

November 17, 2016

Brackett B. Denniston III
Chair, Board of Trustees of Kenyon College
c/o Ransom Hall
Kenyon College
Gambier, Ohio 43022

Dear Mr. Denniston:

I am pleased to provide the following Report of External Review¹ to the Board of Trustees of Kenyon College, and I thank you for giving me the opportunity to serve the Kenyon College community on this matter of significant importance.

Background

Over the past five years, institutions of higher education across the country have made significant changes in the ways they receive reports of, respond to, sanction and educate about campus sexual misconduct. Consistent with what is occurring at other colleges, on July 1, 2015, Kenyon College (“College”) enacted a revised and comprehensive sexual harassment, sexual assault, dating violence, domestic violence, and stalking policy entitled “Title IX and Violence Against Women Act (VAWA) Policy, 2015-16” (the “Policy”). In June, 2016, following one year of the Policy’s operation, the College engaged me to conduct a comprehensive review both of the Policy as written and of the implementation of the Policy under Title IX of the Education Amendments of 1972 (“Title IX”)² and related authority, and under the Violence Against Women Reauthorization Act of 2013 (“VAWA”)³ amendments to the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act⁴ and related authority.

¹ In this Report, the terms “audit” and “review” are used interchangeably.

² 20 U.S.C. §1681 et seq.

³ Pub. L. 113-4.

⁴ 20 U.S.C. § 1092(f).

Appointment of Steering Committee, Committee's Charge, and Scope of Review

A steering committee⁵ appointed by President Sean Decatur assisted in determining the scope of my review and has been responsible for overseeing the audit process.

In its Charge, the committee defined the scope of the review to include the following:

Analysis of the existing College policy against the law, current guidelines from the Department of Education and national promising and effective practices; a review of the College's education and training programs⁶ focused on issues of sexual misconduct⁷ on campus; a review of feedback from participants and implementers in the process about their experience in the implementation of the policy for the 2015-16 academic year; and a review of completed cases brought under the current policy.

My work on the audit began in July, 2016 and continued through the date of this Report. Throughout the course of my work, I met via phone conference with the committee approximately once per month and had regular communication with the co-chairs of the committee, Ruth Fisher and Ted Mason. I also consulted regularly with the College's Civil Rights/Title IX Coordinator, Samantha Hughes, and the Deputy Civil Rights/Title IX Coordinator, Linda Smolak, both of whom assisted me with access to documents, answered numerous informational questions, and provided administrative and logistical assistance. My work included reviewing the Policy, examining the College's Title IX investigative files for all completed formal investigations during school year 2015-16 (16 total), examining the College's files and documentation related to all reports of sexual misconduct during school year 2015-16

⁵ The members of the review committee are: Ruth Fisher (P'17 and member, Kenyon College Board of Trustees) and Ted Mason (P'10 and Associate Provost for Diversity, Equity, and Inclusion, and Professor of English) (together, the chairs of committee); Meredith Harper Bonham ('92 and Vice President for Student Affairs); Susan Morse (Chief of Staff to President Sean Decatur); Judy Holdener (Professor of Mathematics); Jesse Matz (William P. Rice Professor of English and Literature); Marshall Chapin ('94 and member, Kenyon College Board of Trustees); Olivia Cucinotta (Student, Class of 2018).

⁶ Early in my work, the steering committee clarified that, because another entity was in the process of conducting a comprehensive review of the content of the College's sexual misconduct prevention education, the scope of my work would not include an analysis of existing and/or proposed education and training programs related to sexual misconduct. The committee clarified that my inquiry should focus on the results of education and training efforts, and on whether the College community appears knowledgeable about the College's systems for addressing sexual misconduct, informed about definitions of consent and other important concepts, aware of reporting and investigative procedures, and informed about where to get additional resources and support.

⁷ The Policy covers a wide range of prohibited conduct include sexual harassment, sexual violence, stalking, and dating and domestic violence. For ease of reference, the term "sexual misconduct" is used throughout this Report to refer to all of the conduct covered under the Policy. I also use the umbrella terms "sexual and relationship violence" to refer to the range of conduct prohibited by the Policy.

(16 total), examining the College's files and documentation related to all reports of sexual misconduct during school year 2015-16 (approximately⁸ 92 total). I also conducted a number of interviews with College administrators via phone as well as in person.

From the beginning of my engagement with the College, the steering committee emphasized its interest in receiving feedback from the range of members of the Kenyon community who intersected with the Policy and related practices during the 2015-16 school year. To serve this effort, I identified the individuals and groups at the College who had direct involvement with the implementation of the Policy, and I developed a system of outreach and avenues for the collection of feedback from a wide range of community members. My outreach to the community included a five-day visit to campus in September, 2016, when I conducted a series of individual meetings, group round-table discussions, and private one-on-one office hours with a broad range of College community members. An explanation of the scope of my review is attached as Appendix 1.

In addition to these conversations and meetings, I invited members⁹ of the College community to provide input privately and potentially anonymously if the person wished to remain anonymous, through an on-line feedback form. The on-line feedback form was announced to the community on September 1st, and remained open for participation until September 30th. Information collected from all of these areas of review and all of these sources is incorporated in the observations and recommendations set forth below.

Framework for Review and Development of Audit Criteria

The Committee's Charge directed me to analyze the Policy against the law, current guidelines from the Department of Education, and best practices nation-wide. The legal framework that shapes institutions' responses to campus sexual assault includes federal statutes¹⁰, implementing regulations, and significant guidance documents from the U.S. Department of Education's Office for Civil Rights ("OCR"). In addition to these sources which set forth a combination of mandatory requirements and recommended practices, practitioners in the field also look to

⁸ This number is approximate because some of the reports logged as sexual misconduct reports turned out, upon examination by the Title IX Coordinator, to relate to other alleged forms of discrimination or to be unrelated to the work of the College's Office for Civil Rights generally. This number includes the reports that resulted in formal investigations.

⁹ In consultation with the chairs of the steering committee, I determined that the populations who could provide feedback regarding the Policy and practices of the 2015-16 school year were students in their second through fourth years at the College, all employees, alumni of the class of 2016, and parents of either current students or of alumni from the class of 2016. These populations were specifically contacted. A notice about my review, and the ability to provide feedback, was also provided to all members of the Kenyon College community by postings on the Kenyon College Title IX page (including a link to the on-line feedback form and information on how to contact me).

¹⁰ Individual states have also enacted state statutes setting forth additional requirements for institutions.

additional sources for interpreting and executing Title IX's prohibition on sex discrimination in education. Those additional sources include policy and programming guidance from the White House¹¹ and recent resolution agreements between OCR and individual institutions. An overview of the legal framework for my review is set forth in Appendix 2.

In reviewing the College's Policy and related practices, I considered all of the sources described in Appendix 2. I also drew upon my own experiences working on issues of sexual and relationship violence in campus communities as a sex crimes and domestic violence prosecutor in a college town, as both an external and in-house Title IX investigator, and as an interim Deputy Title IX Coordinator. My CV, which provides a fuller description of my background and areas of expertise, is included as Appendix 3. Through my experience working in these fields, I have had the opportunity to observe first-hand the implementation of Title IX and VAWA policies and procedures; the interaction between different academic and administrative units within institutions; the emotional and physical impacts of sexual and relationship violence on those who have experienced such violence; how individuals who have experienced sexual and relationship violence may navigate systems in place for addressing it; the importance of fairness to both parties to the integrity of an institution's process; the need for clear and accurate communication among campus communities; the necessity of campus support systems for complainants¹² and respondents; as well as some common pitfalls institutions have experienced in their attempts to implement effective systems. Thus, I have also drawn from lessons learned during my career to develop a compliance evaluation perspective representing what I believe is the most accurate snapshot of best practices as identified in the law, in policy guidance efforts, and from practice.

It is my hope that the observations and recommendations detailed below assist Kenyon College in both meeting its legal compliance obligations in its implementation of Title IX and VAWA and in providing a safe and healthy environment where all Kenyon College students and employees can thrive.

The Kenyon Community

The Kenyon community met my efforts to collect information with solid support and met my invitations to provide input with candor and a desire to provide feedback that would contribute to a constructive analysis of the Policy and related practices. The numerous students, faculty and

¹¹ These include the White House Task Force to Protect Students from Sexual Assault's "Not Alone" report and accompanying resource materials, available here: <https://www.whitehouse.gov/1is2many/notalone>.

¹² Language is important, and practitioners in this field use various terms to refer to someone who has experienced sexual misconduct and to someone who is accused of engaging in sexual misconduct. Because this Report addresses sexual misconduct in the educational sphere where the terms "complainant" and "respondent" are typically used, those are the terms I have chosen.

staff with whom I spoke expressed appreciation that the College decided to conduct this review. Throughout meetings with administrators, I was struck time and again by the deep commitment each expressed to the particular role they fill at Kenyon, to the College as a whole, and most importantly, to the well-being and success of the students.

Students overwhelmingly told me that, through both the open group conversations and the private office-hours appointments with me, they felt “heard” by the College and felt hopeful that their input would contribute to my work. In private appointments with me, students and employees alike shared deeply personal experiences. Parents and alumni of the class of 2016 also provided robust feedback via the online form, sharing their important viewpoints as well. The feedback illustrated the diverse and caring voices of Kenyon. The feedback included in this written report reflects the criticisms and praises that arose as patterns and themes as I spoke with members of the Kenyon community. While not every comment could be explicitly included in this written report, I considered every opinion and every personal story shared with me as I developed my recommendations for the College.

Any attempt to assess an institution’s Title IX/VAWA system and any recommendations stemming from that assessment would be incomplete without a comprehension of the particular institution’s culture. During my time on the Kenyon campus and through feedback submitted to me via email and via on-line form, I have developed an understanding of certain aspects of Kenyon’s culture. Student norms, values, and expectations; issues of student identities on campus; levels of student engagement; attitudes of staff and faculty; quality of communications and interactions between employees and students; and the role and prominence of certain extracurricular activities are among many cultural aspects of Kenyon about which my understanding has grown.

It is clear that students come to Kenyon with the highest of expectations, seeking far more than the outstanding academics they know Kenyon will provide. Calling Kenyon a “beautiful and magical place,” students told me about the close relationships they develop with professors who are accessible and supportive, the opportunities for real engagement with peers and community through on-campus organizations and study-abroad programs, and the joys of interacting with the stimulating and passionate students enrolled alongside them. Above all, praise for “the bonds and community” of Kenyon echoed throughout my student interviews. As one student said: “We all hold Kenyon to a higher standard because it is so special.”

Alongside this praise, students also expressed mistrust with respect to how the College administration handles the issue of sexual misconduct. Students complained of a lack of transparency regarding the investigative process and expressed a belief that perpetrators of

sexual misconduct are not held accountable for their conduct.¹³ Additional, more specific concerns raised by community members about Kenyon's Title IX/VAWA processes are discussed in the relevant sections, below, in in this Report.

I found the input of those who provided feedback valuable. As reflected in Appendix 1, however, the number of people who provided input represents a very small portion of the campus community. Thus, while I have sought to portray the voices I heard accurately in this Report, I caution against making any sweeping conclusions about the College's culture based on the small amount of the campus population that shared feedback with me.

Examination of Title IX/VAWA Policy and Related Practices

I reviewed the Title IX/VAWA Policy in place during the 2015-16 academic year. In the sections below, I have grouped my observations and recommendations into topics that correspond with the major categories of compliance and with the structure of the Policy.

I. Notification to Community of Policies, Procedures and Title IX Information

A. Observations and Discussion

1. Statement of Non-Discrimination

The College provides a direct link to its Non-Discrimination Statement from its home page, www.kenyon.edu. The Non-Discrimination Statement states:

Kenyon College does not discriminate in its educational programs and activities on the basis of race, color, national origin, ancestry, sex, gender, gender identity, gender expression, sexual orientation, physical and/or mental disability, age, religion, medical condition, veteran status, marital status, genetic information, or any other characteristic protected by institutional policy or state, local, or federal law. The requirement of non-discrimination in educational programs and activities extends to employment and admission. The following person has been designated to handle inquiries regarding the non-discrimination policies, including Title IX, Section 504, and Title VI, is:

Samantha Hughes
Civil Rights/Title IX Coordinator
Eaton North 159
(740) 427-5820
hughess@kenyon.edu

¹³ Data regarding investigative findings and sanctions for the 2015-16 school year is included in subsequent sections of this Report.

Inquiries may also be directed to the United States Department of Education’s Office for Civil Rights, 1350 Euclid Ave., Suite 325, Cleveland, Ohio 44115.

All of the College’s handbooks—the Student Handbook, the Administration and Staff Handbook, and the Faculty Handbook—contain statements of non-discrimination. However, the statements vary in their wording and in the extent to which they address the required elements set forth in Appendix 2. The Administration and Staff Handbook states that announcements for faculty and staff job openings shall contain the phrase "Kenyon College is an equal opportunity employer," or a similar statement to make clear that women and members of minority groups are welcome as candidates. Individual job postings contain the following statement:

Kenyon College is an Equal Opportunity Employer. It is the College's policy to evaluate qualified applicants without regard to race, color, national origin, ancestry, sex, gender, gender identity, gender expression, sexual orientation, physical and/or mental disability, age, religion, medical condition, veteran status, marital status, or any other characteristic protected by institutional policy or state, local, or federal law.

2. Ease of Access to Title IX Information

A visitor to the College’s home page reaches Title IX information quite easily. The home page provides at least two links that take a site visitor directly to Title IX information. Clicking on either “Diversity at Kenyon” or “Non-Discrimination Statement” both take a site visitor to web pages with tabs clearly marked as containing Title IX information, including the name and contact information for the Title IX Coordinator as well as an on-line incident reporting form. The page ultimately reached through these tabs, <http://www.kenyon.edu/directories/offices-services/ocr/title-ix-vawa/>, contains a vertical index of clearly-labelled links to the information required by Title IX.

My experience has shown that individuals seeking information about sexual misconduct resources at their school may not always know about their institution’s Title IX web page, and may therefore search for sexual misconduct-related information using a variety of terms rather than the office’s or the policy’s formal name. Using the search field located on the upper right corner of the College’s website, I searched the terms “Title IX,” “sexual misconduct,” “sexual harassment,” “sexual assault,” “rape,” “domestic violence,” and “dating violence.” All but my search for the term “rape” resulted in a list of responsive links that included the Title IX/VAWA Policy in the first three hits. Searching for the term “rape,” however, did not result in a list of links that included the Policy or other Title IX-related information in the top hits.

The vast majority of students and employees I spoke with were knowledgeable about the existence of the Title IX/VAWA Policy and the identity of the Title IX Coordinator and Deputy

Coordinator. I did not observe any problems with respect to students' knowledge regarding how to find information about the Policy or regarding who on campus was responsible for Title IX compliance.

B. Recommendations: Notification of Title IX Information

I recommend Kenyon's Title IX Coordinator review the various locations where non-discrimination statements are required and draft a uniform, compliant non-discrimination statement to be used throughout Kenyon's educational and employment materials.

I recommend that Kenyon explore with its technology staff the possibility of refining the search mechanism on the Kenyon website so that the term "rape" will yield a hit to the Title IX/VAWA Policy and related information.

II. Investing Title IX Coordinator with Appropriate Authority and Independence

A. Observations and Discussion

Kenyon's Title IX Coordinator during the 2015-16 academic year was Andrea Goldblum.¹⁴ Kenyon designated Professor Emerita Linda Smolak as a Deputy Title IX Coordinator. Ms. Goldblum had the responsibility for coordinating general compliance with Title IX. Depending on their individual availability and other factors, both Ms. Goldblum and Dr. Smolak were responsible for coordinating investigations throughout the school year. Specifically, of the sixteen completed investigations of the 2015-16 school year, Ms. Goldblum coordinated four investigations and Dr. Smolak coordinated twelve.¹⁵

Both Ms. Goldblum and Dr. Smolak have ample training and experience in handling sexual harassment complaints and in the operation of Kenyon's grievance procedures.¹⁶ Ms. Goldblum's employment prior to Kenyon included directing the student conduct office at Ohio State University ("OSU") and one-and-a-half years working in OSU's Title IX office and as its Clery officer. Ms. Goldblum also worked with a highly-regarded national Title IX and Clery consulting firm for one year prior to joining Kenyon. In addition to having received extensive training in conducting investigations (including law enforcement-provided trainings on conducting interviews) and in trauma-informed practices, Ms. Goldblum has provided trainings

¹⁴ Ms. Goldblum was employed as Kenyon's Title IX Coordinator from April, 2015 through May, 2016. In May, 2016, Samantha Hughes was designated as Kenyon's Title IX Coordinator.

¹⁵ Dr. Smolak ultimately coordinated more investigations during the 2015-16 school year because, as the College's Office for Civil Rights prepared for Ms. Goldblum's departure, they determined it made sense not to have Ms. Goldblum commence coordinating investigations if she would not be present through completion.

¹⁶ Ms. Hughes, the current Title IX Coordinator, also has extensive training and experience in the field of Title IX.

on a wide range of Title IX-related information, reflecting her level of expertise in the field. Dr. Smolak also received extensive training related to her role as a Deputy Title IX Coordinator, including a course through the National Association of College and University Attorneys and numerous training sessions provided by nationally-recognized legal experts in Title IX and campus sexual violence. In addition to the extensive knowledge she brings to the role through her career as a psychology professor and researcher, the trainings Dr. Smolak attended included lessons on trauma-informed practice and the neurobiology of trauma.

During the 2015-16 school year, both Ms. Goldblum and Dr. Smolak reported to senior leadership, specifically, to the President of the College via his Chief of Staff, Susan Morse. As Ms. Goldblum was the first full-time designated Title IX Coordinator at Kenyon, some of the structural aspects of the coordinator positions were newly created and still evolving during the 2015-16 year.

From my conversations with Title IX leadership and other senior leadership, it is clear that the Title IX Coordinator and Deputy Coordinator at Kenyon have the independence, support and authority required for effective functioning. Title IX leadership communicated their satisfaction with their access to Ms. Morse and to President Decatur as well as their feeling that President Decatur, as one administrator put it, “clearly made Title IX a priority and was incredibly supportive.” Additionally, the Title IX Coordinator was able to implement interim measures—those protective and remedial steps that are required by OCR to be put in place as needed upon receipt of a complaint of sexual misconduct—without issue. All Title IX leadership said they had the full cooperation of the rest of campus, whether with respect to a request to have a student’s housing changed, a request for academic accommodation, the need to get a complainant or respondent immediate access to counselors, and other interim measures.

While I find the Title IX Coordinator is able to exercise their authority on campus with respect to interim measures, I did learn of some communication challenges between the College’s Office for Civil Rights and other units on campus occurring in the 2015-16 school year. For example, decisions about no-contact orders, interim suspensions and dismissals were not always conveyed adequately and in a timely fashion to offices on campus that need to be kept up to date regarding the status of students, including housing and residential life, the registrar’s office, campus safety, and athletics. Recognizing the need for privacy and discretion for sexual misconduct investigations, representatives from these units nonetheless described some frustration, for example, in being uncertain of a student’s housing restrictions, financial aid status, varsity athletics eligibility, and no-contact order applicability.

My review indicated that although the College was supportive of the Title IX Coordinator, it could do more to increase stability in the College’s Office for Civil Rights. Ms. Goldblum was

the first full-time Title IX Coordinator and, within a year of her arrival, Ms. Goldblum left Kenyon and a new Title IX Coordinator was appointed. It is my understanding that Dr. Smolak plans to retire from the Deputy Coordinator position at the end of this academic year. I note that rapid turnover in Title IX offices and changes in staffing structure are consistent with what is occurring at many institutions and are not unique to Kenyon. However, this turnover combined with the investigative model Kenyon uses-- an external attorney investigator paired with rotating employees who function as volunteer internal investigators--further combined with the year-old Policy resulted in few enduring uniform procedures with respect to office procedures, record-keeping and file management.

For instance, each coordinator and each investigator had different file management styles and record-retention practices. There did not appear to be a centralized location where investigators or coordinators would maintain all documents and correspondence related to a particular investigation. Likewise, when investigation files were forwarded to administrators for adjudication and appeal process, there was no uniform “package” of materials and, at least with respect to the earlier investigations, the materials provided were presented in a somewhat disorganized manner. There is no indication that these lack of uniform office procedures negatively impacted the investigative process during the 2015-16 school year or that it caused inaccurate findings; in addition, I was able to make determinations for this review about the office’s practices by combining my review of documents with interviews of Title IX staff. However, my review would have been facilitated by more uniform record-keeping and file-management practices.

Because Kenyon’s Title IX staffing may continue to shift among individuals and take potentially different shape as the institution further hones its response to campus sexual misconduct, it will be important to develop efficient and reliable internal policies and practices that remain constant, including through changes in personnel.

B. Recommendations: Title IX Coordinator

I recommend that Kenyon create a Title IX team to support the work of the Title IX Coordinator and to support stability of the Title IX office.¹⁷ A Title IX team can provide additional constancy as inevitable staffing changes occur in the future and set a framework for regular inter-departmental communication. Such a team might include representatives from the offices that work in particularly close connection with the Title IX staff: the Chief of Staff, the Provost’s Office, the Office of the Dean of Students, the Office of Housing and Residential Life, and Campus Safety. I recommend the Title IX team meet on a regular basis to ensure that Policy-

¹⁷ I note that information provided regarding 2016-17 reflected that Ms. Hughes has already strengthened inter-departmental relationships and communications, and she has implemented record-keeping protocols.

related practices (such as implementation of interim measures, notifications of no-contact orders, etc.) continue in a stable fashion despite possible changes in Title IX staff. By checking in regularly with the Title IX Coordinator at Title IX team meetings, partner units around campus will also stay informed of any changes in student status due to Title IX/VAWA proceedings.

I recommend the Title IX Coordinator develop internal policies for record-keeping and file management. In particular, I recommend that they construct uniform investigative file styles and retention structures to be used by all investigators, whether internal or external. I further recommend that the Title IX Coordinator establish a central location in their office where all investigative file materials are maintained.

III. Grievance Procedures: Review of Policy as Written

A. Observations and Discussion

The Policy, which applies to students and employees, is a comprehensive policy addressing sexual harassment, sexual violence, gender-based violence, intimate partner violence and stalking. My review of the Policy reflects that it adequately sets forth applicability and jurisdiction; where to get medical and law enforcement assistance; issues of confidentiality and privacy; the available sources of support and advocacy (along with contact information); how the College will address and respond to, as well as the impact of, complainant requests for anonymity; contact information for the Title IX Coordinator and for the Office of Campus Safety; the range of interim measures available; the procedural steps for the initial review of a complaint; the rights of complainants and respondents; the processes for informal and formal resolution of complaints; the range of sanctions; and the appeals processes. In sum, my comprehensive review of the Policy as written results in a finding that the Policy is in compliance with applicable legal standards.

1. General Feedback Regarding Written Policy

In feedback submitted to me, a number of individuals expressed disagreement with Kenyon's use of the preponderance of the evidence standard of proof. Some, in particular parents and employees, felt the preponderance of the evidence standard is too low for a matter that could result in the permanent dismissal of a student from Kenyon. Contrarily, the overwhelming majority of students I spoke with agreed with the use of the preponderance standard. This polarity of opinions echoes the broader national discussion regarding the standard of evidence for Title IX matters. Despite the range of opinions regarding the standard of evidence, the mandate from OCR is clear: institutions are required to use the preponderance of evidence

standard.¹⁸ Kenyon’s use of the preponderance standard reflects compliance with OCR’s mandate, and I do not recommend altering the standard. To address the concern of those who disagree with the preponderance standard, Kenyon could consider providing education to the broader community regarding the OCR’s requirement of the standard. Such education could be provided in an FAQ section on the Title IX website, or in panel discussions on campus, or through some other means that will assist members of the community in better understanding the institution’s regulatory obligations.

A number of parents and faculty also expressed concerns about the general fairness of the process as written for students accused of sexual misconduct. Some felt that under the Policy, respondents lack a meaningful opportunity to review the evidence, question the witnesses, and respond to the investigators’ initial investigation reports (which are described as “summaries” in the Policy). Some felt the timeframes for reviewing the initial investigation report—five days—was too short for both parties; others felt the thirty-day¹⁹ time frame stated for the completion of the investigation was too long.

I find that most but not all the concerns regarding fairness to respondents stem from a lack of familiarity with the process and a possible lack of knowledge about what is meant by the relevant provisions in the Policy. The lack of knowledge is understandable for several reasons: most individuals at Kenyon had no direct experience with an investigation under the Policy last year; sexual misconduct investigations are conducted with the utmost attention to privacy for the parties, and—perhaps most impactful—sexual misconduct investigations are part of students’ education records and are therefore prohibited from disclosure without the student’s consent.²⁰ Were the College to more effectively and transparently explain how the Policy works in general, I believe these concerns would be somewhat assuaged.

Moreover, some of the understandable concerns raised about fairness to respondents stem from OCR’s interpretations of Title IX as set forth in its guidance documents and the College’s attempt to comply with those interpretations. The use of the preponderance of the evidence standard, as noted above, is one such concern that ultimately reflects disagreement with Kenyon’s compliance obligations rather than with Kenyon specifically. Likewise, OCR “strongly discourages” an institution from allowing the parties to personally question or cross-examine each other and recommends that institutions use a third party to “screen” questions submitted by parties for each other to determine the appropriateness and relevance of the

¹⁸ April 4, 2011 Dear Colleague Letter (“2011 DCL”), p. 11

¹⁹ The Policy was changed for the 2016-17 school year and now provides forty-five days for the completion of investigations.

²⁰ See the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g.

questions.²¹ Kenyon’s use of investigators, its distribution of a preliminary report for review, and its multiple interviews of the parties in an investigation all reflect its attempts to comply with this guidance. The concerns I heard from members of the Kenyon community about these issues echo the larger national conversation about OCR’s interpretation and enforcement of Title IX. Nonetheless, because Kenyon’s Policy reflects what is currently understood as part of the current best practices to effect Title IX compliance, I do not recommend straying from these practices.

As discussed in detail in the section on formal investigations, below, I find the Policy is written and is working in such a fashion that respondents have sufficient notice of allegations and the process, a real opportunity to review and challenge the evidence, and a meaningful occasion to have their voice heard. Having reviewed the written Policy and having seen its implementation, I do not have any concern that the Policy as written fails to provide adequate due process²² for respondents.²³

2. Reporting Sexual Misconduct

a. Ways to Report

The Policy addresses reporting options in Section IX and comprehensively explains options for reporting to law enforcement, to on-campus sources, and anonymously. The section includes the College’s policy regarding amnesty for consumption of alcohol and drugs. Amnesty provisions are important because they help remove one potential obstacle to the reporting of sexual misconduct: fear of being sanctioned by the institution for drug/alcohol consumption. I find the section on reporting to be in compliance with applicable legal standards and, with its provisions for anonymous reporting and inclusion of amnesty for alcohol/drug consumption, to reflect current best practices.

Some employees expressed disapproval that the College provides an avenue for people to report sexual misconduct anonymously. Those holding this opinion felt such anonymous reports cannot be substantiated and should not be used as “pattern evidence” because of their unreliability. The concern about anonymous reporting seems to be that Kenyon will treat unverified information as evidence and may take action against a community member based on such information. In my review of sexual misconduct reports, I did not see an occasion when an unverified anonymous report ever served as the basis for action against an individual.

²¹ Title IX Q & A, pp. 28-31.

²² As noted in the section on interim measures, while I identified a need to enhance the process in place during the 2015-16 school year for the imposition of interim suspensions, that process has already been revised.

²³ However, as noted in the relevant section below, I do find that there are steps the College can take to better assist both respondents and complainants through the process so that they are adequately advised of the process, receive robust support, and know how to effectively present their information during an investigation.

Kenyon is not alone in providing an avenue for anonymous reporting. Based on my experience, a majority of institutions across the country permit the kind of anonymous reporting established by Kenyon. There is no legal requirement in Title IX, its implementing regulations, or OCR guidance documents that requires institutions to establish anonymous reporting avenues. However, in April, 2014, the White House Task Force to Protect Students from Sexual Assault developed materials, including a checklist, for institutions to assist them in implementing sexual misconduct policies. The checklist and accompanying “Sample Language for Reporting and Confidentially Disclosing Sexual Violence” include a provision allowing for anonymous reporting.

One benefit of anonymous reporting is to increase students’ access to necessary resources and information. When an anonymous report identifies a potential complainant by name, an institution typically responds by providing that person information regarding the following: what the Title IX office is, what the person’s options are with respect to making a formal report with the institution and with the police; how to connect with confidential resources; the availability of academic accommodations and other interim relief; and other support services available. It is then up to the complainant to decide whether and how to respond to the Title IX office’s outreach, but at a minimum they have been provided with important information about their rights and options.

Moreover, even unverifiable information about alleged sexual misconduct can be useful in tailoring Title IX educational efforts. For instance, if the College’s Office for Civil Rights receives several anonymous reports of alleged incidents that involved a particular issue (such as harassment of gender non-conforming students, or multiple incidents reported as occurring within a particular student club), the Title IX Coordinator can develop or adjust training programs to address that issue more globally through education. This is an example of how anonymous reports assist the Title IX Coordinator with a significant function of their job, which includes “identifying and addressing any patterns, and assessing effects on the campus climate.”²⁴

b. Bystander Intervention

The reporting section also includes a subsection entitled “Bystander Intervention,” which sets forth the College’s encouragement of third parties to take reasonable steps to prevent an act of sexual misconduct from occurring. This subsection’s relevance to reporting mechanisms is not clear.

²⁴ April 24, 2015 Dear Colleague Letter, p. 3.

Like many institutions across the country, by including all the requisite and recommended elements of a Title IX- and VAWA-compliant policy, Kenyon has a Policy that is rather lengthy. Several individuals commented on the lengthiness and “legalese”-quality of the Policy. It is important to remember that those accessing the Policy to learn how to report sexual violence may be doing so in a state of distress. To the extent the College can simplify the information in the Policy, organize it in a sensible manner, and remove sections that are unnecessary, those reading the Policy will have an easier time locating and understanding the important information they need. While a minor revision, removing the bystander intervention²⁵ section will make the reporting section shorter and less daunting visually.

c. Recommendations: Reporting

I recommend the College continue with its current reporting mechanisms, including providing an avenue for anonymous reporting. I further recommend that the College continue to use unverified anonymous information only in the aggregate to assist with educational efforts and the assessment of broader climate issues.

I recommend removing the section on bystander intervention from the reporting section of the Policy, while still highlighting this information in other places on the College’s Office for Civil Rights website and incorporating bystander intervention lessons in prevention programs.

3. Definitions of Prohibited Conduct

a. Observations and Discussion

The College’s definitions of prohibited conduct are set forth in Section VI of the Policy. The Policy identifies and defines nine forms of prohibited conduct: sexual harassment; non-consensual sexual intercourse; non-consensual sexual contact; sexual exploitation; stalking; physical harm and intimidation; harassment, bullying or cyberbullying; intimate partner violence; and retaliation. Section VII contains information and definitions of “related” concepts. I find all of these definitions and explanations of prohibited conduct to be in compliance with applicable legal guidelines.

i. Application to LGBTQ+ Students

While I find the Policy’s definitions of prohibited conduct legally sufficient, I did learn through my meetings with students of a notable amount of confusion regarding certain aspects of the Policy’s application. A number of students expressed concern about how Kenyon’s LGBTQ+

²⁵ VAWA does require institutions to educate students about, and provide information regarding, bystander intervention programs. My recommendation is to create a separate resource apart from the Policy that includes this information, perhaps on the College’s Office for Civil Rights website and elsewhere.

community members relate to the Policy's language. Some individuals told me the Policy is "heteronormative" and "confusing" as to how it might relate to sexual conduct occurring between individuals of the same sex. While the Policy does specify in Section II Scope of Policy that the definitions of prohibited conduct apply "against individuals of any gender, gender identity, gender expression or sexual orientation," the Policy's application to the LGBTQ+ population could be made more explicit and could be stated in a more prominent location.

An example of confusing language is that while non-consensual sexual intercourse as a Policy category includes a variety of conduct that can occur between same-sex individuals, the term "intercourse" is understood by many students to refer only to one sexual act that occurs between opposite sex individuals. Students described instances with friends who, uncertain whether the Policy covered particular conduct, read and re-read the Policy trying to determine if their non-consensual experience that occurred between people of the same gender fell within the prohibited conduct. And, one student questioned whether the Policy applies to students who identify as male, given that part of the Policy's name is "Violence Against Women Act." These concerns are important because they represent possible obstacles to individuals reporting incidents of sexual misconduct.

ii. Retaliation

Another area of potential clarification is the Policy's statement regarding retaliation. The Policy in effect during the 2015-16 school year provided the following definition of the prohibited conduct "Retaliation" in Section VI.I:

Retaliation is any real or perceived act or attempt to retaliate against or seek retribution from any individual or group of individuals involved in the investigation and/or resolution of a report under this policy. Retaliation can take many forms, including abuse, violence, threats and intimidation. Any individual or group of individuals, including but not limited to a complainant or respondent, can be held accountable for retaliation under this policy.

This explanation of retaliation, because of its somewhat general and legalistic language, did not effectively convey to students and employees the full protection of Kenyon's prohibition on retaliation. The first sentence of the retaliation section was changed as underlined for the 2016-17 school year to "Retaliation is any real or perceived act or attempt to take an adverse action against or seek retribution from any individual or group of individuals involved in the investigation and/or resolution of a report under this policy." This change is a good first step in providing a better explanation of the concept of retaliation, but I find there is still work to be done in this regard.

Because fear of retaliation is often a significant obstacle to reporting sexual misconduct, it is important to provide an ample explanation of that protection. From my experience explaining the concept of retaliation to parties and witnesses, I have found that many individuals do not understand what acts could constitute retaliation. The Policy's illustrative forms of retaliation, "abuse, violence, threats and intimidation," are not, from my experience, the typical forms of retaliation that students or employees might face because of their participation in a Title IX/VAWA investigation. Rather, retaliatory conduct on campus more often takes the form of spreading rumors, prohibiting a person from participating in a group activity (e.g., prohibiting a person from entering upon fraternity or sorority premises), snubbing in the workplace, and other forms of social aggression. Fears of these kinds of retaliation are exactly what Kenyon students and employees alike described to me as a major obstacle to the reporting of sexual misconduct.

Recognizing that Kenyon's small size is a contributing and unchangeable factor, students told me that their friends feared being ostracized from their peer communities and feared being the focus of a "massive rumor mill" regarding their conduct. While not every rumor may constitute retaliation, it is important that students understand the full scope of the protection against retaliation. In addition, if the various forms of retaliation are spelled out in more detail in the Policy, it may have a deterrent effect on someone spreading rumors about a matter or engaging in more subtle forms of retaliation in the first place.

b. Recommendations: Definitions of Prohibited Conduct

I recommend the College examine the Policy in light of the concerns raised about possible confusion in applicability to LGBTQ+ individuals. Based on the thoughtful feedback provided by these groups, I recommend the College invite members of LGBTQ+-related organizations for input on potential language changes. I also suggest the College consider renaming the Policy to avoid any misconceptions as to whether a policy with the name "Violence Against Women Act" in its title applies to other gender identities as well. The College could consider an all-inclusive and more obvious title such as "Sexual Misconduct and Interpersonal Violence Policy."

I recommend the College provide a more detailed explanation of retaliation.²⁶ The College could enhance students' understanding of this important protection by using explanatory terms and synonyms, such as describing retaliation as "taking adverse action" against someone or "attempting to cause harm" or "treating someone badly" because the person participated in the Title IX process. In addition, I recommend adding a catch-all phrase such as "or any conduct

²⁶ If the College revises the provision on retaliation, it should also consider whether to remove "perceived acts" as a form of retaliation, as this term introduces unnecessary ambiguity.

engaged in intentionally to discourage a reasonable person from participating as a party or as a witness in this process” to the forms of retaliation listed.

IV. Evaluating and Responding to Reports of Sexual Misconduct

A. Observations and Discussion

Approximately ninety-two reports of potential sexual misconduct were made to the College’s Office for Civil Rights during the 2015-16 school year. I reviewed the log of reports which reflects the available facts of each report (dates, names, brief statement of complaint, brief summary of institutional response), as well as, where available, the hard copy file of any documents related to each report. Reports cover a wide range of conduct; the amount of detail—such as names of the people involved, the kind of conduct alleged, dates/places of alleged conduct, etc.—provided with each report also ranges significantly.

Most of the reports made to the College’s Office for Civil Rights contained sufficient contact information for complainants and many alleged conduct that, if substantiated, would constitute a violation of the Policy. The College’s obligation in situations where a complainant requests to remain confidential and/or does not want to proceed with a formal investigation is to determine the appropriate response based on factors set forth by OCR.

Based on my conversations with Title IX staff, I find they did apply these factors to determine the appropriate institutional response to complaints. However, the written documentation was often incomplete and made reviewing their work and the appropriateness of the College’s response challenging. While my interviews with Title IX staff and the log reflected appropriate follow-up in all of the reports, there seemed to be no routine manner in which the College’s Office for Civil Rights collected and organized (whether in hard copy or in electronic format) important communications and notes related to each report.

As noted, a large number of reports did not result in formal investigations because the complainant informed the College that they did not want any formal investigation or process to occur. Having a large percentage of complainants choose not to initiate a formal investigation is, based on my experience, common among institutions nation-wide and is not unique to Kenyon. Bringing focus to complainants who choose not to participate in formal investigations is not a criticism of that choice; rather, I affirm each complainant’s choice to participate to any extent they feel comfortable. However, it is important to examine if there are any particular characteristics unique to Kenyon that might discourage a complainant from participating in an investigation.

My conversations with students illuminated some of the factors that might be causing them to opt out of the investigative process at Kenyon. Students had negative perceptions about the

investigative process; these perceptions, they say, caused them to avoid participation in the process and to advise friends not to participate as well. Those negative perceptions included that students are “repelled” by the investigative process because they believe it is a very “difficult” process with no positive results. One student said “So many victims fear coming forward because of the need to go through an agonizingly long process that only delivers justice in the minority of cases.” Students all said the process takes far too long. I also heard that the investigative process is too hard on complainants, that most accused students are found not responsible, and that those found responsible do not face any serious consequences for their actions. It is important to note the majority of the students who held these views did not have their own direct experiences with the Title IX system. Rather, a number of them developed their opinions based on what they heard from others and based on information made public in the spring of 2016, regarding one sexual misconduct investigation.

B. Recommendations: Evaluating and Responding to Reports

I recommend the College take steps to address the negative perceptions of the investigative process. Students view this review and my solicitation of community input itself as a positive step forward. To continue making progress, I recommend the College increase transparency regarding the investigative process by implementing effective informational programs to educate community members about the way the process functions (also discussed elsewhere in this Report). I also recommend that moving forward, the College identify appropriate aggregate data regarding reports and matters investigated that will be shared with the Kenyon community, and that the College determine useful timeframes (such as two-year periods, etc.) for sharing that data.

I recommend the College develop uniform record-keeping systems reflecting all communications with sexual misconduct complainants, all information shared with them, and any accommodations provided. This will ensure that for every report, documentation of the requisite information shared with complainants is uniform and complete.

V. Interim Measures

A. Observations and Discussion

Section X of the Policy states that the College may impose “reasonable and appropriate interim measures designed to eliminate the reported hostile environment and protect the parties involved.” The section sets forth the range of interim measures, including the imposition of a “no-contact order.” The Policy provides that the College will take “immediate and responsive action” to enforce interim measures and that “disciplinary sanctions may be imposed” for failure to abide by them. Another subsection, entitled “College Imposed Interim Suspension,” provides

that a respondent may be suspended temporarily prior to the formal investigation or resolution of a complaint “whenever a student’s or group’s actions and/or activities are viewed as threatening or potentially injurious to the well-being or property or orderly functions” of the College.

1. No-Contact Orders

I reviewed the standard no-contact order language which is typically provided in a letter sent by the Title IX Coordinator or Deputy Coordinator. Kenyon no-contact orders are “no-fault” and “mutual,” meaning both people are “expected to refrain from all avoidable contact” with each other. Students expressed confusion over what the term “avoidable contact” means, described alleged violations of no-contact orders, and criticized a perceived inability or unwillingness on the part of the College’s Office for Civil Rights to impose consequences on the alleged violator. Others described difficulties complying with a no-contact order on a campus the size of Kenyon’s.

While I find the language of the College’s no-contact orders adequate, students’ confusion suggests that the Coordinator and Deputy Coordinator may need to refine the manner in which they explain no-contact orders. In explaining no-contact orders, Title IX staff should use examples relevant to student experiences, such as expectations for behavior if both students are in the dining hall at the same time, seek to participate in the same extra-curricular activity, or attend the same party.²⁷ To the extent the Title IX staff already address these specific examples with individuals who are parties to no-contact orders, my review reflects that some students still fail to understand the verbal explanations that are provided regarding how to deal with real-life no-contact order issues as they arise.

2. Interim Suspension

A number of individuals shared concerns with me that interim suspensions suggest a person is “guilty until proven innocent” and believe that interim suspensions are unfair to respondents “who after all, are Kenyon students too.” Some of those voices were opposed to interim suspensions in any circumstance. Another individual shared the very different concern that interim suspensions weren’t used frequently enough, and expressed unhappiness in retrospect that a student who was ultimately found responsible for violating the Policy had been permitted to remain on campus for the months that the investigation was pending.

²⁷ In my conversations with Title IX staff, they said they use specific examples to explain the contours of no-contact orders.

The Policy and practices of the 2015-16 school year lacked factors to assist the decision-maker²⁸ in determining whether a respondent's alleged conduct is "threatening or potentially injurious to the well-being or property or orderly functions." By their nature, decisions regarding interim suspensions are made in a very abbreviated time frame without all of the evidence available. I affirm that the decision whether to impose an interim suspension should be made on a case-by-case basis with some flexibility. However, as noted in recent OCR findings, the "equitable" principle in Title IX may require institutions to consider a variety of factors in weighing whether an interim suspension is an appropriate interim remedy, given the potential educational impact of an interim suspension on the accused student. These factors include the following: whether there are circumstances that suggest a risk to the greater College community, whether there is a risk that the accused student will commit additional acts of sexual misconduct, whether there have been other sexual misconduct complaints against the same accused student, whether the accused student threatened further sexual misconduct against the victim or others, and whether the sexual misconduct was committed by multiple perpetrators.

Moving in this direction, in June, 2016, Kenyon's Title IX staff implemented a set of considerations, including the factors listed above, for the decision-maker to weigh in determining whether to impose an interim suspension. I note that that the College's Office for Civil Rights' current use of those evaluative factors reflects that the 2016-17 Policy incorporates what is currently understood as best practices related to the imposition of interim suspensions. Adding this structure to an administrator's decision whether to impose an interim suspension brings Kenyon in line with OCR's expectations, increases fairness for respondents, and enhances consistency and trust in the Title IX/VAWA process.

To emphasize that interim suspensions are separate from a determination of the merits of claim, the College might consider revising the Policy's language on interim suspensions to include the explicit statement that decisions regarding interim suspensions are made based on preliminary information and are not reflective of the ultimate merits of the investigation. To further address fairness for those who are interim suspended, the College could add a provision to the Policy stating it will seek to resolve matters where a respondent is interim suspended on an expedited basis where possible. The Title IX Coordinator's rationale for imposing or not imposing an interim suspension should also be properly documented and should reflect the information available to them at the time of the decision.

²⁸ In the 2015-16 Policy, the decision-maker was either the Dean of Students, the Provost, or the Director of Human Resources. Had this remained, I would have recommended that the decision-maker for interim suspensions be changed to the Title IX Coordinator. I note that the 2016-17 Policy has already been changed and now places the decision of whether to interim suspend a student appropriately in the hands of the Title IX Coordinator, in consultation with the Dean of Students.

B. Recommendations: Interim Measures

I recommend the College's Office for Civil Rights take additional efforts to confirm that parties to no-contact orders comprehend how those orders work in their daily lives on campus. I recommend the College's Office for Civil Rights develop a protocol for handling allegations of no-contact order violations so that complaints of violations are handled in a consistent and meaningful manner.

I recommend the College maintain the ability to impose interim suspensions as a possible interim measure. Based on my experience, by permitting the Title IX Coordinator to implement interim suspensions when warranted, Kenyon is in line with other institutions. While Title IX does not specifically mandate the use of interim suspensions, it does require that an institution "take steps to ensure equal access to its education programs and activities and protect the complainant as necessary, including taking interim measures before the final outcome of an investigation."²⁹ The areas I identified with respect to interim measures as needing changes or improvements in the 2015-16 Policy have already been addressed by the College. While I find the adoption of evaluative factors for the imposition of interim suspensions to be an important enhancement, I recommend the College list those factors in the Policy so that the community is made aware how such decisions are made. I further recommend the College augment this section of the Policy by explaining that decisions on interim suspensions are made on the basis of preliminary information and are not decisions about the merits of a claim, as well as a statement that the College will seek to resolve matters involving interim suspensions on an expedited basis where possible.

VI. Support and Resources for Complainants and Respondents

A. Observations and Discussion--Confidential Resources

During the 2015-16 school year, the Policy listed the following on-campus confidential resources: the Cox Health and Counseling Center, the Sexual Misconduct Advisors ("SMAs"), the Athletic Trainers³⁰, and Marc Bragin, College Chaplain. In addition to these listed

²⁹ April 29, 2014 Questions and Answers on Title IX and Sexual Violence ("Title IX Q&A"), p. 32.

³⁰ The Policy was revised for the 2016-17 school year and Athletic Trainers have been removed as confidential resources. Had they remained as confidential resources, I would have recommended removing them.

confidential resources, the Peer Counselors³¹ and Rachel Kessler³², College Chaplain/Priest-in-charge at Harcourt Parish, also served as confidential resources.

Based on my conversations with members of the community, the most frequently-used confidential resources last year were the Counseling Center and the SMAs. Students' comments about the Counseling Center and the individual members of the counseling staff were overwhelmingly positive. Students also complained that their access to the Counseling Center had been limited by changes in appointment policies over the past months.

The role of the SMAs as confidential resources came up often in my conversations on campus. The majority of feedback was extremely positive: students said they were most likely to confide in their peers rather than non-peer adults, students shared personal experiences of how SMAs had provided assistance and comfort to friends, and the SMAs themselves conveyed their deep commitment to assisting their peers who may have experienced sexual misconduct. The SMAs I spoke with also illustrated an understanding of the importance of confidentiality.

A minority on campus shared negative experiences and opinions regarding the SMAs. Some shared accounts of SMAs failing to maintain confidentiality. Some students said they “knew stuff [they] shouldn’t” because an SMA disclosed private information to them. Others expressed the concern that the SMAs’ training and qualifications are inadequate in light of the complicated and delicate position they hold of receiving confidential information regarding possible sexual violence occurring among their peers.

I find that the SMAs fulfill a critical role at Kenyon that aligns with Kenyon’s vision of engaged students. Especially in light of the distrust issue addressed elsewhere in this Report and some students’ perception that the Counseling Center is becoming less available to them, it seems the SMAs perform a particularly crucial role as a “go-to” resource for information about the Title IX/VAWA system and for emotional support.

I also find, however, that the knowledge of the SMAs varied greatly from individual to individual, and I observed that there is room for improvement in training the SMAs about the Policy and related practices. The SMAs told me students consult them to determine whether the Policy applies to their situations and to learn details about how investigations work. As individuals sanctioned by the College to perform the important function of answering these

³¹ The Peer Counselors were not originally included as confidential resources based on Ohio’s felony reporting statute. After the Peer Counselors underwent additional training, an email was sent to the campus adding them to the list of confidential advisors because the Policy had already been printed at that point in the year.

³² Rev. Kessler’s first year of employment at the College was 2015-16. Her name was specifically added as a confidential resource in subsequent printings of the Policy.

questions, it is imperative that the SMAs have the training and knowledge required; I find there is still work to do in this regard.

With respect to respondents, a number of individuals said the support services were inadequate. They noted that while complainants may typically consult with an SMA, respondents do not have an equally obvious resource for support. A majority of the SMAs candidly told me that they would feel uncomfortable advising a respondent due to their beliefs about campus sexual assault and their feelings of alignment with victims of sexual assault. Apart from the Counseling Center, there is no group or office at the College that is offered as a specific confidential resource for students accused of sexual misconduct.

B. Recommendations—Confidential Resources

I recommend that the College maintain and enhance the SMA program by providing more rigorous and effective training that includes regular refresher trainings throughout the school year.

I recommend the College address more seriously the confidentiality requirements of the SMAs to send a clear message regarding the importance of maintaining confidentiality. Currently, if an SMA breaches confidentiality, they can no longer participate as an SMA. The College could emphasize the importance of confidentiality by adding possible disciplinary measures through the student conduct system for those who breach confidentiality.

I recommend the College enhance and/or clarify the confidential support resources for respondents. The College could publicize support resources by adding a specific section on the Title IX website containing information for respondents. While continuing to identify the Counseling Center as an appropriate confidential resource for respondents, the College should also determine which, if any, SMAs are willing to provide support to respondents and specifically include those individuals by name in the on-line information for respondents.

C. Observations and Discussion--Advisor Support During Investigations

The Policy provides that the parties may be supported by an “advisor of choice” during the resolution of a complaint. A party’s advisor may be an attorney, and the only limitations on a person’s choice of advisor are that the person may not be a fact witness “or otherwise have any conflicting role in the process.”

For their advisors, the sixteen complainants chose the following:³³ SMAs (three), a representative from a local rape crisis center (two), a staff member from the Counseling Center (two), and a family member (one). Eight complainants chose not to have an advisor during the investigative process.

For their advisors, the sixteen respondents chose the following:³⁴ a staff member from the Counseling Center (ten), a coach (three), and an SMA (one). One respondent chose not to have an advisor during the investigative process.

Issues related to advisors arose frequently in my on-campus conversations. Some voiced concerns that complainants often do not have formal advisors or take advantage of the opportunity to have a strong and/or knowledgeable person advising them; they highlighted the possible resulting imbalance between an unsupported/unadvised complainant and a well-supported/well-advised respondent. The general concern about unadvised complainants was borne out by the fact that half did not have a formal advisor. Highlighting some complainants' choice not to have formal advisors in the investigative process is not a criticism of that choice; rather, I affirm a complainant's determination regarding their level of need for support and advising.³⁵ Others in the community voiced concerns regarding respondents and their advisors, noting that while all parties have the right to seek SMA support, respondents might in reality feel hesitant to seek out SMAs as advisors or may be uncertain about who can act as their advisor.

Input from some administrators highlighted the need for students to have knowledgeable advisors during all phases of the grievance process. Several said it appeared that students may not understand the different kinds of written materials they are permitted to submit at each stage: investigation, adjudication, and appeal. I heard that students may not adequately advocate for themselves in their impact and mitigation statements, and they may mistakenly try to submit new evidence when a decision is on appeal. Based on my experiences in the field, I agree that participants in the investigative process have much to gain from the support of a formal advisor.

Others criticized the role that some coaches played as advisors, citing the appearance of a conflict of interest stemming from the coach's own interest in the outcome of an investigation, as the finding and sanction could impact the strength of the coach's team. I also heard the belief

³³ These numbers reflect individuals who served as formal advisors in the investigative process. Complainants may have also consulted and received advice from others who were not identified as their formal advisor during the investigative process.

³⁴ These numbers reflect individuals who served as formal advisors in the investigative process. Respondents may have also consulted and received advice from others who were not identified as their formal advisor during the investigative process.

³⁵ It is possible that some complainants may choose not to have a formal advisor during the investigative process because they feel adequately supported and informed by the Title IX staff generally.

that the coaches acting as advisors improperly influenced investigation findings and sanctions. My review of the investigation files, however, did not find any evidence that would support the claim that any coach had improperly interfered with any investigation, adjudication, appeal or sanction.

Based on my review, I do have some concern about the difficult position that the Counseling Center staff are put in when they are asked to act as a person's formal advisor in the investigative process. Counselors provide therapeutic sessions to the entire campus. Counselors acknowledged to me that they felt some apprehension about serving as advisors in any given matter because they may also see other students involved in that investigation as clients in the Counseling Center. Additionally, the therapeutic role of a counselor who also serves as the client-student's process advisor can potentially become distorted, as what might be advisable from a therapeutic perspective may not be advisable from an investigative process perspective. Given the frequency of respondents' use of Counseling Center staff as formal advisors, if the College ultimately implements a rule prohibiting Counseling Center staff from serving as advisors due to the primacy of their therapeutic role, it will be important for the College to amplify advisor resources for respondents.

D. Recommendations—Advisor Support During Investigations

I recommend the College refine its referrals and resources related to advisors, with the goal of increasing the use of well-trained advisors for all participants in the investigative process. The College should maintain SMAs as a potential source of advisors while recognizing that most SMAs in reality are likely only to be used by complainants and are likely only to want to serve complainants. While maintaining SMAs as advisors, the College must ensure that SMAs have a high level of knowledge regarding the actual processes for investigating and adjudicating sexual misconduct.

I recommend the College implement a policy for Counseling Center staff that discourages them from acting as formal advisors to parties in the investigative process. Because it has been respondents who have most used Counseling Center staff as advisors, the impact of these changes will fall largely upon respondents.

I recommend the College cultivate a group of employees who can act as advisors to the parties. Complainants and respondents would not be limited to choosing an advisor from the group; rather, it would simply be offered as list of willing and well-trained advisor resources. To address concerns of lack of racial diversity in those involved in implementing the Policy, I recommend the College seek to recruit faculty and staff of color to participate as potential advisors. These advisors should be willing to provide advisor services to both complainants and respondents and should have appropriate training in the investigative process so that they can

provide quality advice and guidance to parties in an investigation. The group of employees should be identified by name and contact information on the Title IX website both as general resources for both parties, and potentially also as specific resources for respondents. Additionally, the Title IX Coordinator can include a list of individuals willing to act as advisors for complainants and respondents in their first correspondence with the parties.

VII. Dual Investigator Model

A. Observations and Discussion

The Policy provides that formal resolution of complaints will be investigated by two investigators, one of whom will be a College employee; the other investigator may either be a College employee or an external investigator. All investigators are required to have specific training and experience investigating reports of conduct prohibited by the Policy. At the conclusion of the investigative process the investigators are responsible for making the determination of whether there is sufficient information to support a finding of responsibility under the preponderance of the evidence standard.

1. External Investigators

All but one³⁶ of the sixteen investigations were conducted by a pairing of one College employee and one external attorney. I find the external investigators have the requisite knowledge and training necessary for conducting sexual assault and sexual harassment investigations. Among the three attorneys who provided investigations for Kenyon during the 2015-16 school year, one has a Master's Degree in higher education with an emphasis in counseling and has conducted over 2000 investigations in a higher education setting, one has over 25 years of experience in employment and labor law and has done "countless" employment-related wrongdoing investigations, and one has over eighteen years of experience in investigating workplace injuries. All have attended specific Title IX training, both from the National Association of College and University Attorneys and from other reputable individuals and firms.

Feedback from community members was mostly positive regarding the external investigators. A few individuals who had been involved in investigations either as a party, witness or advisor described some interviews feeling like "interrogations," and described attorney behavior that might be better suited for the courtroom than for a neutral investigation occurring in a college setting. Although this was a minority view, this feedback was repeated enough that the College may want to have the current Title IX Coordinator work with the external investigators to ensure

³⁶ One investigation was conducted by two College employees prior to implementation of what became the regular external-internal pairing system.

they are using a tone and approach in line with Kenyon's expectations for student-staff interactions.

While I am confident in the external investigators' ability to conduct complex sexual harassment and sexual assault investigations under Title IX, I believe the investigators could benefit from additional training regarding intimate partner violence. Among the training modules the external investigators described attending, none were mentioned that pertain directly to understanding intimate partner violence. This is not unusual, as Kenyon, like many institutions around the country, added intimate partner violence to its comprehensive sexual misconduct policy in response to the mandates of VAWA within recent years.

While only one formal investigation during the 2015-16 school year involved an explicit complaint of intimate partner violence, others involved claims of nonconsensual sexual conduct that occurred within ongoing relationships. From my experience, institutions that have incorporated intimate partner violence into their sexual misconduct policies are seeing increases every semester in the reporting of incidents of intimate partner violence. It will be important for Kenyon's external investigators to continue to develop their expertise with respect to the dynamics of relationship violence, patterns of abuse and contrition, and the forms of emotional and psychological abuse that sometimes accompany or replace physical and sexual violence. Moreover, the training the investigators receive on interpersonal violence should also address violence within same-sex relationships.

2. Internal Investigators

Understandably, the internal investigators, who work in full-time unrelated positions for the College, have less experience and less training than the external attorneys with respect to investigating misconduct. Between December, 2014 and January, 2016, the College offered internal investigators four training sessions on investigating Title IX/VAWA matters; most investigators participated in two of these trainings. Because of the more supporting rather than leading role played by the internal investigators, because they have an external attorney available for guidance, and based on my interaction with the internal investigations, I found their knowledge of relevant issues and of Kenyon's process to be adequate to perform their role. However, the internal investigators would also benefit from training regarding intimate partner violence, including within same-sex relationships.

In formal investigations at Kenyon, the external investigator takes the lead role with respect to conducting interviews, communicating with the Title IX Coordinator throughout the process, and writing the investigation report. The internal investigator plays a second-chair role during interviews and provides logistical support. Both investigators are involved in analyzing the evidence and making a determination regarding responsibility. During the 2015-16 school year,

investigations often took several months to complete, involved tens of witness interviews and hundreds of pages of written/electronic evidence, necessitated multiple interviews and re-interviews of the parties, and required the investigators to devote intense attention and energy to analyses and making findings. These efforts require a substantial amount of financial resources in terms of the external investigators' time and take a substantial toll in several ways on the internal investigators.

Internal investigators described spending tens of hours on investigations, being drawn away from their regular workplace for long periods of time, working into the evenings, and—perhaps the most severe negative consequence described—experiencing emotional strain due to the magnitude of the decisions required. Co-workers of internal investigators described the impact of having a co-worker regularly absent due to working on an investigation. These consequences for internal investigators suggest that the current system of having volunteer internal investigators may be unsustainable in the long term. Based on what I have seen at other institutions, fewer and fewer are utilizing employees with other full-time responsibilities as sexual misconduct investigators.

3. Other Considerations

Additionally, as noted elsewhere in this Report, investigations at Kenyon during the 2015-16 school year often took several months to complete, and none were completed within the thirty-day goal³⁷ set forth in the Policy.³⁸ Some of the delays resulted from having to find interview times that worked for the parties and witnesses, the external investigators who must travel to campus from their law firm's office, and the internal investigators who must also balance their full-time job obligations.

In my conversations with members of the Kenyon community, I posed the question of whether the pairing of the internal and external investigator model was working for Kenyon. The overwhelming majority felt it was important to have a Kenyon employee as part of the investigative team. Those who had acted as advisors in the process described how important it was to have someone with institutional knowledge as part of the information-collection and determination process. The external investigators said it was necessary to have the internal investigator reserve rooms and coordinate scheduling with students; the internal investigators said it was beneficial to use a kenyon.edu email address in scheduling communications with students.

³⁷ The Policy states that this time frame may be extended for good cause with written notice to the parties.

³⁸ The Policy has been revised for the 2016-17 school year and now allots forty-five days for the completion of investigations.

B. Recommendations: Dual Investigator Model

I recommend the College re-evaluate its dual investigator model. While the current system of paired internal-external investigators is resulting in high-quality investigations, it may not be sustainable in the long term due to the combination of the financial resources required to retain outside attorneys and the tremendous resource and emotional toll the system is having on College employees. Because the internal investigators provide important logistical and scheduling assistance, the College could consider transitioning to using a single external investigator³⁹ and providing an administrative support person within the College to assist that investigator with logistic and scheduling matters. Such a move would maintain the quality of investigations currently provided by the external investigators but alleviate the drain on College internal investigators. A significant downside to using a single external investigator is that there will no longer be someone within the investigation who the students feel “knows and gets the Kenyon culture.” However, it is likely that over time, as the same three external investigators conduct repeated investigations at Kenyon, they will come to know the Kenyon culture and values; based on my conversation with the external investigators, it appears one or more of them already have developed familiarity and connection with the Kenyon community.

Alternatively, with the anticipated retirement of the Deputy Title IX Coordinator, the College could consider restructuring the Office for Civil Rights and bringing sexual misconduct investigations completely “in-house.” To do so, Kenyon could consider hiring two full-time internal investigators who would share the responsibility of conducting investigations and providing some campus training. If Kenyon is able to hire two investigators with sufficient expertise, based on the numbers of reports and investigations from the 2015-16 school year, it seems likely that a team of three full-time individuals in the College’s Office for Civil Rights would be able to handle the sexual misconduct matters.

Whatever personnel structure the College ultimately chooses, I note feedback criticizing the lack of racial diversity in those who implement the Title IX/VAWA Policy. This criticism related to concerns about underreporting of sexual misconduct by students of color and perceptions that students of color may be unfairly targeted in sexual misconduct claims.⁴⁰ It will be important for

³⁹ I note that some practitioners in the field believe that having two people conduct each investigation is a best practice for several reasons, including because it facilitates note-taking and because it provides a witness in the room to what each interviewee says. For many institutions, however, this is not financially feasible. Institutions can ameliorate one downside of having a single investigator by confirming each interviewee’s typed-up statement (from the investigator’s notes) with the interviewee and permitting the interviewee to correct any errors before it is finalized; in fact, some of Kenyon’s investigators already do this.

⁴⁰ Information regarding the race of participants in investigations in the 2015-16 school year is provided elsewhere in this Report.

the College to use its best efforts to recruit and maintain employees of diverse backgrounds as implementers of the Title IX/VAWA process.

VIII. Formal Investigations

A. Observations and Discussion—Systems Review

Section XI.F of the Policy sets forth the process for formal investigations of allegations of sexual misconduct. The Policy provides that both parties will receive written notice of the initiation of an investigation, that two investigators will be assigned to each investigation, and includes equal opportunities for presentation of evidence. The Policy provides that the College will seek to complete the investigation within thirty⁴¹ days of the notice of investigation, but permits extensions for good cause with written notice to the parties. It provides for the preparation and sharing with the parties of an initial investigation report, and after the parties have the opportunity to provide comment, the investigators make a determination under the preponderance of the evidence standard. If the investigators do not find the respondent responsible, the matter is dismissed. If they do find the respondent responsible, the matter is referred to an adjudicator for determination of the appropriate sanction. Both parties have a right to appeal the investigators' finding and the sanctions.

I heard a number of criticisms of the College's investigative process. Students expressed concerns that the investigators did not properly apply concepts of incapacitation, consent, and preponderance of the evidence; that investigative outcomes reflect alleged improper influence by coaches on behalf of student athletes; and that witnesses were misquoted and information in investigation reports was incorrect. Students said communication and follow-up from the Title IX staff was poor, expressed a belief that "no one gets expelled" for sexual misconduct, that the College generally mishandles sexual misconduct matters, and shared their impression that a player's position on a sports team can influence the outcome of an investigation.

1. Communications

My work in evaluating communications within the investigative system was challenged by the lack of uniform recordkeeping of investigative files, including correspondence between Title IX staff (including investigators) and complainants and respondents. For the most part, it appears the Title IX Coordinator or Deputy Coordinator, rather than the investigators, were responsible for keeping the parties updated regarding the status of investigations. Some staff members, such as Dr. Smolak, had strong communication with the parties. Dr. Smolak provided a projected investigation timeline and sent email updates on occasions when the timeline was extended.

⁴¹ The Policy was changed for the 2016-17 school year and now provides 45 days for the completion of investigations.

Other communications with complainants and respondents appeared less consistent, but it was not evident if that appearance was due to the lack of record-keeping or to a true deficiency in communication.

I also reviewed the template for letters sent to complainants and respondents at the commencement of investigations. I find that those letters, along with the other correspondence I reviewed, use an appropriate tone and a trauma-informed approach to communication. For example, shortly before sending the parties the initial investigation report for their review, Dr. Smolak sent a “notice” email, letting them know that the document would be coming and reminding them of support resources. This practice of sending a “notice” email alleviates the shock that a complainant or respondent might experience upon receiving out of the blue an email that contains the initial investigation report, which for many parties is the first time they see the other person’s detailed account of the allegation/defense to allegation. I further find that initial correspondence from the College’s Office for Civil Rights provides the requisite information regarding resources, the parties’ rights and responsibilities, and other important information.

2. Thoroughness of Investigation and Parties’ Opportunity to Review

My review of the written investigation reports reflects that the fact-finding process is exceptionally thorough and fair to both parties. Interviews of the parties are extensive, and often last for several hours. Complainants and respondents are invited to identify witnesses, and the records reflect that the investigators show willingness and follow-through with respect to contacting all witnesses identified by the parties. The number of witnesses interviewed for investigations ranged from two to twenty-five, with an average of thirteen witnesses per investigation. Investigators regularly interviewed complainants and respondents multiple times to collect follow-up information as witness interviews yielded new information. I further find the parties were treated equally throughout the investigative process.

Moreover, the investigative process provides complainants and respondents with sufficient opportunities to respond to information gathered, comment on the evidence, and raise questions about the other party’s account. Complainants and respondents have an opportunity to review and comment on all of the evidence gathered by the investigator when they are provided with an initial investigation report that contains “summaries” of the information collected. As mentioned elsewhere in this report, the word “summary” is a misnomer, as the investigators meticulously create investigative narratives out of each person’s statements. To ensure accuracy of their summaries of witness interviews, some, but not all, of the investigators send their written summaries to the witnesses to review and confirm accuracy prior to its inclusion in the investigation report. This is a best practice which can be time-consuming as the investigators wait to hear back from witnesses but which is important for ensuring accuracy.

3. Analysis and Application of Policy Terms

My review of the final investigation reports reflects that the investigators implemented a thoughtful application of the Policy’s provisions to the facts collected. To be sure, campus sexual misconduct matters—largely cases of word on word credibility assessments—are some of the most difficult to resolve. As shown in the written reports, to determine credibility, the investigators regularly consider a number of factors set forth by OCR in its guidance documents. The structure of this regular practice gives their analyses consistency from case to case and helps minimize personality-driven and/or biased credibility assessments. In addition, by following enumerated factors to reach a conclusion regarding credibility, the investigators assist the parties in understanding and following their reasoning, even if the party does not agree with the conclusion. By “showing their work” and walking step by step through credibility determinations, the investigators also bring trustworthiness to their reports as a whole.

While I did not find any circumstance in which the investigators misapplied the Policy definition of incapacitation, I do note that their analyses in incapacitation cases was not always set forth in the explicit manner that their credibility determinations were. This may contribute to the feedback I heard specifically complaining about how the investigators applied the concept of incapacitation. To illustrate, the Policy provides a set of factors to consider when evaluating whether a person is incapacitated, which are summarized as inquiring whether they can appreciate the “who, what, where, when, why or how of a sexual encounter.” While it was apparent to my eyes that the investigators had asked the questions of “who, what, etc.,” their written analysis did not always spell out that each question had been asked and answered with reference to specific pieces of evidence in a manner that ultimately supported their findings. The investigative findings in incapacitation cases would be stronger—and potentially better understood and appreciated by the parties—if the investigators more explicitly laid out their reasoning process.

4. Claims of Improper Influence and/or Bias

As noted above, a number of individuals shared their belief that coaches exercise improper influence on the investigative process and that investigative outcomes are biased in favor of athletes. I thoroughly reviewed correspondence, notes, investigation reports and other documents and I found no evidence that any coach had exercised any pressure on the Title IX/VAWA investigative, adjudicatory or appeal processes. I found no evidence of investigator or administrative bias in any manner with respect to outcomes, including the original investigative finding, the sanction imposed, or the decision on appeal. A breakdown of cases reflecting whether participants were varsity athletes is included in the “Student Status as Athlete” section below.

B. Recommendations: Formal Investigations--Systems Review

I recommend the College's Office for Civil Rights provide regular status updates to the parties in investigations at least as frequently as once per week. I further recommend the College's Office for Civil rights continue to use trauma-informed and thoughtful language and procedures with respect to its communications with complainants and respondents.

I recommend the College's Office for Civil Rights take steps to confirm the accuracy of witness statements by having them review and approve of their written accounts prior to including those statements in investigation reports.

I recommend the investigators enhance and spell out more fully the rationale for their findings in cases involving claims of incapacitation.

C. Observations and Discussion—Analysis of Claims

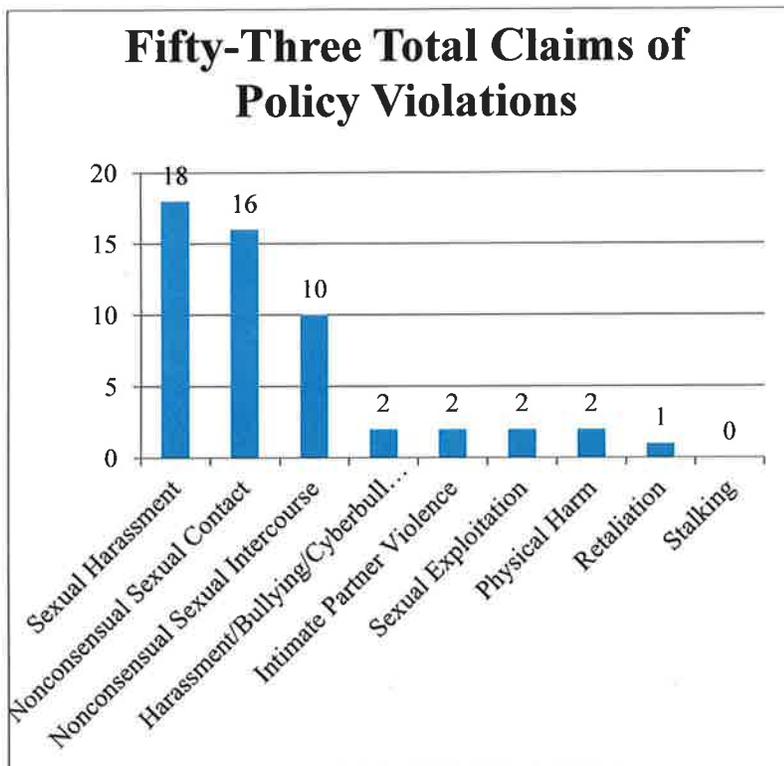
The College completed⁴² sixteen investigations from September, 2015 through July, 2016. For each investigation, I conducted a thorough review of the investigators' notes and files; the Title IX Coordinator's notes and files; materials submitted during or related to adjudications and appeals; correspondence related to the investigation; and the individual investigation reports. During the course of my review, I also gathered input from a broad cross-section of individuals, which I have aggregated for this Report. Because my goal was to understand challenges in implementation and opportunities for improvement at a systems level, my observations are noted generally and are deliberately set forth in a manner that omits identifying information or context that might reveal an individual complainant or respondent.

Any conclusions drawn from the data regarding investigations must be understood in the context of the very limited data set reviewed. My review examined one single academic year, the first year the Policy was in operation. The data set of sixteen cases is too small to view the results as necessarily representative of larger trends, and too small on which to base predictions for what may occur in future years. I do not believe these limited findings can be extrapolated. Nonetheless, information from the sixteen investigations can provide helpful insights into the functioning of the Policy last year. It is with these cautions that I provide my observations, below.

⁴² "Completed" investigations, for the purpose of my review, includes matters for which there are no other administrative steps, either because the matter was resolved by an investigative finding that was not appealed or through a finding that was appealed and ruled upon by the appeal process.

1. General Observations Regarding Claims Investigated

The Policy enumerates nine categories of prohibited conduct: sexual harassment, non-consensual sexual contact, non-consensual sexual intercourse, harassment/bullying/cyberbullying, intimate partner violence, sexual exploitation, physical harm, stalking, and retaliation. While sixteen matters were investigated, many of these matters involved numerous claims of prohibited conduct. In total, over sixteen matters, the investigators investigated fifty-three claims of prohibited conduct. Of particular importance to these statistics, the investigations treated claims of nonconsensual sexual contact and nonconsensual sexual intercourse as claims of sexual harassment as well, because one instance of nonconsensual sexual conduct would also fall within the Policy’s definition of sexual harassment. I note that certain claims are counted twice: once as the nonconsensual sexual act, and again as an instance of sexual harassment. A breakdown of the specific allegations is set forth in the chart below.



Looking at the circumstances of the claims, I find they share many characteristics of claims of sexual misconduct seen on campuses nationwide. For example, all the claims of nonconsensual sexual acts involved non-stranger sexual assault, meaning that the complainant and respondent were known to one another. While this does not diminish the significance of these incidents, the information is valuable for the College's determination of the relevant content for its prevention education programs.

Likewise, in keeping with other institutions' experiences, it appears⁴³ that fifteen of the sixteen complainants chose⁴⁴ not to pursue a criminal police investigation⁴⁵ or seek a sexual assault forensic examination. Highlighting the choice not to pursue a criminal investigation is not a criticism of any individual decision. On the contrary, I affirm an individual's right to determine how and if they want their complaint addressed by institutions and agencies. In this regard, any choice regarding the involvement of law enforcement is the right choice for that individual.

Nonetheless, it is important to examine whether there are any particular circumstances at Kenyon that might contribute to a person's decision not to engage law enforcement. In this regard, the information is significant because it dovetails with feedback I received from a number of students and employees that they had a negative impression of local law enforcement's handling of sexual assault allegations. To the extent the College can work with local law enforcement to bring police onto campus to partner in sexual assault prevention programs, train local law enforcement regarding Title IX, or start a dialogue with local law enforcement about typical characteristics of campus sexual assault and brainstorm best practices for addressing the problem, the College might make progress in developing stronger trust and familiarity between police and students that could result in the desire to have an increased police response in allegations of campus sexual violence.

The investigations I reviewed also reflected that complainants often waited a period of time before reporting an incident of sexual misconduct. Two complainants reported within twenty days of the incident, another seven reported within one hundred days of the incident, another five reported within two hundred days of the incident, and another two reported within four hundred days of the incident. Research on sexual violence reflects that delays in reporting are not unusual. Highlighting delays in reporting is not a criticism of any individual's choice of when to

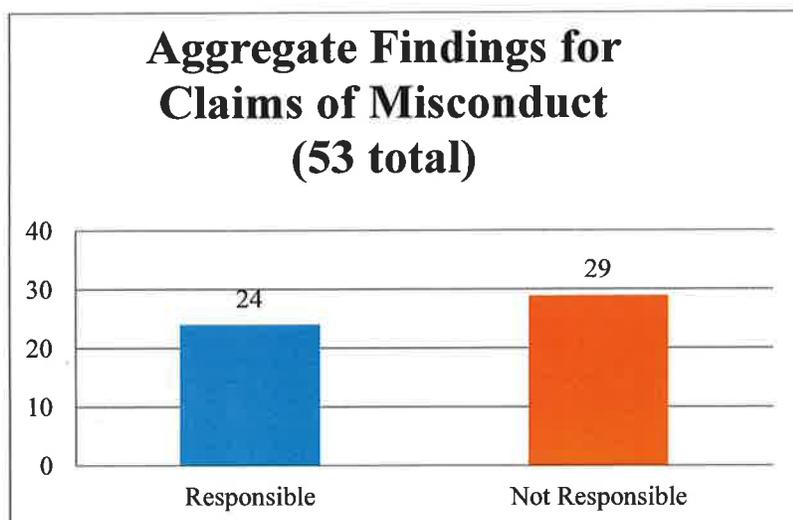
⁴³ This is a conclusion drawn from my review of the investigation materials. It is possible that a complainant may have had interactions with the police that were not reflected in the College's investigation materials.

⁴⁴ It is important to note that some allegations, such as sexual harassment and retaliation, may constitute violations of the Policy but would not constitute violations of the criminal law.

⁴⁵ Under Ohio law, the College is required to report felonies to the police. When the College became aware of potential felonies, the College's Director of Campus Safety, Robert Hooper, notified the Knox County Sheriff's Department.

report an incident; rather, I support a person’s choice to decide when, if any, is the right time for them to report an assault. However, it can be challenging to conduct an investigation into a matter that occurred many months prior. Thus, it is important to consider this data and determine if there are any particular obstacles at Kenyon that might give a complainant additional pause before reporting.

As illustrated in the student quotes above, many students—including some SMAs—have a negative view of the investigative process which may dissuade them and their peers from engaging with it. A handful of these opinions were based on direct experience with the process, but the majority of the negative impressions were based on what many students believed based on some information made public last year by persons not currently at Kenyon about a past investigation at Kenyon. I find that as a result of some concerns expressed publicly, many students developed a poor opinion of the investigative process. Without any other information about or experience with Kenyon’s investigative processes, members of the Kenyon community understandably generalized the criticisms expressed publicly to the broader investigative system. This was reflected in feedback that the process takes too long, that investigations never yield outcomes of responsible, that those found responsible for sexual misconduct do not face serious consequences. My review of the sixteen investigations reflects that not all of those perceptions are accurate. The charts and tables on the following pages reflect data relevant to these perceptions.



The table below shows the findings for each claim investigated under the Policy:

Amount and Type of Claim of Misconduct	Finding of Responsible	Finding of Not Responsible
18 Claims of Sexual Harassment	9	9
16 Claims of Nonconsensual Sexual Contact	7	9
10 Claims of Nonconsensual Sexual Intercourse	█	█
2 Claims of Harassment/Bullying/Cyberbullying	█	█
2 Claims of Intimate Partner Violence	█	█
2 Claims of Sexual Exploitation	█	█
2 Claims of Physical Harm	█	█
1 Claim of Retaliation	█	█

Data has been withheld to prevent unintended disclosure of student identity.

Section XI.F.5 of the Policy sets forth the range of possible sanctions for upon a finding of responsibility. Multiple sanctions can be imposed upon an individual respondent (such as, for example, a combined sanction of suspension and education). Of the nine respondents who were found responsible, five respondents were permanently dismissed from the College. The others received one or more of the following sanctions: suspension (two respondents), counseling (three respondents), and other sanctions (four respondents). “Other” sanctions included education on sexual harassment, housing changes, and no-contact orders.

2. Issues of Timeliness

Numerous members of the Kenyon community complained about the length of time it took for investigations to be completed during the 2015-16 school year. These criticisms are borne out by review; no investigations were completed within the 30-day time period set forth in the 2015-16 Policy.⁴⁶ The table immediately following reflects time periods between the report of incident and completion of investigation and time between investigation report (which contains one or more findings) and Notice of Outcome (which sets forth the sanction imposed by the adjudicator upon a finding of responsible). Investigations that resulted in findings of not responsible are not forwarded to adjudicators; the second column is therefore not applicable for matters that had a finding of not responsible.

⁴⁶ The Policy does permit extensions for good cause and upon written notice to the parties, and I note that several of these investigations were extended for good cause and the parties were notified of those extensions.

	Days from Report⁴⁷ of Incident to Investigation Report Policy Goal: 30 Days	Days from Investigation Report to Notice of Outcome Policy Goal: 20 Days
1	124	17
2	79	N/A
3	107	18
4	46	N/A
5	54	8
6	51	N/A
7	51	7
8	89	10
9	40	N/A
10	79	13
11	79	13
12	77	13
13	41	N/A
14	41	N/A
15	41	13
16	41	N/A

As the above chart illustrates, the length of investigations varied significantly. The median length of investigations is 52.5 days. The average length for investigations during the 2015-16

⁴⁷ In several cases, complainants who made an initial report to the Title IX Coordinator but did not want to pursue a formal investigation changed their minds and subsequently requested a formal investigation sometime later. The date used for those cases is the date the complainant requested that a formal investigation begin.

school year was 65 days. Two investigations, at 127 and 104 days in length respectively, bring the average up; the other fourteen investigations were completed in 89 days or less. And, nine of the sixteen investigations were completed in less than 60 days.

OCR has opined that a typical investigation, from date of report to the school through the imposition of sanctions, takes approximately sixty days,⁴⁸ but has noted that a determination of timeliness may depend on the complexity of the investigation and the severity and extent of the alleged conduct.⁴⁹ Both Kenyon's median and average investigation lengths were above the College's promised thirty-day timeframe for the relevant year. While the median falls within OCR's guidepost, the average exceeds it. When the time for reaching the Notice of Outcome is included, OCR's guidepost is exceeded even more.

Thus, the data shows that timeliness of investigations is a problem area for the College. I observed several reasons for delay in the matters reviewed. As noted in the section on the dual investigative model, the need to accommodate the schedules of both an external attorney and an employee with another full-time job can result in delays. Some matters experienced various incremental delays, absences due illnesses, missed appointments by witnesses, and the like. Other matters were delayed because the investigators had unforeseeable challenges in collecting relevant evidence. And some were delayed because one or both of the parties requested extensions in providing feedback to the initial report. There were few, if any, addressable systemic issues that stood out as reasons for delay.

The challenge for the College's investigators will be to balance the need for timely investigations while not sacrificing the quality of investigations. However, if the College is interested in: preserving the thorough fact-finding process currently used by its investigators; having the investigators implement the best practice of confirming the accuracy of witness statements; continuing to give the parties an opportunity to submit—without stringent limits—feedback on the initial investigation report that often results in additional party and witness interviews; and maintaining and augmenting the investigators' analysis of the evidence, then I think it is unlikely that investigations will be completed in much less time than sixty days. And, given what I have learned about Kenyon's values and expectations of excellence over the course of my review, I do not recommend that any of the above elements be unduly compromised in the name of expediency.

To the extent the investigative process is slowed by the investigators' identification and collection of evidence, there are a few curative steps the Title IX Coordinator can take. The Title IX Coordinator should be knowledgeable about what paperwork is required and what request

⁴⁸ 2011 DCL, p. 12.

⁴⁹ *Id.*

avenues are available with respect to external agencies. The Title IX Coordinator should regularly ask certain threshold questions during the Title IX Initial Assessment, such as whether the complainant reported to law enforcement (and if so, which agency, the name of the officer, and the report number if the complainant has that information) and whether the complainant received medical care such as a forensic sexual assault examination (and if so, at which medical facility and on what date). The Title IX Coordinator should maintain blank copies of all necessary request forms, including medical releases for local hospitals and clinics, so that, if relevant, the complainant can sign request forms and medical releases during the Initial Title IX Assessment. As part of their initial interactions with both parties in an investigation, the Title IX Coordinator should instruct them that, while they will have additional opportunities to submit evidence, they should bring relevant evidence to the parties' first interview with the investigators to the extent possible. These proactive measures will help alleviate potential delays in evidence collection down the road in the investigative process.

3. Alcohol

Students, staff and parents all expressed concerns about the role of alcohol with respect to sexual misconduct. While each constituency brought a different perspective, they shared the perception that the use of alcohol is connected to, and exacerbates in some way, the problem of campus sexual misconduct.

Of fifteen⁵⁰ matters reviewed, eleven involved the consumption of alcohol by both parties and four did not involve the consumption of alcohol by either party. While striking on its own, with data suggesting that nationwide, at least fifty percent of campus sexual assault cases involve the usage of alcohol by one or both, this high percentage of alcohol-involved incidents at Kenyon reflects that addressing alcohol consumption will need to be part of Kenyon's prevention programming. Additionally, the amount of alcohol-involved incidents of sexual misconduct correlates with the concerns I heard from students and parents alike surrounding issues of alcohol and sexual assault. Some expressed concerns that if both parties in a sexual encounter are intoxicated, male students may be held to an unfair standard and may be vulnerable to false claims of sexual misconduct. Others expressed fear and anger that female students who consume alcohol are too often preyed upon and then disbelieved. Two voices illustrate the diversity of opinions on this issue: One parent stated, "There must be a way to have underage drinking curbed, since sexual assault tends to happen when the female is intoxicated" while a student said "Kenyon needs to be realistic that it's a drinking culture—you will be drinking, so here's how to handle it."

⁵⁰ For one investigation, it was unclear if the parties had consumed alcohol so that matter is not included in this breakdown.

3. Gender

Sixty-four percent (eleven) of the cases involved a female complainant and a male respondent, while eleven percent (just one case) involved a male complainant and a female respondent. Another twenty-five percent (four cases) involved same-sex complainants and respondents.

4. Race

Several members of the Kenyon community shared concerns that people of color may be overrepresented as respondents in the Title IX/VAWA process. Feedback also focused on the lack of racial diversity among investigators and Title IX staff and possible underreporting of incidents by students of color who experience sexual misconduct.

My review reflected the following breakdown of the racial categories⁵¹ of the parties in the sixteen investigations:

Racial category of complainant	Racial category of respondent	Number of investigations
Caucasian	Caucasian	█
Person of color	Caucasian	█
Caucasian	Person of color	█
Person of color	Person of color	█

Data has been withheld to prevent unintended disclosure of student identity.

For the 2015-16 school year, students of color constituted 19.7 per cent of the population. As noted at the beginning of this section, it is my opinion that due to the small data set, the investigative numbers contained in my Review cannot be extrapolated. With respect to race (and the category of athletic status, discussed below), there are additional factors of intersectionality that warrant cautious consideration before drawing any conclusions from the data. For example, for a person with several of the characteristics measured for this review, such as a person of color who participates in varsity athletics, assigning or prioritizing any weight to one of the characteristics over the other with respect to importance in the Title IX/VAWA context proves problematic. Thus, rather than for extrapolative purposes, the numbers are provided here solely for the purpose of informing the community about the racial categories of the parties involved in the investigative process during the 2015-16 school year.

⁵¹ The category “person of color” includes individuals who are African-American, biracial and Latinx. I chose to cluster these as one category because I felt using a broader grouping best protects the confidentiality of the identities of the parties.

5. Student Status as Athlete

Some in the Kenyon community expressed concern about the perceived frequency of sexual misconduct allegations against student varsity athletes, and I heard concerns of an allegedly problematic culture within several of the male athletic teams. Such feedback came mostly from outside but also from within athletics. Several members of athletic teams shared feelings of discomfort that some in leadership roles approach the issue of sexual misconduct as “how can we stay out of trouble” rather than “how can we do the right thing.” Students outside athletics generally expressed the belief that male athletes were more likely to commit sexual assault than non-athletes. I also heard—with much less frequency—that male athletes were wrongfully targeted by sexual misconduct allegations and that whole teams are unfairly “lumped together” if one member allegedly engages in sexual misconduct.

My review reflected that thirty-one percent of the sixteen investigations involved a respondent who was a varsity athlete. Approximately one-third of Kenyon’s student body are varsity athletes. Varsity-athlete respondents were found responsible in forty-seven percent of the claims made against them. Non-varsity-athletes were found responsible for forty-one percent of the claims made against them. As noted above, the small data set examined limits the ability to extrapolate from these findings. Nonetheless, I include the information here for the purpose of assisting the College in gauging the accuracy of student perceptions against the actual numbers from the 2015-16 school year.

D. Recommendations—Analysis of Claims

I recommend that the College’s Office for Civil Rights, perhaps in conjunction with the Department of Campus Safety, explore opportunities to educate, cross-train, and collaborate on prevention programs with local law enforcement.

I recommend the College work to address any misperceptions among the student body regarding the sexual misconduct investigative process. This effort may include sharing aggregate data, adding a “frequently asked questions” section or other information to the Title IX website, or holding small group discussions among campus communities.

I recommend the College incorporate issues of alcohol and sexual misconduct in its prevention education programs, discussed further below.

I recommend the College’s Office for Civil Rights work proactively to avoid delays in evidence collection. This will entail familiarizing themselves with information request policies of law enforcement agencies and medical providers and maintaining copies of request forms and releases in the College’s Office for Civil Rights so that those forms are available at all times. The Title IX Coordinator should also regularly ask certain threshold questions during the Initial

Title IX Assessment to identify what evidence may exist and to expedite the investigators' collection of that evidence.

IX. Results of Educational Efforts

A. Observations and Discussion

Sexual misconduct education begins at the College with information provided during a student's first week on campus. Beer and Sex offers⁵² additional sexual misconduct education to first-year students in small groups in their residence halls. Students involved in certain activities (Peer Counselors, SMAs, Beer and Sex, Community Advisors, and certain Greek organizations) and student athletes receive additional sexual misconduct training. Despite these training efforts, many students expressed a significant lack of knowledge not only about the College's sexual misconduct investigative processes, but also about the important issues of consent and intoxication/incapacitation. As one Community Advisor told me, they "have no idea what a typical Title IX process looks like" so they feel like they are "sending students into an abyss." One student represented this experience well when they said "So many Title IX meetings and I'm still so confused by the Policy." Another said "I have gone through five Title IX trainings. The language is hard to really grasp, there's a lot of Title IX training that is just not as clear as could be." Yet another criticized the "lack of crucial information given, such as what is an actual assault and what really happens when you press charges." It was clear to me that the education efforts of the 2015-16 school year did not succeed in reaching the vast majority of students with whom I spoke.

While orientation/beginning of the year seems like the right time to teach incoming students about the Policy, students overwhelmingly told me that this is a time they are bombarded with information, are very stimulated about having just arrived on campus, and are not in a place where they process or internalize lessons about the Policy.⁵³ Moreover, while the students who attended Beer and Sex's session on sexual misconduct said it was very good, as noted, the majority of students I spoke with chose not to attend. Thus, while sexual misconduct education at the beginning of the year does seem necessary, it is clearly not sufficient.

Students also criticized the educational efforts as heteronormative and inaccessible to LGBTQ+ students. They said language and examples used both by the Title IX staff in trainings and by

⁵² There was a difference of opinion regarding whether Beer and Sex was mandatory. Some students told me it was mandatory and others said it was an optional program. Anecdotally, approximately less than 25% of the students who spoke with me attended Beer and Sex's session on sexual misconduct when it was offered to them.

⁵³ Beginning this year, the College implemented a required on-line sexual misconduct educational module for first-year students. I heard positive feedback on this module.

leaders of the other trainings failed to convey the Policy's application to non-heterosexual conduct.

In terms of content knowledge, I have identified elsewhere in this Report areas needing attention: misinformation regarding the Policy's definition of incapacitation, consent, and the difference between incapacitation and intoxication; and lack of understanding of the investigative process. I observed these areas of need across a broad range of students, including students responsible for advising their peers on these issues. Structurally, given students' lack of understanding and retention from current educational efforts, I encourage the College to explore other ways of conveying this important information.

The College has recognized the need for continued improvement in educational efforts, resulting in a separate comprehensive review of educational programs conducted by national experts, and in the implementation in the 2016-17 school year of mandatory on-line sexual misconduct training. Students expressed approval and appreciation for the new on-line sexual misconduct training.

B. Recommendations

With knowledge that the College is in the process of reevaluating its educational efforts regarding the Policy and sexual misconduct, I recommend the College take into account my observations in this Report. Specifically, I recommend the College consider adding "booster sessions" of sexual misconduct training for all students throughout all four years they are at the College, rather than focusing efforts only on first-year students or those students involved in specific programs. I recommend the College examine the content of educational efforts to ensure that they speak to all communities at the College including the LGBTQ+ students. I also recommend the College place necessary emphasis on the influence of alcohol in campus sexual misconduct.

If the College plans to keep Beer and Sex and/or enforce its "mandatory" nature (which I recommend, due to the positive feedback the program received), I recommend the College provide more rigorous training to Beer and Sex program leaders, as I found they had a wide range of knowledge levels, including some who would benefit from additional education before setting out to teach about Kenyon's institutional policies and practices.

As it reconsiders its educational programs, I recommend the College explore creative, student-driven possibilities in addition to the more formal programs led by Title IX staff. Given the level of engagement and passion Kenyon students showed during my on-campus visit about these issues, it seems particularly appropriate to use student-driven educational programs. These efforts might include social media campaigns, incorporating sexual misconduct issues in

dramatic and other projects on campus, video or other artistic competitions/showcases around issues of sexual violence prevention, and programs that pair film viewings/book readings with panel discussions.

X. Conclusion

I am impressed by the commitment of senior leadership, staff, faculty and students to these critical issues. I am confident in the College's ability to integrate these recommendations effectively.

Thank you for the opportunity to assist Kenyon College and to candidly share my observations and recommendations.

Yours truly,



Rebecca Leitman Veidlinger