

Independent Counsel  
Report to the  
University of Missouri  
Board of Curators

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## **CONCLUSIONS OF INDEPENDENT COUNSEL EXECUTIVE SUMMARY**

### **The University Failed to Have Title IX Policies in Place for Its Employees Contrary to the Department of Education's Guidance Regarding Title IX**

In 2012, and during our investigation, the University did not have policies in place for its employees addressing how University employees should handle information of a possible sexual assault upon a University student and what procedures should be followed by the University to investigate and ensure compliance with Title IX once the University receives notice of such allegations. The lack of such policies is not consistent with the Department of Education's guidance about the requirements of Title IX and is not in accord with what would be expected of a University with a robust Title IX compliance program. The University's lack of the necessary policies to ensure compliance with Title IX is significant and appears to have contributed in large part to the University's failure, as discussed in our additional conclusions, to conduct an appropriate inquiry when University officials had information indicating that Sasha Menu Courey had been sexually assaulted.

### **The University Should Have Acted on the Information It Had in November 2012**

An analysis of Title IX, its regulations, and the pertinent guidance provided by the Department of Education regarding its views of the requirements of Title IX, in conjunction with an analysis of the facts which were known by University officials as of November 20, 2012, demonstrates that the steps taken at that time by the University, and its General Counsel's Office in particular, were inconsistent with the Department of Education's guidance about the requirements of Title IX and were not in accord with what would be expected of a university with a robust Title IX compliance program. The Title IX coordinator should have been notified of the facts, an investigation should have been conducted at that time, and the police department should have been notified.

### **The Columbia Tribune Article in February 2012 Should Have Been Provided to the Title IX Coordinator**

Certain employees and officials of the University saw the February 21, 2012 *Columbia Daily Tribune* article regarding Sasha Menu Courey, which stated that Sasha had written in her diary about a sexual assault "at the end of her freshman year." The article provided no other details regarding information about the assault and further stated that Sasha "did not name the attacker." Nonetheless, this information should have been provided to the Title IX Coordinator so that she could decide what investigation should be done.

## **There is No Definitive Conclusion That Any University Employee Knew of Sasha's Assault While She was Alive, Other Than Medical Personnel**

Sasha Menu Courey told medical personnel of the sexual assault at various times. They are bound by confidentiality rules and cannot disclose that information.

In regard to a call between Sasha Menu Courey and Meghan Anderson on May 12, 2011, it is not possible to reach a conclusion as to what exactly Sasha Menu Courey said during the call, or conversely, to determine what Meghan Anderson heard. In fact, because Meghan Anderson was participating in the telephone call while at a restaurant, it is possible that either because of miscommunication or an inability to hear everything, there was an unintentional disconnect between what Sasha Menu Courey said and what Meghan Anderson heard during the call.<sup>1</sup>

Thus, aside from University healthcare providers, it cannot be definitively concluded that a report of sexual assault of Sasha Menu Courey was made to any employee or official of the University while Sasha was alive, other than medical personnel.

### **Final Note**

Neither the statutory language of Title IX, nor the corresponding regulations speak directly about sexual assault. Application of Title IX to sexual harassment and assault has been developed through case law involving private civil actions and through the various guidances issued by OCR. OCR has responsibility for enforcement of Title IX.

To the extent the Board's charge to Dowd Bennett was to determine whether the University "violated the law," because of the uniqueness of these particular facts, and because of the lack of specificity, clarity and precision within the actual statute and regulations as would be applied to these facts, it would be fairly easy to craft reasonable arguments that the University's actions did not "violate the law." However, we do not believe such legal debate is worthwhile for the purposes of advising the Board. As the OCR guidance specified in 2001, "The revised guidance reaffirms the compliance standards that OCR applies in investigations and administrative enforcement of Title IX of the Education Amendments of 1972 (Title IX) regarding sexual harassment." Therefore, while we do not conclude that the University "violated the law," we do conclude with certainty that the University, as set out above, acted inconsistently with the Department of Education's guidance about the requirements of Title IX and did not act in accordance with what would be expected of a university with a robust Title IX compliance program.

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<sup>1</sup> Clearly, if Meghan Anderson had heard of an allegation of sexual assault, it would have been her obligation to report that to her superiors and the University would have been responsible for addressing the report as called for by Title IX and the OCR guidance as discussed.

# **Independent Counsel’s Report to the University of Missouri Board of Curators Regarding Whether University Employees Acted Consistent with the Law and University Policies Regarding the Allegations of Sexual Assault of Ms. Sasha Menu Courey**

## **BACKGROUND**

In 2009, Sasha Menu Courey enrolled as a freshman at the University of Missouri – Columbia (“MU”). She was an excellent swimmer and arrived at MU as a highly touted athletic recruit. She was also an excellent student, with an interest in studying psychology. She was described by anyone who knew her as a vibrant personality.

Before she enrolled at MU, but undetected by her medical providers, Sasha Menu Courey suffered from Borderline Personality Disorder, a long-lasting, complex mental health illness. In her first semester, all indications are that Sasha was handling this disorder well. Tragically, in February of her freshman year at MU, she was sexually assaulted.<sup>1</sup> About 15 months following the assault, in June 2011, Sasha took her own life.

In late January of this year, ESPN’s *Outside the Lines* aired a story about Sasha Menu Courey. ESPN reported that Sasha Menu Courey had been raped in February 2010 by one or more football players and alleged that MU failed to properly investigate the information regarding her sexual assault.

On February 14, 2014, the Board of Curators, the governing body of the University of Missouri System (“UM System”), announced the hiring of the Dowd Bennett law firm to conduct an independent investigation to determine whether University<sup>2</sup> employees acted consistent with law and University policy regarding the allegations of sexual assault or rape of former MU student-athlete Sasha Menu Courey.

## **INVESTIGATIVE STEPS TAKEN**

Dowd Bennett interviewed more than 60 individuals. Forty-one of these individuals interviewed were in person, most of them in Columbia; the rest were interviewed by phone. Dowd Bennett had an in-depth meeting and interview with Sasha Menu Courey’s parents, reviewed all documents they provided, and had several follow-up communications with them by phone and by email. Other interviewees included current and former swimming coaches, members of the football team coaching staff, other current and former Athletic Department officials, attorneys from the UM System Office of the General Counsel, employees involved in responding to a public records request from Sasha Menu Courey’s parents, members of the Chancellor’s Office, healthcare providers involved in Sasha Menu Courey’s treatment, professors, the MU Title IX Coordinator, and individuals from the University of Missouri and

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<sup>1</sup> Though the assault has not been “proven” in a court of law, because this Report provides no identification of the alleged assailants, and because information regarding a possible sexual assault is sufficient to implicate Title IX, the Report will generally refer to the incident as an assault.

<sup>2</sup> “University” is used in this Report to refer collectively to MU and the UM System.

Columbia police departments. Dowd Bennett also spoke with a number of friends and teammates of Sasha Menu Courey.<sup>3</sup>

In addition, one of the first steps of the investigation was to set up through a third-party service a confidential reporting hotline that would allow individuals with relevant information to make an anonymous report by phone or over the Internet. The contact information for this service, as well as for Dowd Bennett, was included in the press release announcing Dowd Bennett's hiring to conduct the investigation. Another initial step was to place a hold on the email accounts of nearly 600 employees who were currently working in or who had formerly worked in MU or UM System departments that we had identified as having employees with potentially relevant information. These holds prevented any destruction of emails during the course of the investigation.

On February 20, 2014, at the request of Dowd Bennett, employees of these departments were also sent a memo from the UM System Board of Curators that: 1) notified them of the investigation and directed them to cooperate; 2) encouraged employees with relevant information to contact Dowd Bennett attorneys or to use the confidential third-party service that was set up to enable them to make an anonymous report; and 3) directed them to preserve all documents and electronically stored data related to Sasha Menu Courey or to the investigation in any way.

On March 20, 2014, Athletic Director Mike Alden sent another email to all Athletic Department staff that again encouraged employees with relevant information to contact Dowd Bennett or the confidential reporting hotline. That same day, Alden separately sent an email to all student-athletes encouraging them to contact Dowd Bennett or the confidential reporting hotline if they had relevant information.

After Dowd Bennett identified specific employees who had or who potentially had relevant information, we requested searches by the UM System IT staff for dozens of employees' email accounts for emails that contained certain search terms. As a result of these searches, Dowd Bennett reviewed close to 20,000 emails containing these key terms.<sup>4</sup> Dowd Bennett also reviewed emails retrieved from an image of the laptop of former MU Total Person Program Academic Coordinator Meghan Anderson. We reviewed other documents, including medical records, documents provided in response to public records requests, and documents provided by relevant individuals, including employees of the Athletic Department, the Chancellor's Office,

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<sup>3</sup> Several individuals, including one who had given an interview to ESPN, declined to be interviewed by Dowd Bennett or never returned telephone calls. Other individuals spoke to Dowd Bennett in initial telephone interviews but declined in-person interviews. Some individuals of whom interviews were sought could not be located. All current University employees made themselves available for any interviews requested.

<sup>4</sup> It should be noted that in order to help guard against the possibility of missing potentially relevant documents, our search terms were intentionally broad and a very large number of these emails, although containing one of the search terms, did not contain information relating in any way to Sasha Menu Courey or that was otherwise relevant to the investigation.

the Office of Student Conduct, the Office of the General Counsel, the Custodian of Records office, and the UM System Office of the Vice President for Human Resources.

Dowd Bennett also reviewed and analyzed MU and UM System policies and conducted legal research relating to Title IX and the Clery Act.

As a reading of this Report will show, there are very few individuals mentioned by name. A small set of people whose names were highlighted in the media are identified, but it is unnecessary for the purposes of advising the Board of Curators of the findings and conclusions to publicly identify everyone who provided information for this report.

## CONCLUSIONS

Dowd Bennett has reached the following findings and conclusions as a result of the investigation.

### Conclusion I:

**In 2012, and even during this investigation, the University did not have policies in place for its employees addressing how University employees should handle information of a possible sexual assault upon a University student of which they become aware and what procedures should be followed by the University to investigate and ensure compliance with Title IX once the University receives notice of such allegations. The lack of such policies is not consistent with the Department of Education’s guidance about the requirements of Title IX and is not in accord with what would be expected of a University with a robust Title IX compliance program. The University’s lack of the necessary policies to ensure compliance with Title IX is significant and appears to have contributed in significant part to the University’s failure, as discussed in Conclusions II and III, to conduct an appropriate inquiry when University officials had information indicating that Sasha Menu Courey had been sexually assaulted.**

Congress and the U.S. Department of Education determined that discrimination based on gender is damaging to the principle that women and men deserve equal access to education. As part of the effort to overcome traditional obstacles to the achievement of women, Congress passed the Education Amendments of 1972 (Title IX of that act being the most relevant).

Title IX provides: “No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a). Regulations promulgated by the U.S. Department of Education, specifically 34 C.F.R. § 106.31(a), contain the following language related to the prohibitions against sex discrimination found in Title IX:

Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance.

The U.S. Supreme Court and Federal executive departments and agencies, including the U.S. Department of Education Office for Civil Rights (“OCR”), have recognized that sexual harassment of students can constitute discrimination prohibited by Title IX. The threshold question is whether Title IX has been triggered by the circumstances presented in this matter. Title IX is an anti-discrimination statute. See 20 U.S.C. §1681. As such, the statute prohibits any discrimination, on the basis of sex, in education programs or activities receiving Federal financial assistance. Id. The prohibited discrimination is not limited to discriminatory policies or actions on the part of the university. Discrimination also occurs if: 1) a hostile environment exists in the school’s programs or activities; 2) the school knows or should have known of the harassment; and 3) the school fails to take immediate and appropriate action. 62 Fed. Reg. 12034, 12039. As the OCR has explained, a “school’s failure to respond to the existence of a hostile environment within its programs or activities permits an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX.” Id. Thus “Title IX does not make a school responsible for the actions of harassing students but rather for its own discrimination in failing to remedy it once the school has notice.” See id. at 12040.

Courts and OCR have recognized that sexual violence is a form of sexual harassment prohibited by Title IX. OCR has responsibility for enforcement of Title IX. On April 4, 2011, OCR issued what is now known as the Dear Colleague Letter (“DCL”), a “significant guidance document” for colleges and universities setting out its position that the DCL sets out “the requirements of Title IX pertaining to sexual harassment also cover sexual violence, and lays out the specific Title IX requirements applicable to sexual violence.” DCL, p. 1.

The DCL further states that the university’s Title IX coordinator is responsible for “overseeing all Title IX complaints and identifying and addressing any patterns or systemic problems that arise during the review of such complaints.” DCL, p.7.

### **The Lack of Adequate Policies**

Dowd Bennett was engaged to investigate whether the University acted consistent with the law and University policies regarding the allegations of sexual assault of Sasha Menu Courey. As part of the investigation, Dowd Bennett attempted to identify University policies which would have been relevant to assessing the University’s actions regarding the sexual assault allegations. However, after a review of existing University policies and interviews with those most responsible for such policies, it does not appear the University has policies addressing how University employees should handle information of a possible sexual assault upon a University student of which they become aware, and what procedures should be followed by the University to investigate and ensure compliance with Title IX once the University receives notice of such allegations. (Policies advising students, as compared to advising employees, about Title IX do exist on campus).

The 2011 Dear Colleague Letter advised universities to review and revise their policies to comply with the “requirements articulated in this letter.” Specifically, the Letter states:

OCR advises recipients to examine their current policies and procedures on sexual harassment and sexual violence to determine whether those policies comply with

the requirements articulated in this letter and the *2001 Guidance*. Recipients should then implement changes as needed. . . .

OCR also recommends that schools develop specific sexual violence materials that include the schools' policies, rules, and resources for students, faculty, coaches, and administrators. Schools also should include such information in their employee handbook and any handbooks that student athletes and members of student activity groups receive. . . . ***These materials also should tell students and school employees what to do if they learn of an incident of sexual violence.***

Consequently, following the issuance of the DCL, universities around the country began reviewing and revising their policies relating to Title IX and sexual harassment and sexual violence. The University of Missouri System organized a committee to conduct such a review of its policies in January 2012.

The committee was made up of representatives from all four UM System campuses, including Columbia. A representative from the University's General Counsel's Office was on the committee. The committee's charge was "to review and revise (as needed) all policies and practices related to Title IX compliance" and "develop[] a training program in response to Title IX mandates." The committee prepared a 43-page report with recommendations for significant proposed revisions and additions to UM System policies in order to comply with Title IX mandates: *Report on Title IX in the University of Missouri System dated September 4, 2012*.

However, as to proposed revisions to employee related policies concerning Title IX – which would have included the policies addressing how University employees should handle information of a possible sexual assault upon a University student of which they become aware, and what procedures should be followed by the University to investigate and ensure compliance with Title IX once the University receives notice of such allegations – there is a memorandum in the report which states, in part, that the responsibility to review these policies was assigned to representatives of the UM System, Human Resources and the General Counsel's Office, and that, "[t]o date, no proposed revisions have been received." *Report on Title IX*, p. 33. During her interview with Dowd Bennett, the UM System, Human Resources employee assigned to participate in review of the employee policies stated that she believes the General Counsel's Office determined that no revisions or additions were necessary. However, she acknowledged that there did not exist policies addressing the questions of how University employees should handle information of a possible sexual assault upon a University student of which they become aware, and what procedures should be followed by the University to investigate and ensure compliance with Title IX once the University receives notice of such allegations.

For reasons unclear to Dowd Bennett,<sup>5</sup> notwithstanding the formation of the committee and the issuance of its *Report on Title IX*, the University had yet to implement policies to address how University employees should handle allegations of sexual assault upon a University student of which they become aware and what actions and procedures should be followed by the University to investigate and ensure compliance with Title IX once the University receives

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<sup>5</sup> Dowd Bennett was not engaged to investigate why these policies relating to Title IX compliance were never developed or implemented, and therefore no conclusions were reached as to the cause of this lapse.

notice of such allegations. The MU Title IX Coordinator, the MU Vice Chancellor (and Deputy Title IX Coordinator), and the UM System Vice President for Human Resources have each acknowledged that such policies had yet to be implemented. Witnesses have indicated that, to the best of their recollection, members of the General Counsel's Office took the position that the then-existing employee policies were sufficient. The attorney from the General Counsel's Office who sat on the committee stated in her interview, "We probably dropped the ball."

We did not believe it was within our purview to attempt to assess why these policies were never implemented. No matter the reason, the fact remains that in 2012, when the University received notice that Sasha Menu Courey had said she was sexually assaulted, the necessary policies did not exist to ensure the matter was handled in compliance with the OCR's guidance about the requirements of Title IX.

## **Conclusion II:**

**From an analysis of Title IX, its regulations, and the pertinent guidance provided by the U.S. Department of Education regarding its views of the requirements of Title IX, in conjunction with an analysis of the facts which were known by certain University officials as of November 20, 2012, it is clear that the steps taken at that time by the University, and the Office of the General Counsel in particular, were inconsistent with the U.S. Department of Education's guidance about the requirements of Title IX and were not in accord with what would be expected of a university with a robust Title IX compliance program. The Title IX Coordinator at MU should have been notified of the facts, an investigation should have been conducted at that time and the police department should have been notified.**

## **Application of Title IX**

The DCL supplemented the OCR's *Revised Sexual Harassment Guidance* issued in 2001 (2001 OCR Guidance). Therefore, a proper understanding of the DCL also requires review of the 2001 OCR Guidance.

The 2001 OCR Guidance sets out the guiding principle for addressing sexual harassment because as OCR stated "[t]he law is clear that sexual harassment may constitute sex discrimination under Title IX." 2001 OCR Guidance, p. 3.<sup>6</sup> As the 2001 OCR Guidance set out in its Introduction, "A critical issue under Title IX is whether the school recognized that sexual harassment has occurred and took prompt and effective action calculated to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects. If harassment has occurred, doing nothing is always the wrong response." 2001 OCR Guidance, p.iii.

The 2001 OCR Guidance emphasis is very clear, "[i]f a student sexually harasses another student and the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the program, and if the school knows or *reasonably should know about the harassment*, the school is responsible for taking immediate effective action to

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<sup>6</sup> The 2001 OCR Guidance defines sexual harassment to include sexual assault. "Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature." 2001 OCR Guidance, p.2.

eliminate the hostile environment and prevent its recurrence.” 2001 OCR Guidance, p.12 (emphasis added). In analyzing what a school should reasonably know, i.e., what puts the school on notice, the 2001 Guidance spells out that, “[a] school has notice if a responsible employee ‘knew, or in the exercise of reasonable care should have known’ about the harassment.” 2001 OCR Guidance, p.13.

Relevant to our inquiry, a school’s Title IX responsibilities do not depend on a formal complaint or grievance from the student victim. 62 Fed. Reg. at 12042. The 2001 OCR Guidance recognizes that notice may come from other sources besides a complaint from a victim, stating, “[t]he school also may have [indirectly] learned about the harassment . . . . For the purposes of compliance with the Title IX regulations, a school has a duty to respond to harassment about which it reasonably should have known, i.e., if it would have learned of the harassment ***if it had exercised reasonable care or made a “reasonably diligent inquiry.”***” 2001 OCR Guidance, p.13. The 2001 OCR Guidance emphasized that the requirement of investigating allegations of sexual harassment was not dependent on the source of the information:

Regardless of whether the student who was harassed, or his or her parent, decides to file a formal complaint or otherwise request action on the student’s behalf (including in cases involving direct observation by a responsible employee), ***the school must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation.*** The specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. However, in all cases the inquiry must be prompt, thorough, and impartial.

2001 OCR Guidance, pp. 15-16 (emphasis added).

The 2001 OCR Guidance also addressed the circumstance when the harassed student requests confidentiality:

The scope of a reasonable response also may depend upon whether a student, or parent of a minor student, reporting harassment asks that the student’s name not be disclosed to the harasser or that nothing be done about the alleged harassment. In all cases, a school should discuss confidentiality standards and concerns with the complainant initially. The school should inform the student that a confidentiality request may limit the school’s ability to respond. The school also should tell the student that Title IX prohibits retaliation and that, if he or she is afraid of reprisals from the alleged harasser, the school will take steps to prevent retaliation and will take strong responsive actions if retaliation occurs. If the student continues to ask that his or her name not be revealed, ***the school should take all reasonable steps to investigate and respond to the complaint consistent with the student’s***

*request as long as doing so does not prevent the school from responding effectively to the harassment and preventing harassment of other students.*

2001 OCR Guidance, p. 17 (emphasis added).

The Guidance then goes on to state:

At the same time, a school should evaluate the confidentiality request in the context of *its responsibility to provide a safe and nondiscriminatory environment for all students*. The factors that a school may consider in this regard include the seriousness of the alleged harassment, the age of the student harassed, whether there have been other complaints or reports of harassment against the alleged harasser, and the rights of the accused individual to receive information about the accuser and the allegations if a formal proceeding with sanctions may result.

2001 OCR Guidance, pp. 17-18 (emphasis added).

The requirements set out in the 2011 Dear Colleague Letter supplement the 2001 OCR Guidance in setting out OCR's expectations for a university's response to allegations of sexual assault. Under the heading, "Schools' Obligations to Respond to Sexual Harassment and Sexual Violence," the letter states: "Regardless of whether a harassed student, his or her parent, or a third party files a complaint under the school's grievance procedures or otherwise requests action on the student's behalf, *a school that knows, or reasonably should know, about possible harassment must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation.*" DCL, p. 4 (emphasis added). The DCL further states (as did the 2001 OCR Guidance), "as discussed in more detail below, the school's inquiry must in *all cases* be prompt, thorough, and impartial." DCL, p.5 (emphasis added).

The DCL then states:

Schools also should inform and obtain consent from the complainant (or the complainant's parents if the complainant is under 18 and does not attend a postsecondary institution) before beginning an investigation. If the complainant requests confidentiality or asks that the complaint not be pursued, *the school should take all reasonable steps to investigate and respond* to the complaint consistent with the request for confidentiality or request not to pursue an investigation.

DCL, p. 5 (emphasis added). Neither Sasha nor her parents made a request to the University for confidentiality or a request for no action.

As was true in the 2001 Guidance, even if a request not to do anything is made, such a request does not eliminate the requirement to investigate. Rather, it merely shapes the investigation which needs to be done. Both the 2001 OCR Guidance and the 2011 DCL contain language setting forth the need for an investigation for allegations of sexual assault related to the

school because of the need for protection not just of the victim but the campus community in general.

As discussed in the *2001 Guidance*, if the complainant continues to ask that his or her name or other identifiable information not be revealed, the school should evaluate that request in the context of *its responsibility to provide a safe and nondiscriminatory environment for all students*. . . . The school should inform the complainant if it cannot ensure confidentiality. Even if the school cannot take disciplinary action against the alleged harasser because the complainant insists on confidentiality, *it should pursue other steps to limit the effects of the alleged harassment and prevent its recurrence*.

The fact that a sexual assault may have occurred off school grounds and outside a school's education program or activity does not negate the University's responsibility to investigate the allegation. Rather, the DCL specifically states that "schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus." DCL, p. 4. This is true for both the individual victim of a sexual assault and the university's "*responsibility to provide a safe and nondiscriminatory environment for all students*." DCL, p. 5. This is particularly pertinent if the possible sexual assault is student on student. There is no language in the DCL which negates the need to take "all reasonable" investigative steps when the University has notice of a possible student-on-student sexual assault.<sup>7</sup>

### **The Facts Relative to November 2012**

In August 2012, Sasha Menu Courey's parents submitted open document requests to the University asking for numerous records related to their daughter. During the course of the University's efforts to comply with the open document requests, the then-Deputy Custodian of Records came upon two significant documents contained within Sasha Menu Courey's e-mails.

The first document was attached to a draft e-mail created on December 8, 2010 and saved in Sasha Menu Courey's Drafts Folder. It was a transcript of an online conversation Sasha had with someone at the National Sexual Assault Hotline. The document has been referred to as the "chat transcript." Though the chat transcript itself is not dated, it indicates that Sasha was then a sophomore in college. The conversation began with Sasha stating, "last February I'm not sure what happened, whether it was rape or not." As the conversation progresses, it becomes clear from her description of the events, that Sasha was describing an incident of her being sexually

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<sup>7</sup> While the University was able to determine in 2014 that the incident may have occurred off campus, that fact would not in any way negate its responsibility to investigate the allegations in 2012. As the DCL letter sets out, "a school that knows, or reasonably should know, *about possible harassment* must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation." DCL, p. 4 (emphasis added). In 2012, when the University did not know the location of the reported assault, being aware of a "possible" student-on-student assault required the University to "promptly investigate."

assaulted. She referenced two “football players.” No other identification of the assailant/s was provided.

The second document was a Medical Intake Assessment Questionnaire for a psychologist in Canada. The questionnaire appears to have been filled out by Sasha Menu Courey and was e-mailed on April 21, 2011. In her e-mail attaching the questionnaire, Sasha stated “all I need is for this information not to get to my parents.” Amongst the information included in the Questionnaire was a response to the question, “Have you ever suffered a traumatic event (such events could vary widely from being scolded frequently as a child, to witnessing a serious injury or death, to rape or assault),” which included the answer that she was “raped by an acquaintance February 2010.”

On November 20, 2012, the Deputy Custodian of Records forwarded both of these documents to the University’s Assistant General Counsel who would routinely handle open document requests. On the same day, the same Assistant General Counsel reached out to several people within the MU Athletic Department and informed them of the documents indicating a sexual assault. He also reached out to the Senior Coordinator, Office of Student Conduct. The Title IX Coordinator was not notified of the allegation. No one contacted had received any information relating a sexual assault of Sasha Menu Courey. Prior contact with the MUPD by the Deputy Custodian of Records had also established that the MUPD had no incident report involving Sasha.

A week later, on November 27, 2012, the Deputy Custodian of Records forwarded to the Assistant General Counsel, another member of the General Counsel’s Office and the Custodian of Records the February 21, 2012 *Columbia Daily Tribune* article about Sasha Menu Courey. In the e-mail, the Deputy Custodian of Records stated, “The article mentions her diary and a sexual incident from her freshman year.”

The Assistant General Counsel and the Student Conduct Senior Coordinator discussed the information they had on two or three occasions in late November 2012. The discussion included some dialogue as to what actions, if any, could be taken by the University to look into the matter further. One option discussed was contacting members of the football team. After some consideration of the Dear Colleague Letter, the Assistant General Counsel decided that a letter should be written to Sasha Menu Courey’s parents to: 1) notify them of the discovery of the chat transcript; 2) inquire if they have any information possibly identifying the assailants; and 3) inquire if they want the University to conduct an investigation. The letter was drafted by the Assistant General Counsel in late November 2012 to be sent by the Office of Student Conduct. The letter was not sent until January 28, 2013.

Sasha Menu Courey’s parents received the letter but did not respond to it. Rather, they have indicated that they perceived the letter as an attempt by the University to “check the boxes” rather than a sincere attempt to find out information.

Following the mailing of the letter to Sasha Menu Courey’s parents, no further action was taken by anyone at the University. While discussing other unrelated matters with the Student Conduct Senior Coordinator, the Assistant General Counsel did inquire as to whether Sasha’s

parents had responded to the letter, but there was never a plan to address next steps if the parents did not respond. Consequently, there was no further communication with the parents and nothing further was ever done regarding the reported sexual assault.

During his interviews with Dowd Bennett, the Assistant General Counsel indicated that the decision to not conduct any investigation was his decision. He stated the reasons for the decision were: 1) to his knowledge, Sasha Menu Courey did not report that she had been raped to anyone while she was alive, suggesting she wanted to keep the incident confidential; 2) Sasha's parents had not responded to the letter, and he therefore assumed they did not want an investigation; and 3) in his view at the time, the information set out in the chat transcript did not provide sufficient leads to conduct an investigation.

### **An Investigation Should Have Been Undertaken and the Title IX Coordinator and Police Department Should Have Been Notified**

Because of the documents found in Sasha Menu Courey's e-mail, on November 20, 2012, the University was on notice of a possible rape against an MU student, who had committed suicide. Though there was no information as to whether the reported rape occurred on or off campus, the chat transcript indicated that the alleged assailant/s were "football players," presumably from the MU team. Though Sasha Menu Courey was no longer alive (and therefore, could not be subject to further prohibited harassment), it was not known whether the alleged assailant/s were still students and thereby still posed a risk to others on campus.

As discussed above, the OCR's interpretation of Title IX states, "[a] critical issue under Title IX is whether the school recognized that sexual harassment has occurred and took prompt and effective action calculated to end the harassment, *prevent its recurrence*, and, as appropriate, remedy its effects." As the 2001 OCR Guidance also states, "If harassment has occurred, doing nothing is always the wrong response." 2001 OCR Guidance, p. iii. The Guidance explains the University is responsible for both "responding effectively to the harassment and *preventing harassment of other students*" and providing "a safe and nondiscriminatory environment *for all students*." 2001 OCR Guidance, p. 17 (emphasis added). The Guidance also states, "by investigating the complaint to the extent possible — including by reporting it to the Title IX coordinator or other responsible school employee designated pursuant to Title IX — the school may learn about or be able to confirm a pattern of harassment based on claims by different students that they were harassed by the same individual." 2001 OCR Guidance, p. 18.

Likewise, the Dear Colleague Letter, which was a supplement to the 2001 OCR Guidance, states that it is the university's responsibility "to provide a safe and nondiscriminatory environment for all students." Therefore, in all cases it must pursue steps to both "limit the effects of the alleged harassment and prevent its recurrence."

Those within the University most familiar with Title IX understand the Department of Education's guidance about the requirements of Title IX calls for an investigation if a university is on notice that it possibly has an alleged rapist on campus. In an e-mail dated January 26, 2014, following the ESPN report about Sasha Menu Courey, the MU Title IX Coordinator, stated, "We had (according to our current understanding of T. IX requirements, but not contemporaneous standards) the obligation to assess, even if Sasha didn't want an investigation,

whether the accused present a continuing danger to (members of) the campus community.” Likewise, the MU Deputy Chancellor and an MU Professor of Law (who previously worked as an attorney for the OCR), stated in another January 26, 2014 e-mail discussing Sasha Menu Courey, “We clearly have a obligation to do what we can to protect our students from threats on our campus. . . . ***I believe Title IX and common sense would require us to explore that question ASAP***” (emphasis added).

Moreover, the Assistant General Counsel (and the University official who was most influential in the decisions made in the Fall of 2012), acknowledges that he made a mistake in 2012 and that the Title IX Coordinator’s above-quoted e-mail was correct that under Title IX the University “had the obligation to assess, even if Sasha didn’t want an investigation, whether the accused present a continuing danger to (members of) the campus community.”

However, in 2012, at least in part due to a lack of appropriate policies and training, the steps taken after the University found the documents indicating Sasha Menu Courey had been raped fell significantly short of the Department of Education’s guidance about the requirements of Title IX and what would be expected of a University with a robust Title IX compliance program. Inquiry was made of the MUPD,<sup>8</sup> the Student Conduct Senior Coordinator, and a small number of people in the MU Athletic Department, and Sasha Menu Courey’s parents were sent the January 28, 2013 letter. Nothing more was done. The OCR calls for a “reasonably diligent inquiry.” These limited steps do not qualify as a “reasonably diligent inquiry” when there were other reasonable, and likely more fruitful, steps to consider.

The limited steps taken around November 20, 2012, were not viewed as “an investigation” when they were taken. In fact, the January 28, 2013 letter to Sasha Menu Courey’s parents stated that the University was waiting to determine if “an investigation should proceed.” Additionally, during his interview, the Assistant General Counsel acknowledged he did not consider what he had done an investigation. Both the Assistant General Counsel and the Senior Coordinator for the Office of Student Conduct acknowledged that there were investigative steps that should have been taken but were not.

The Assistant General Counsel suggested that concern for Sasha Menu Courey’s confidentiality was a reason for not going forward with an investigation in 2012. However, the then-known facts do not justify this disproportionate concern regarding confidentiality. First, no one asked the University to maintain confidentiality – the Assistant General Counsel merely surmised Sasha Menu Courey’s desire for confidentiality based on uncovering no report of the alleged assault from their limited inquiry. Second, the victim’s confidentiality became less of an issue because she was deceased. She could not be embarrassed or humiliated or harassed because of the start of an investigation. Third, and most significantly, after her death, her parents had made the assault publicly known by providing the excerpt from her diary to the *Columbia Daily Tribune* reporter months earlier.

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<sup>8</sup> The MUPD was not asked to conduct an investigation, but only asked as part of the open documents request if they had documents referencing Sasha. This inquiry was made prior to the discovery of the chat transcript in November 2012.

The University also did not have a request to take no action. The only possible fact to allow speculation as to the parents' wishes was the non-response to an impersonal letter mailed to them. Particularly without any follow-up to confirm what the lack of a response meant, the parents' non-response does not justify the failure to investigate a possible rape of an MU student by other MU students.

Under the facts, the Title IX Coordinator should have been notified and an investigation undertaken. Further, because the assault would have been a criminal matter, law enforcement should have been notified.

There were a number of steps which could have been taken without exposing any more information about the reported sexual assault than was already within the public domain. First, as the Assistant General Counsel and the Student Conduct Senior Coordinator discussed back in 2012, the University could have interviewed members of the football team. Second, though not discussed in 2012, the University could have interviewed Sasha's friends and her teammates. Each of these interviews could have been done using the February 21, 2012 article from the *Columbia Daily Tribune* and thereby without exposure of possible confidential information. Third, the University could have put out requests to limited groups of students and student athletes seeking information through anonymous tip lines. Fourth, the University could have followed up with the parents to determine what information they had. Fifth, because at the same time they found the chat transcript they also found the Medical Intake Questionnaire, which indicated Sasha Menu Courey had told at least one healthcare professional that she was raped, the University could have sought medical releases from her parents to talk to other healthcare professionals. Sixth, as discussed between the Assistant General Counsel and the Custodian of Records in 2012, the University could have reached out to law enforcement and requested that law enforcement conduct an investigation.<sup>9</sup> As the Student Conduct Senior Coordinator said during his interview, the University could have done what ESPN did to acquire information.

Had the appropriate policies (as discussed in Conclusion I) been in place, the General Counsel's office would have been required to notify the MU Title IX Coordinator about the possible sexual assault on a student by other students. Yet because of the lack of appropriate policies and training, the Assistant General Counsel handling the Sasha Menu Courey matter indicated that in 2012 he was not even sure who the Title IX Coordinator was or if one existed. Had the Title IX Coordinator been informed, the facts would have been evaluated by individuals within the University best equipped to determine what steps should have been taken. Very possibly, better decisions would have been made.<sup>10</sup>

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<sup>9</sup> Referral to law enforcement does not relieve a university of its own investigative obligations.

<sup>10</sup> It should be noted, that the Athletic Department believed it did have a non-written policy which required any Department employee to report to their supervisor any report of sexual violence brought to their attention. The MU Athletic Director stressed with his employees that if "you see it or hear it, you own it." Everyone within the Department who was questioned about this unwritten policy confirmed that this was a frequent message. In fact, the Agenda for a Department Staff Meeting on September 28, 2011, listed "See It, Hear It, Report It" as a discussion item to be covered by the Senior Associate Athletic Director. But this unwritten policy did not provide the guidance to ensure that the Title IX Coordinator

### Conclusion III:

Certain employees and officials of the University saw the February 21, 2012 *Columbia Daily Tribune* article regarding Sasha Menu Courey, which stated that Sasha had written in her diary about a sexual assault “at the end of her freshman year.” The article provided no other details regarding information about the assault and further stated that Sasha “did not name the attacker.” Nonetheless, this information should have been provided to the Title IX Coordinator so that she could decide what investigation should be done.

#### The Article

On February 21, 2012, the *Columbia Daily Tribune* reporter David Briggs wrote a lengthy article about Sasha Menu Courey. The article was about Sasha, her struggles and death, and the man who received her heart in a transplant. In discussing Sasha’s struggles with mental illness, the article had one sentence which mentioned an entry in her diary made, “months later that she was sexually assaulted at the end of her freshman year.” The article also stated the diary did not mention “the attacker.”

When it came out in February 2012, the article was e-mailed to multiple employees in the Athletic Department, including those on the Executive staff. The article was also seen by at least one member of the General Counsel’s office. It is not clear that everyone who saw the article in fact read the entire piece or saw the reference to the sexual assault, but some people did see the reference. No action was taken to investigate the matter at this time by anyone at the University.

#### Title IX Implications

The 2001 OCR Guidance points out, “[i]f a student sexually harasses another student and the harassing conduct is sufficiently serious to deny or limit the student’s ability to participate in or benefit from the program, and if the school knows or *reasonably should know about the harassment*, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence.” 2001 OCR Guidance, p.12. The 2001 Guidance also states, “a school has a duty to respond to harassment about which it reasonably should have known, i.e., if it would have learned of the harassment *if it had exercised reasonable care or made a “reasonably diligent inquiry.”*” 2001 OCR Guidance, p.13.

Although the article’s brief mention of the assault is unclear as to whether the assault was during the school year, whether it occurred on or off campus, and whether the possible assailant was affiliated with the University, under the OCR guidance, the incident should have been reported to the Title IX Coordinator. There was a report of a sexual assault of a MU student.

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was apprised of all reports of sexual violence and did not provide guidance on how the information, once reported, should be handled at the University level. Once again, a university policy requiring notification of the Title IX Coordinator would have solved this problem.

The article did not say the assault was off campus or unrelated to the University. Therefore, since Title IX was “possibly” implicated, the Title IX Coordinator should have been informed.

The Title IX Coordinator’s responsibility would have been to determine what “reasonably diligent inquiry” would have been necessary. Given the information provided in the article, a reasonable step may well have been to contact Sasha Menu Courey’s parents to see if they knew more than was reported. Had the University made such an inquiry, it likely would have resulted in the discovery of information connecting the assault to other students, thus resulting in the need for a more in-depth investigation.

### **FINDINGS OF FACT THAT DID NOT PERMIT A DEFINITIVE CONCLUSION**

An issue of significant importance is whether any employee or official of the University became aware of the sexual assault of Sasha Menu Courey before her tragic death. The available information indicates that the assault would have occurred sometime in February 2010. Sasha took her life on June 17, 2011.

Though not immediately after the assault, Sasha Menu Courey did inform certain healthcare providers that she had been raped. From the records available, it appears that the first time she notified a University healthcare provider about the assault was in late December 2010, some 10 months after the incident. Over the following months, the healthcare records indicate that she shared information regarding the sexual assault with several other University healthcare providers.

Sasha does not appear to have used the available services on campus for survivors of sexual assault, such as those available in the MU RSVP Center in the MU Women’s Center.

Healthcare providers are generally prohibited from disclosing confidential information obtained from a patient, and we found no information that any healthcare provider disclosed the information regarding the assault to any MU officials outside of health care providers. The lack of disclosure by the healthcare providers does not violate Title IX or any other relevant law or regulation. It likewise does not violate any University policy.

Except for the healthcare providers, it appears that Sasha Menu Courey did not share this information about the assault with almost anyone, even her closest friends or family. One healthcare document does suggest that she disclosed the assault to someone identified as her “boyfriend.” We have not been able to identify that specific individual to talk to him.<sup>11</sup> We did interview one close friend who was told of the assault close to the time of its occurrence. However, she stated she did not share that information with anyone at all. Sasha did not tell her parents and in fact one document indicates she told a healthcare provider with the specific request that it not be shared with her parents. Her close friends and former teammates with

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<sup>11</sup> The ESPN report highlighted one of Sasha’s friends, Rolandis Woodland, and his knowledge of the assault of Sasha Menu Courey. Though an in-person interview was requested several times, Mr. Woodland only participated in a telephone interview. In his interview, he indicated that, though a very close friend of Sasha’s, he did not realize she had been sexually assaulted until he received a letter and video from Sasha a day or two after she had taken her life.

whom we were able to communicate also all indicated that she had not told them about the assault and they had not heard of the assault prior to her death.

We interviewed the current and former swim coaches and those in the Athletic Department who had close contact with Sasha Menu Courey. All denied hearing anything about a sexual assault prior to Sasha's death. A review of the emails collected from the accounts of key Athletic Department employees did not produce any evidence that anyone in the Athletic Department had been given or heard information about Sasha being sexually assaulted.

However, there was evidence that one Athletic Department employee - Meghan Anderson, the Total Person Program Academic Coordinator for baseball, swimming & diving and tennis during Sasha Menu Courey's time at MU - had been informed of the assault by Sasha. Regrettably, the existing evidence does not permit a conclusion as to whether Meghan Anderson did in fact ever hear Sasha say that she was sexually assaulted. The details surrounding that issue and the reasons no definitive conclusions are reached are set out below:

In a May 12, 2011 entry in Sasha Menu Courey's diary/journal, which was only seen by anyone other than Sasha after her death, Sasha wrote that she had told Meghan Anderson in a telephone conversation that she was raped:

I called my athletic academic advisor tonight. I told her how I don't think I'll be going back to Mizzou and that I'm doing well, working hard to get better. I let her know that I'd gotten raped back at Mizzou and it's a big reason why I don't think it's a good reason for me to go back. I felt so uncomfortable telling her, but I just wanted to get it out and let her know. I have to admit I felt relieved once I'd told her and I hope the news wasn't too difficult for her to hear. She didn't talk to me in a sympathetic way and for that I am so incredibly grateful. I didn't want to hear how sorry she was that I'd been raped and how horrible that must have been for me. My voice was firm and direct when I told her I'd been raped and then I moved on to telling her how I'm doing well now, talking to therapists and figure out the next steps. I was pleased that she didn't mention the rape again and simply told me that she was happy I was at McLean getting better. She told me take all the time I need making my decision on whether or not to come back to Mizzou and that if I make the final decision not to go back, she'll still be available to talk and help me transfer to another school. She is quite an incredible person. She is really kind and caring and she goes above and beyond to help her student-athletes exceed.

There is no question a telephone call between Sasha and Meghan Anderson took place on May 12, 2011. Phone records establish that Sasha Menu Courey had a nine minute call with the phone number assigned to Meghan Anderson in the evening of May 12, and Meghan Anderson fully acknowledges that the phone call occurred.

A day after the phone call, on May 13, 2011, the McLean Hospital therapist treating Sasha prepared Progress Notes containing notations that Sasha Menu Courey reported that she had spoken to her "college counselor" and discussed "her hesitations about returning to Mizzou." In a telephone interview, the therapist indicated that she had made the notation because Sasha had told her that she had such a call. The therapist stated that the only "hesitation" Sasha Menu

Courey had discussed with her about returning to MU was arising from the rape incident. Though the therapist did not have a recollection of Sasha Menu Courey telling her that she told the college counselor she was raped, she believed that was the conclusion to be drawn from a review of her notes and knowing the only hesitation for Sasha was related to the rape incident.

The therapist also stated that after Sasha's death, she had reviewed many of Sasha's diary entries. She described them as meticulous and accurate in their detail as to facts of which the therapist had first-hand knowledge. Therefore, she believed Sasha's May 12 diary entry accurately reflected Sasha's recollection of the conversation between the college counselor and Sasha Menu Courey. She did not believe the entry would have been fabricated by Sasha.

Also, in a telephone interview, a friend of Sasha's stated that Sasha had told her that Sasha told Meghan Anderson "something big." This witness did not submit to a requested in-person interview.

Ms. Anderson, who is no longer an MU employee, voluntarily agreed to an in-person interview with Dowd Bennett. In that interview, Ms. Meghan Anderson acknowledged that she did have a telephone call with Sasha Menu Courey on May 12, 2011. She was at a restaurant with a friend/co-worker celebrating the friend's birthday. At 9:02 pm the call was made to Meghan Anderson's cell phone. Meghan said when the phone rang, she saw that the call was from Boston and she assumed it was Sasha. At first, she was hesitant to answer because it had been suggested to her that given the seriousness of Sasha's mental health issues, and the lack of training she or others from the Athletic Department had with dealing with such serious mental health issues, it might be best to leave it to the treating medical providers to have any significant interaction with Sasha. Nevertheless, Meghan Anderson answered the phone because she stated she did not want to ignore Sasha. She stepped away from the table to take the call.

As to what was said during the call, Meghan Anderson is adamant that Sasha Menu Courey did not tell her she had been "raped." She is very confident that had she heard that word, she would have reacted strongly and known exactly what she would have needed to do (which, in her understanding was to report it to her superiors). She likewise stated, she did not hear anything about a sexual assault. Rather, she recalls Sasha telling her that she was hesitant to return to school because "bad things had happened there." Ms. Anderson assumed that the "bad things" were Sasha Menu Courey's attempts to take her own life. She stated that she did not hear anything that suggested Sasha Menu Courey was sexually assaulted. Because she believed she knew what the "bad things" were, she did not ask about them during the call. The conversation also involved a discussion of Sasha's alternatives for the next school year.

The interview of Meghan Anderson was conducted by Jim Martin and Ed Dowd, who between them have over 40 years of experience in investigative interviews. Both found Ms. Anderson to be very credible in her demeanor and description of the events. There was nothing observed during the interview which indicated that she was being less than fully honest.

Ms. Anderson was convincing that she knew she would be obligated to report the assault if she had heard Sasha mention a sexual assault.

Also noteworthy in assessing the dialogue between Sasha and Ms. Anderson, Sasha Menu Courey's May 12 diary entry states that during the call, Meghan Anderson "didn't talk to me in a sympathetic way and for that I am so grateful." Sasha Menu Courey's May 12 diary

entry also ends with a statement about Meghan Anderson that “[s]he is quite an incredible person. She is really kind and caring and she goes above and beyond to help her student-athletes exceed.” This description of Meghan Anderson was confirmed by multiple interviews. Both based on multiple interviews of people who knew Meghan Anderson and from the Meghan Anderson interview itself, Ms. Anderson’s personality does not appear to be the type that would fail to “talk in a sympathetic way” if she had actually understood that a person she clearly cared about informed her that she had been raped.

We also talked to the friend/co-worker with whom Ms. Anderson was having dinner that night. This individual at the time was a graduate assistant in the Athletic Department Total Person Program working with Meghan Anderson. She indicated she recalls the night that Meghan Anderson got the call. She stated that when Meghan Anderson came back to the table after the call, she did not say a lot about the call and did not give the appearance that she had been told terrible news. She also stated that she would have expected that had Meghan Anderson just been told that Sasha had been raped, Meghan would have told her because of both their friendship and their working relationship.

There is no evidence suggesting Sasha fabricated the details of her diary entry. However, considering all available information, it is not possible to reach a definitive conclusion as to how exactly Sasha Menu Courey described the sexual assault, or conversely, to determine what Meghan Anderson heard. In fact, though this is not a conclusion, because Meghan Anderson was participating in the telephone call while at a restaurant, it is possible that either because of miscommunication or an inability to hear everything, there was an unintentional disconnect between what Sasha Menu Courey said and what Meghan Anderson heard during the call.<sup>12</sup>

Thus, aside from University healthcare providers, it cannot be concluded that any University employee or official knew of information indicating that Sasha Menu Courey had been sexually assaulted prior to Sasha’s death.

### **FINAL NOTE**

Neither the statutory language of Title IX nor the corresponding regulations speak directly about sexual assault. Application of Title IX to sexual harassment and assault has been developed through case law involving private civil actions and through the various guidances issued by OCR. OCR has responsibility for enforcement of Title IX. Its Dear Colleague Letter is not statutory law passed by Congress but rather a “significant guidance document” for colleges and universities setting out OCR’s position that “the requirements of Title IX pertaining to sexual harassment also cover sexual violence, and [the DCL] lays out the specific Title IX requirements applicable to sexual violence.”

To the extent the Board’s charge to Dowd Bennett was to determine whether the University “violated the law,” because of the uniqueness of these particular facts, and because of the lack of specificity, clarity and precision within the actual statute and regulations as would be applied to these facts, it would be fairly easy to craft reasonable arguments that the University’s

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<sup>12</sup> Clearly, if Meghan Anderson had heard of an allegation of sexual assault, it would have been her obligation to report that to her superiors and the University would have been responsible for addressing the report as called for by Title IX and the OCR guidance.

actions did not “violate the law.” However, we do not believe such legal debate is worthwhile for the purposes of advising the Board. As the OCR guidance specified in 2001, “The revised guidance reaffirms the compliance standards that OCR applies in investigations and administrative enforcement of Title IX of the Education Amendments of 1972 (Title IX) regarding sexual harassment.” Therefore, while we do not conclude that the University “violated the law,” we do conclude with certainty that the University, as set out above, acted inconsistently with the Department of Education’s guidance about the requirements of Title IX and did not act in accordance with what would be expected of a university with a robust Title IX compliance program.<sup>13</sup>

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<sup>13</sup> While Title IX is implicated, the Clery Act does not appear to be. The Clery Act requires that universities disclose statistics for certain crimes that occur: 1) on campus, 2) on public property within or immediately adjacent to campus; and 3) in or on noncampus buildings or property that an institution owns or controls. Based on information available about the location of the assault, it does not appear that the Clery Act is implicated.

## ADDITIONAL LEGAL ANALYSIS

There may be those who believe that in determining the requirements of Title IX, the applicable case law should carry more weight than the guidance provided by OCR. However, we believe Title IX case law is not particularly helpful in determining the full responsibility of a university when it becomes aware of an allegation of sexual assault. Most Title IX cases address the circumstances under which a school may be held liable to a private plaintiff for damages. The case law provides that a school cannot be held civilly liable unless the school had actual notice; had some level of control over the harasser in the context in which the harassment occurred; and demonstrated “deliberate indifference.” See, e.g. Gebser v. Lago Vista Sch. Dist., 524 US 274 (1998); Roe v. St. Louis Univ., 2014 WL 1181097 (8th Cir. 2014); Lopez v. Regents of Univ. of Calif., 2013 WL 6492395 (N.D. Cal. 2013). Title IX’s requirements, as interpreted by the Department of Education, go well-beyond this narrow standard adopted for the implied private right of action. In particular, a duty arises under Title IX to respond to allegations following actual or constructive notice and to put in place procedures which will prevent harassment and allow for effective resolution of complaints. DCL, p. 7. See generally Office of Civil Rights, Sexual Harassment Guidance, 62 Fed. Reg. 12034-01 (1997); Office of Civil Rights, Revised Sexual Harassment Guidance, 65 Fed. Reg. 66092-01 (2001). Thus a school can fail to be in compliance with Title IX by not acting with reasonable care even though the school could not be held liable for damages to a private plaintiff. 65 Fed. Reg. at 66093, 66096; see also DCL, p. 12. As a result, the Title IX cases addressing civil suits by private plaintiffs do not address the full scope of Title IX obligations and focus instead on whether the school acted with deliberate indifference.

Similarly, the requirements for discontinuing federal funding are not helpful in this context. Under Title IX, the Department of Education cannot take enforcement action without giving the institution notice of the alleged violations and an opportunity to voluntarily correct the problem. Gebser, 524 U.S. at 288-90; 20 USC §1682. The Supreme Court has noted that this standard is roughly equivalent to the deliberate indifference standard applied to private actions, Gebser, 524 U.S. at 290. However, the question addressed in this Report is not whether the university is in danger of an imminent loss of federal funding. The question is whether the university’s lack of action violated Title IX in the first place. As the OCR has noted, an institution can violate Title IX before the requirements for an enforcement action (such as notice and opportunity to correct) have been satisfied. 2001 OCR Guidance, pp. 14-15.