with the help of a neutral expert who is trained to help parties discuss their differences. A mediator does not decide who is right or wrong or issue any formal decisions of responsibility. A mediator's job is to help parties work out their own solutions to problems.

## APPENDIX D: FLOWCHARTS (WITH INTERVENTIONS MARKED)



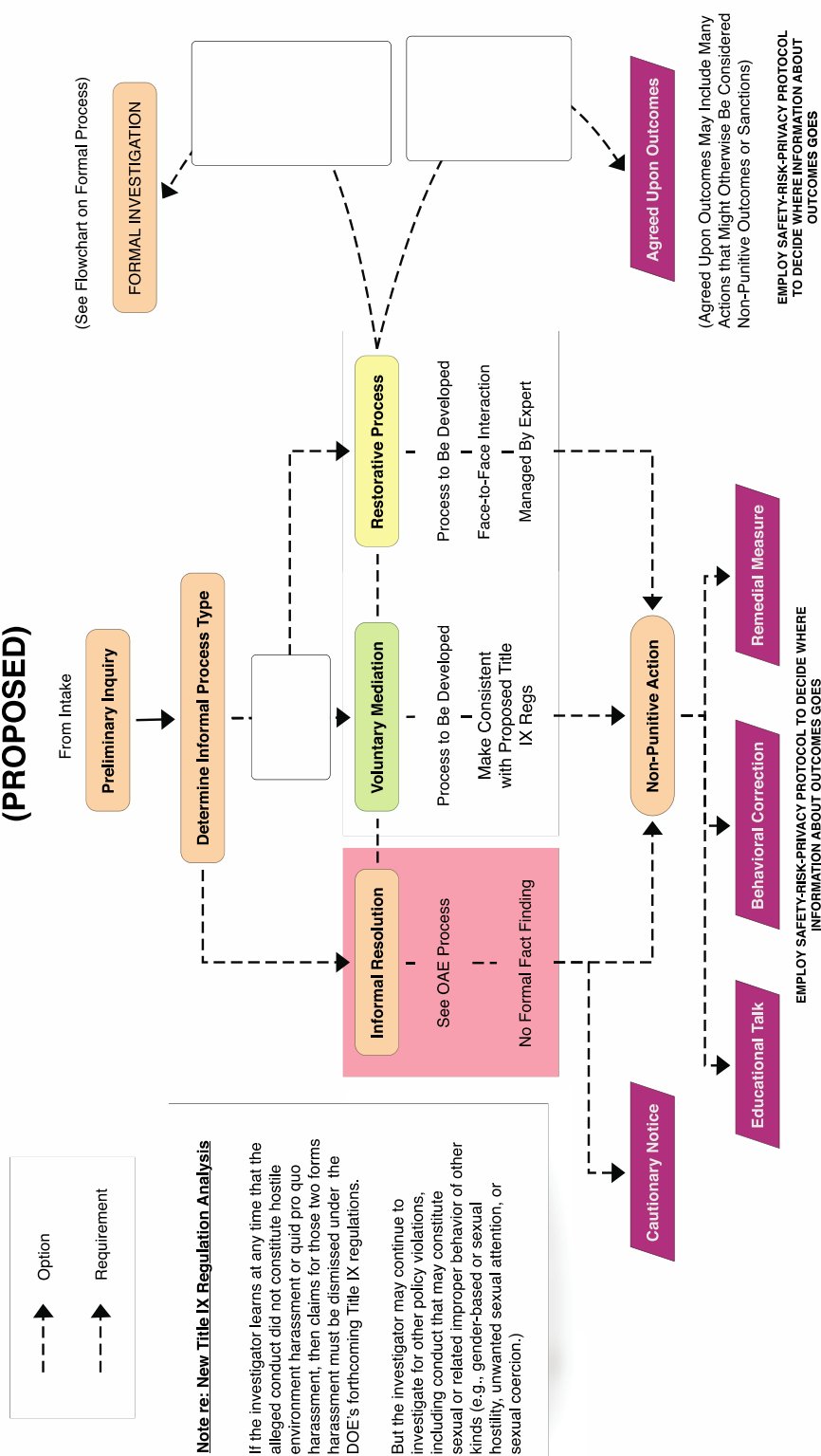
## INTERIM ACTION PROCESS FOR FACULTY RESPONDENTS (PROPOSED)



**FLOWCHART DISCLAIMER** All of the substantive recommendations in this report are found in the main text, not in these flowcharts. Any discrepancies in interpreted recommendation should be resolved in favor of the main text. In addition, the policies, practices, and procedures used to investigate and respond to sexual misconduct are currently evolving, such that these flowcharts cannot be relied upon as accurate indications of how these practices and procedures operate. Readers interested in understanding the correct, current policy or procedural statements by OAE, the Title IX Office, or any other appellate panel or grievance review board should consult the official materials from those entities. We nevertheless thought it would be helpful to create flowcharts to indicate how our main recommendations would integrate with and alter the type of policies, practices, and procedures used to investigate and respond to sexual misconduct by the University.

## REPORT ON FACULTY SEXUAL MISCONDUCT

# AOE INFORMAL PROCESS (PROPOSED)



**FLOWCHART DISCLAIMER** All of the substantive recommendations in this report are found in the main text, not in these flowcharts. Any discrepancies in interpreted recommendation should be resolved in favor of the main text. In addition, the policies, practices, and procedures used to investigate and respond to sexual misconduct are currently evolving, such that these flowcharts cannot be relied upon as accurate indications of how these practices and procedures operate. Readers interested in understanding the correct, current policy or procedural statements by OAE, the Title IX Office, or any other appellate panel or grievance review board should consult the official materials from those entities. These flowcharts are merely aids to indicate how our main recommendations would likely integrate into and alter the types of policies, practices, and procedures used to investigate and respond to sexual misconduct by the University.

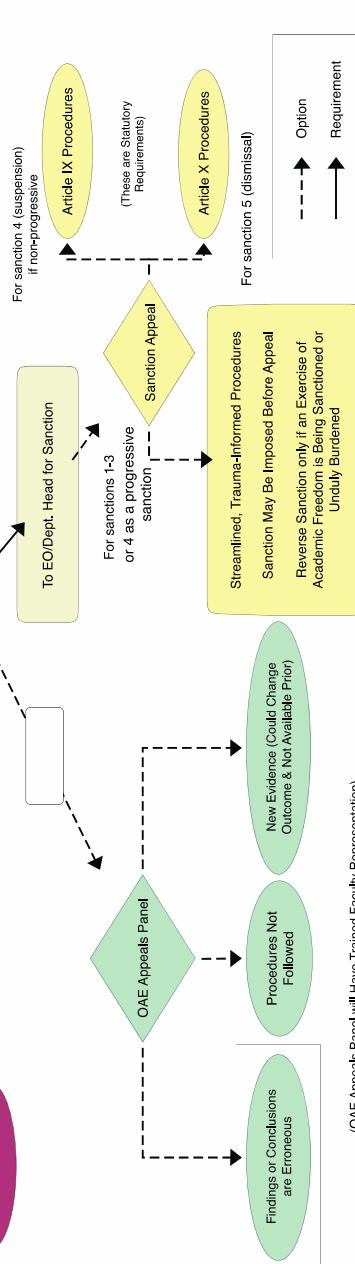
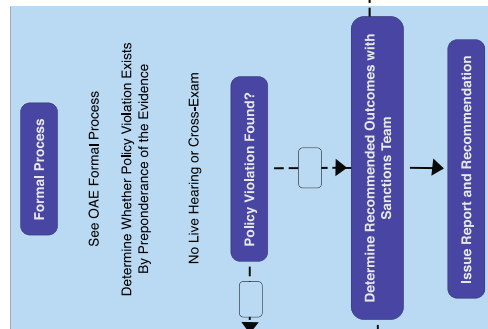
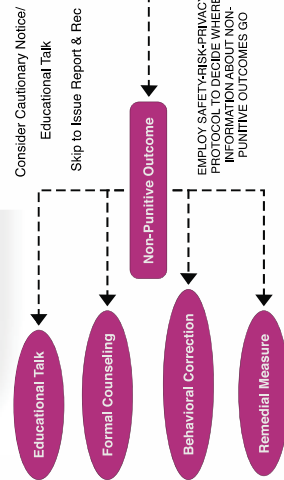
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## FORMAL PROCESS AND APPEAL (PROPOSED OVERVIEW)

### New Title IX Regulation Analysis

If the investigator learns at any time that the alleged conduct did not constitute hostile environment harassment or quid pro quo harassment, then claims for those two forms harassment must be dismissed under the DOE's forthcoming Title IX regulations.

But the investigator may continue to investigate for other policy violations, including conduct that may constitute sexual or related improper behavior of other kinds (e.g., gender-based or sexual hostility, unwanted sexual attention, or sexual coercion.)



USE PROTOCOLS TO DECIDE WHERE SANCTIONING INFORMATION  
GOES--ALWAYS TO COMPLAINANT AND RESPONDENT'S  
DEPARTMENT HEAD

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