

Central Student Government Task Force
Investigation of the
August 2013 Sexual Misconduct Policy



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Task Force Members

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I. Introduction

This report details the results of the Central Student Government Task Force's ("CSG Task Force") investigation of the Office of Conflict Resolution's implementation of the University of Michigan Policy on Sexual Misconduct by Students, effective August 19, 2013, and the expulsion of Brendan Gibbons from the University of Michigan.

The CSG Task Force prepared this report in order to make the University of Michigan a safer place for all students by increasing transparency in University decision-making. CSG is positioned to investigate these matters because, among other reasons, CSG can recommend amendments to the *Statement of Student Rights and Responsibilities*. The recommendations contained herein reflect the structural changes the CSG Task Force believes are necessary to increase transparency in University decision-making and to ensure that survivors of sexual misconduct are fully protected under the new Sexual Misconduct Policy.

The CSG Task Force is committed to protecting survivors of sexual misconduct. As a result, this report will not contain any information identifying survivors of sexual misconduct. If any survivors of sexual misconduct chose to speak to the CSG Task Force, the CSG Task Force will neither identify these survivors nor confirm any information provided in confidence. The CSG Task Force interviewed University administrators, Athletic Department administrators, and Ann Arbor Police Department detectives. The CSG Task Force appreciates the willingness of University administrators to meet with members of the CSG Task Force to explain the Sexual Misconduct Policy. Other individuals who spoke to the CSG Task Force in an unofficial capacity are not named in this report.

Finally, the CSG Task Force applauds the United States Department of Education Office for Civil Rights ("Department of Education") for its ongoing investigation of the University for alleged violations of federal law related to the events discussed in this report. The CSG Task Force notes that its investigation is entirely separate and distinct from the Department of Education's investigation related to alleged violations of federal law.

II. Establishment and Scope of the CSG Task Force

This section first discusses important dates surrounding the Brendan Gibbons incident and the implementation of both the interim and final Sexual Misconduct Policies. Second, this section describes Executive Order 3-030, issued by CSG President Michael Proppe.

A. Statement of Facts

During the 2009-2010 school year, the old Sexual Assault Policy governed sexual misconduct on campus. On November 22, 2009, Brendan Gibbons allegedly engaged in sexual misconduct.¹ Brendan Gibbons was the placekicker for the University of Michigan football team from 2009 – 2013.² In August 2011, the University of Michigan adopted an interim Sexual Misconduct Policy. On August 28, 2013 the University of Michigan adopted the final Sexual Misconduct Policy. On November 20, 2013, the Michigan Daily Reports that Brendan Gibbons was found responsible for “ engag[ing] in unwanted or unwelcome conduct of a sexual nature, committed without valid consent, and that conduct was so severe as to create a hostile, offensive, or abusive environment.”³ On December 19, 2013, the Michigan Daily reports that Brendan Gibbons was notified that he would be permanently separated from the University of Michigan.⁴ On February 2, 2014, CSG President Michael Proppe issued Executive Order 3-030 creating the CSG Task Force to investigate OSCR’s implementation of the August 2013 Sexual Misconduct Policy.⁵ On February 21, 2014, the Department of Education Office for Civil Rights announced an investigation into the University’s handling of sexual misconduct complaints.⁶

¹ See ANN ARBOR POLICE DEPARTMENT CASE REPORT, Case No. 0900009441 (opened Nov. 22, 2009).

² MGOBLUE.COM, FOOTBALL: BRENDAN GIBBONS, http://www.mgoblue.com/sports/m-footbl/mtt/brendan_gibbons_470886.html (last viewed Apr. 9, 2014).

³ Matt Slovin and Adam Rubenfire, *Former Kicker Brendan Gibbons Permanently Separated from University for Sexual Misconduct*, MICHIGAN DAILY, Jan. 28, 2014, available at <http://www.michigandaily.com/sports/former-kicker-brendan-gibbons-expelled-sexual-misconduct>.

⁴ *Id.*

⁵ Appendix A: CSG Executive Order, *infra*.

⁶ Appendix E: Department of Education Notice of Investigation, *infra*.

B. Executive Order

The Constitution of the Student Body of the Ann Arbor Campus of the University of Michigan (“All-Campus Constitution”) vests the Central Student Government (“CSG”) President with the ability to sign executive orders which are binding on the executive branch. Previously CSG was known as the Michigan Student Assembly and the name changed when students approved the new All-Campus Constitution. Second, the *Statement of Student Rights and Responsibilities* (“Statement”) allows CSG to view confidential records related to student disciplinary matters.

On February 2, 2014, CSG President Michael Proppe issued Executive Order 3-030, *infra* Appendix A, establishing the CSG Task Force to Investigate the Office of Student Conflict Resolution’s implementation of the August 2013 Sexual Misconduct Policy. The Executive Order arrived after numerous students⁷ and members of the public asked University administrators to disclose how the University handles sexual misconduct cases and why the University waited four years to permanently separate Brendan Gibbons from the University.⁸ These calls for transparency went unanswered - including direct attempts by CSG President Proppe to seek more information from University administrators prior to creating the CSG Task Force.

In Executive Order 3-030, the CSG President specifically charged the CSG Task Force to investigate the following open questions surrounding the Office of Student Conflict Resolution, the newly adopted student Sexual Misconduct Policy, and the expulsion of Brendan Gibbons from the University:

- i. Did the Office of Student Conflict Resolution, or any other person employed by the University, intentionally delay the completion of the investigation of the allegations of sexual misconduct against Brendan Gibbons until late Fall of 2013?
- ii. Did the office of Student Conflict Resolution properly apply the Statement of Student Rights and Responsibilities throughout their

⁷ See e.g., Editorial, *From the Michigan Daily: A Suspect Separation*, MICHIGAN DAILY, Jan. 29, 2014, available at <http://www.michigandaily.com/opinion/01daily-suspect-separation29>. Editorial, *From the Daily: A Shameful Response*, MICHIGAN DAILY, Jan. 31, 2014, available at <http://www.michigandaily.com/opinion/01daily-shameful-response31>.

⁸ Slovin and Rubenfire, *supra* note 3.

investigation of the allegations of sexual misconduct against Brendan Gibbons?

- iii. Did any person employed by the University leak any confidential information, including the decision to expel Brendan Gibbons, with regards to the investigation of the allegations of sexual misconduct against Brendan Gibbons?
- iv. Would a hypothetical case that is being investigated in 2013, but is surrounding incidents that took place in 2009, be investigated under the student sexual misconduct policy in place in 2009 or the policy adopted in 2013?
- v. Can the University reopen investigations of sexual misconduct absent new evidence? If the investigation closed prior to the adoption of the new student sexual misconduct policy, under which policy would the reopened case be considered?⁹

Executive Order 3-030 further states that the CSG Task Force's investigation is not necessarily limited to the five questions posed above.¹⁰

⁹ Appendix A: CSG Executive Order, *infra*.

¹⁰ *Id.*

III. Statement of Student Rights and Responsibilities

In addition to the All-Campus Constitution, the CSG Task Force also derives authority from the *Statement of Rights and Responsibilities* (“*Statement*”), which allows CSG to view confidential records related to student disciplinary matters. Before evaluating CSG’s authority to review confidential records under the *Statement*, it is important to consider the context which gave rise to this authority. The ability to review records of resolution arose out of students’ distrust of the *Statement* and offered an opportunity for students to ensure the University properly applied the *Statement*.

The University of Michigan Board of Regents (“Regents”) approved the first code of conduct in 1970 but it only prohibited a few violent offenses.¹¹ Student strikes and demonstrations shut down the University. In 1988, President Fleming replaced the code of conduct with a broader code and established a University police force.¹² Large scale protests erupted across campus. In 1992, the University considered completely rewriting the code.¹³ Conservative Coalition and Progressive Party presidential candidates for the Michigan Student Assembly publically opposed the idea of a code of conduct. “We are not in favor of the Statement of Rights and Responsibilities as written. We are opposed to the idea of a code of non-academic conduct coming from the administration.” The first version of the new code of conduct was scrapped.

In October 1992, the Michigan Daily published the second draft of the new code of conduct in its entirety.¹⁴ The headline reads, “Wolf in sheep’s clothing.” The second version of the code was finally adopted despite unclear student responsibilities. Under this version of the code, students had fourteen distinct rights. A student viewpoint published by

¹¹ *Demonstrations Get Eye at Michigan University*, MICHIGAN DAILY, Apr. 18, 1970, available at http://news.google.com/newspapers?id=Izk_AAAAIBA&sjid=qVEMAAAAIBA&pg=3461,1102456&dq=university+of+michigan+code-of-student-conduct&hl=en.

¹² Aaron Guggenheim, *Duderstadt Shares History of Activism*, MICHIGAN DAILY, Mar. 18, 2012, available at <http://michigandaily.com/news/duderstadt-discusses-role-activism-university>.

¹³ *MSA Election Issues: The Code*, MICHIGAN DAILY, Nov. 11, 1992, available at <http://news.google.com/newspapers?id=bvpJAAAAIBA&sjid=-x0NAAAAIBA&pg=1327,2798080&dq=university+of+michigan+rights+and+responsibilities&hl=en>.

¹⁴ Community Insight, *Wolf In Sheep’s Clothing: Code Debate Still Heated*, MICHIGAN DAILY, Oct. 12, 1992, available at http://news.google.com/newspapers?id=Y_pJAAAAIBA&sjid=-x0NAAAAIBA&pg=2792,1576786&dq=university+of+michigan+rights+and+responsibilities&hl=en.

the Michigan Daily in 1995 blasted the code as creating a kangaroo court and called the code an embarrassing document.¹⁵

In October 1995, the Michigan Daily extensively covered an overhaul to the code of conduct, which included changing the name to the *Statement* and adding the position of Resolution Coordinator.¹⁶ The Daily reported the changes were semantic and the Code still did not include enough student input during the resolution process.

Under previous versions of the code, MSA could directly propose amendments to the code to the UM Board of Regents. Before this amendment process changed, a faculty Student Relations Advisory Committee (“SRAC”) subcommittee actually voted to allow the student body to vote on proposed code amendments.¹⁷ A student body referendum to approve the code was considered but dismissed because that “is not the way the University of Michigan deals with policy and that a referendum will not be binding on the regents.”¹⁸ SRAC declined to adopt this recommendation and decided instead to appoint itself as “an oversight committee that would monitor proposals for an amendment process.”¹⁹ The Regents then changed the amendment process to give SRAC the authority to recommend changes to the University President.²⁰ All proposed amendments, even those approved by MSA, must now be approved by SRAC before the University President can consider the amendments.

In December 1998, SRAC received a presentation from the faculty Civil Liberties Board. The Civil Liberties Board “agreed with the idea of downplaying the legalistic side of

¹⁵ Jordan Stancil, *The Focus Has Changed In the Code Debate: From Adversarial to Inane*, MICHIGAN DAILY, Nov. 9, 1995, available at

<http://news.google.com/newspapers?id=GBBKAAAAIIBAJ&sjid=sB4NAAAAIIBAJ&pg=1082,4112446&dq=university+of+michigan+rights+and+responsibilities&hl=en>.

¹⁶ Editorial, *The Code Draft Decoded: Better, but Dogged By Questions*, MICHIGAN DAILY, Oct. 24, 1995, available at

<http://news.google.com/newspapers?id=EBBKAAAAIIBAJ&sjid=sB4NAAAAIIBAJ&pg=898,2967331&dq=university+of+michigan+code-of-student-conduct&hl=en>.

¹⁷ SRAC Meeting Minutes, Nov. 4, 1994, available at <http://www.sacua.umich.edu/srac/srac11-04-94.pdf>.

¹⁸ SRAC Meeting Minutes, Jan. 13, 1995, available at <http://www.sacua.umich.edu/srac/srac01-13-95.pdf>.

¹⁹ SRAC Meeting Minutes, *supra* note 17.

²⁰ SRAC Meeting Minutes, Nov. 19, 1999, available at <http://www.sacua.umich.edu/srac/srac11-19-99.pdf>.

the Code and emphasizing its educational tone.”²¹ One suggestion from the Civil Liberties Board was to change its title from the Student Code of Conduct to the Statement of Student Rights. The next revision of the code changed its name from the Student Code of Conduct to the *Statement of Student Rights and Responsibilities*.

In 2001, the Michigan Daily published an editorial calling the *Statement* a “draconian code” and complaining that the recent round of amendments hardly changed the *Statement*.²² “The Statement of Student Rights and Responsibilities, are unfair to the students charged under them and need [sic] to be abolished. Bollinger should not justify his refusal to support important recommendations made by the SRAC as an effort to further the ‘educational’ intent of the code, thereby masking a punitive process as an educational one.” Four days after the editorial, the MSA Student General Counsel and members of MSA expressed frustration at SRAC’s and President Bollinger’s failure to seriously consider the proposed *Statement* amendments.²³ Students protested at a UM Regents meeting.²⁴ The University adopted none of MSA’s proposed 2001 *Statement* amendments.²⁵

In 2001, the Michigan Daily Editor-in-Chief reflected on President Bollinger’s tenure at the University of Michigan and complained that Vice President Royster Harper erroneously represented President Bollinger’s adoption of changes to the code.²⁶ VP Harper stated that President Bollinger adopted 85% of MSA’s recommended amendments to the *Statement*. This number was not accurate because most of MSA’s proposed changes were not approved by SRAC, so they were not considered by President Bollinger. Proposed amendments would have granted students the right against double jeopardy, the

²¹ SRAC Meeting Minutes, Dec. 11, 1998, available at <http://www.sacua.umich.edu/srac/srac12-11-98.pdf>.

²² Editorial, *A Semantic Gloss: Draconian Code has Hardly been Fixed*, MICHIGAN DAILY, Feb. 8, 2001, available at <http://michigandaily.com/content/semantic-gloss-draconian-code-has-hardly-been-fixed>.

²³ Carrie Thorson, *MSA Upset by Changes Absent From Code*, MICHIGAN DAILY, Feb. 12, 2001, available at <http://www.michigandaily.com/content/msa-upset-changes-absent-code>.

²⁴ Editorial, *Keep It Up: Pressure From Activists Leads to Awareness*, MICHIGAN DAILY, Apr. 1, 2001, available at <http://michigandaily.com/content/keep-it-pressure-activists-leads-awareness>.

²⁵ Carrie Thorson, *MSA Angered About Code, Student Rights*, MICHIGAN DAILY, Feb. 14, 2001, available at <http://www.michigandaily.com/content/msa-angered-about-code-student-rights>.

²⁶ Editorial, *Lee C. Bollinger: The Legacy of the University of Michigan’s 12th President: 1997-2001*, MICHIGAN DAILY, Oct. 3, 2001, available at http://news.google.com/newspapers?id=x_hJAAAAIIBAJ&sjid=5R0NAAAAIIBAJ&pg=1084,1881757&dq=university+of+michigan+code-of-student-conduct&hl=en.

right to exclude hearsay from hearings, the right to legal representation, and would have precluded the University from prosecuting students for conduct that occurred off campus.

In 2002, after President Bollinger's departure, the Michigan Daily published an editorial arguing for strong reforms to the *Statement*.²⁷ Later that year, the Michigan Daily published an editorial arguing that the University should accept MSA's proposed changes to the *Statement*.²⁸ The editorial argued that the Statement should be completely eliminated or, at the very least, the University should not have jurisdiction over off-campus conduct, students should be afforded legal representation, and students should be protected from double jeopardy and hearsay. In 2005, SRAC voted to not approve any of MSA's proposed amendments.²⁹

In 2009, the MSA President worked with SRAC to amend the *Statement* to include a good-Samaritan defense.³⁰ This change was not adopted. The next month, MSA rejected a resolution to lower the standard of evidence in *Statement* hearings from clear and convincing evidence to preponderance of the evidence.³¹ In December 2012, CSG unanimously passed A.R. 2-024 which proposed an amendment to the *Statement* to provide students with full due process rights.³² SRAC did not consider the amendment. In 2013 and 2014, CSG passed two resolutions recommending six amendments to the *Statement* amendment process itself.³³ These amendments would require all proposed *Statement* amendments to pass the CSG

²⁷ Editorial, *Code Revisions on Deck for Next School Year*, MICHIGAN DAILY, Apr. 10, 2002, available at <http://michigandaily.com/content/code-revisions-deck-next-school-year>.

²⁸ Editorial, *Still Worth the Effort: University Should Accept MSA Code Revisions*, MICHIGAN DAILY, Feb. 22, 2002, available at

<http://news.google.com/newspapers?id=RxBKAAAAIIBAJ&sjid=yR4NAAAAIIBAJ&pg=2029,2124505&dq=university+of+michigan+rights+and+responsibilities&hl=en>.

²⁹ Annie Joling, *Proposed Code Change Voted Down*, MICHIGAN DAILY, Jan. 18, 2005, available at <http://michigandaily.com/content/proposed-code-change-voted-down>.

³⁰ Stephanie Steinberg, *Students, Faculty Promise Cooperation to Solve Campus Problems*, MICHIGAN DAILY, Sept. 14, 2009, available at <http://michigandaily.com/content/students-faculty-promise-cooperation-solve-campus-problems?page=0,0>.

³¹ Kyle Swanson, *Future is Uncertain for Proposed Change to Student Code*, MICHIGAN DAILY, Dec. 10, 2009, available at <http://michigandaily.com/content/confusion-continues-over-proposed-change-student-code>.

³² CENTRAL STUDENT GOVERNMENT ASSEMBLY RESOLUTION 2-024, https://csg.umich.edu/files/files/A_R_%202-024.pdf.

³³ Michael Sugerman, *CSG Moves for Increased Oversight on Student Bill of Rights*, MICHIGAN DAILY, Dec. 10, 2013, available at <http://michigandaily.com/news/csg-proposes-resolution>.

Assembly before being adopted into the *Statement*. SRAC did not approve these amendments.

With the contentious history of the *Statement* in mind, CSG's ability to view confidential student records is one of the few remaining checks that students have over the University's ability to regulate students. Section VIII(F) of the *Statement* states:

Statistical reports of actions taken through the Statement will be published following each academic term. These data will cover the number of complaints and the types of violations, resolutions, and sanctions/interventions. *Periodic, regular review of records of resolution actions will be made available, in confidence, to the Code of Conduct Advisory Board Chair of CSG.*

Section VIII(D) of the Statement defines Records of Resolution Actions as:

Records will be maintained by the RC with regard to any and all actions taken under the Statement. Accordingly, records will be maintained by the RC of complaints, agreements, hearings, findings, and sanctions/interventions. For each case in which a complaint is issued, including cases where the student accepts responsibility, the record will recite the facts of all conduct found or admitted to be in violation of the Statement with sufficient specificity to indicate that a violation of the Statement occurred. Confidentiality of records will be maintained to the extent permitted by law and the University of Michigan Student Rights and Student Records Policy: <http://www.umich.edu/~regoff/ferpa/>

The *Statement* allows a member of CSG to view the records of resolution in confidence. The records of resolution include complaints, agreements, hearing, findings, and sanctions. CSG can then use the information it gathers from this oversight process to recommend meaningful changes to the *Statement*. Even though the *Statement* does not explicitly grant the CSG Task Force the ability to view the documents, the position of Code

of Conduct Advisory Board Chair of CSG no longer exists. The authority to review the documents in confidence would vest in the CSG President upon the elimination of the Code of Conduct Advisory Board Chair of CSG. This position was an executive branch position appointed by the CSG President, so the CSG President has the ability to appoint a student to that position. In this situation, the CSG President chose to appoint a member of the CSG Task Force to that position.

A. CSG Oversight and the Sexual Misconduct Policy

While the CSG oversight clause of the *Statement* is clearly written, University administrators erroneously contend that CSG has no access to records for cases of sexual misconduct. This report briefly addresses the problems with the University's interpretation. First, CSG's access to the confidential records is supported by the text and past interpretations of the *Statement*. Second, any concerns about incidental disclosure could be addressed in a confidentiality agreement between CSG and the University. Even though the University denied CSG access to the confidential documents, the Department of Education Office for Civil Rights will review extensive documentation during its investigation.³⁴

First, past interpretations of the *Statement* and CSG's previous access to confidential records makes clear that the CSG Task Force has access to records pertaining to the Sexual Misconduct Policy. Both the old and new sexual misconduct policies are incorporated into the *Statement* by reference. Previously, the *Statement* prohibited sexual assault and sexual assault was defined by the University of Michigan Sexual Assault Policy. The policy, although significantly shorter than the current Sexual Misconduct Policy, states the rights of the survivor and outlines University disciplinary procedures. Under the old policy, CSG received confidential records of resolution. The CSG Task Force could find no instances or accusations that any member of CSG who reviewed these confidential records ever contacted a survivor, leaked confidential information, or that access to those records dissuaded a survivor from contacting University officials.

The new Sexual Misconduct Policy is also referenced in the *Statement*. Section III.B of the current version of the *Statement* prohibits "[e]ngaging in sexual misconduct as defined

³⁴ Appendix E: Department of Education Notice of Investigation, *infra*.

by the University's Student Sexual Misconduct Policy. Students who are reported to have experienced or engaged in sexual misconduct are subject to the resolution procedures outlined in the Student Sexual Misconduct Policy.” This policy, which is more comprehensive and detailed than the old Sexual Assault Policy, also outlines the rights of the survivor and University disciplinary procedures. At no point during the drafting of this document did members of the Institutional Advisory Committee suggest that CSG would no longer have access confidential records of resolution for sexual misconduct cases. The Sexual Misconduct Policy itself does not mention CSG’s ability to view confidential records of resolution as part of its oversight authority.

Further, the final Sexual Misconduct Policy still falls under the auspices of the *Statement* and CSG’s oversight provisions. The Sexual Misconduct Policy affects students because it is referenced in the *Statement* as defining prohibited sexual misconduct. University spokesperson Rick Fitzgerald stated that the interim sexual misconduct policy was only temporary because a permanent sexual misconduct policy would require an amendment to the *Statement*.³⁵ The adoption of the final Sexual Misconduct Policy followed the formal approval mechanisms required for an amendment to the *Statement*. A policy governed by the *Statement’s* amendment process should also reasonably be governed by the *Statement’s* oversight provisions.

Second, concerns about incidental disclosure could be addressed in a confidentiality agreement between CSG and the University. Kirkland & Ellis LLP represented the CSG Task Force in drafting a proposed confidentiality agreement governing the CSG Task Force’s review of records pertaining to the investigation. Though counsel drafted a confidentiality agreement tailored to this investigation, the University administrators declined to provide comments on the draft agreement or to engage with CSG’s outside counsel to work toward a mutually-acceptable solution. The CSG Task Force repeatedly reaffirmed its commitment to protecting any confidential information, hence asking its counsel to draft an agreement that would have ensured that all records were subject to stringent confidentiality obligation on the part of the CSG Task Force. In addition, the

³⁵ Haley Goldberg, ‘U’ Instates New Policy for Sexual Misconduct, MICHIGAN DAILY, Oct. 6, 2011, available at <http://www.michigandaily.com/news/u-creates-interim-policy-sexual-misconduct?page=0,1>.

CSG Task Force met with I Will – a student-led campaign working to break the silence surrounding sexual assault on college campuses³⁶ – to address concerns that its members may have. Despite these considerable efforts, University administrators blocked access to these records citing their view that the CSG Task Force would not comply with its obligations under any agreement.

Even though the CSG Task Force was wrongfully denied access to information pertaining to the Sexual Misconduct Policy, CSG needs to clarify this provision of the *Statement*. On February 21, 2014, the Department of Education Office for Civil Rights announced it will investigate the University’s handling of the Gibbons expulsion.³⁷ The University is required to produce all documents and communications related to all sexual misconduct cases (occurring after 2011) for the Office for Civil Rights, or the University risks losing its federal funding.

³⁶ I WILL FACEBOOK, ABOUT, <https://www.facebook.com/umichiwill/info> (last viewed Apr. 4, 2014).

³⁷ Appendix D: Proposed Confidentiality Agreement; Katie Woodhouse, *U.S. Department of Education Reviewing U-M Sexual Assault Investigation Involving Brendan Gibbons*, MICHIGAN DAILY, Feb. 25, 2014, available at http://www.mlive.com/news/ann-arbor/index.ssf/2014/02/us_department_of_education_rev.html#incart_m-rpt-2.

IV. History of the Sexual Misconduct Policy

The University of Michigan prohibits sexual misconduct through the *Statement of Student Rights and Responsibilities* (“*Statement*”). Before 2011, the *Statement* prohibited sexual assault through the University of Michigan Sexual Assault policy. On April 4, 2011, the United States Department of Education Office for Civil Rights published a “Dear Colleague Letter” which required schools to implement stricter sexual misconduct policies to comply with Title IX. On August 28, 2011, the *Statement* was amended to reflect the University’s interim Sexual Misconduct Policy that incorporated changes required by the Office for Civil Rights. On August 19, 2013, the University formally adopted the final Sexual Misconduct Policy.

A. Pre-2011 U of M Sexual Assault Policy

Before August 28, 2011, the *Statement* prohibited sexual assault through the University of Michigan Sexual Assault Policy.³⁸ This three-page policy discussed the rights of the survivor, University disciplinary procedures, off-campus legal options, medical services, and University counseling and educational services. Under this policy, OSCR received less than four complaints of sexual assault/harassment per academic year between 2007 and 2011.³⁹ In most cases the defendant was found not responsible.

The old Sexual Assault Policy did not define consent, but defined sexual assault with the following four definitions:

Merriam-Webster Dictionary: illegal sexual contact that usually involves force upon a person without consent or is inflicted upon a person who is incapable of giving consent (as because of age or physical or mental incapacity) or who places the assailant (as a doctor) in a position of trust or authority.

Sexual Assault Prevention and Awareness Center: any form of unwanted sexual contact obtained without consent and/or obtained through the use of force, threat of force,

³⁸ UNIVERSITY OF MICHIGAN, SEXUAL ASSAULT POLICY (archived Jan. 21, 2010), *available at* <http://web.archive.org/web/20100121151935/http://www.studentpolicies.dsa.umich.edu/assault.html>.

³⁹ OSCR ANNUAL REPORTS, *available at* <http://oscr.umich.edu/article/annual-reports>.

intimidation, or coercion.

Department of Public Safety: a crime involving forced or coerced “sexual penetration” or “sexual contact.”

Michigan State Law: assault with intent to commit criminal sexual conduct.⁴⁰

The policy does not define consent but appears to favor a force-based definition of consent. Absent evidence of physical force, it may be difficult for a survivor to establish lack of consent under either the Merriam-Webster Dictionary or Department of Public Safety definition of consent. Under the Sexual Assault Prevention and Awareness Center definition of consent, the survivor would only need to establish that the sexual contact was unwanted and occurred absent consent. The policy is unclear whether consent is viewed from the perspective of the respondent, the complainant, or an objective third-party.

The Sexual Assault Policy was also problematic because participation by the survivor was required to bring a claim. Unlike the new Sexual Misconduct Policy where OIE conducts an investigation, the old policy was adversarial. The University could only hear the merits of an accusation if the survivor filed a complaint with OSCR. The survivor was required to uncover and submit all evidence to either a Resolution Officer or an OSCR Hearing Panel. At that point, the survivor and defendant would decide which method of dispute resolution would occur. If the parties agreed on the OSCR Hearing Panel form of resolution, the survivor would be required to both present evidence and testify. Neither party could have an advocate speak on their behalf.

The resolution process under the old Sexual Assault Policy could be very difficult for a survivor. Sexual assault and harassment are more than just physical crimes. Requiring a survivor to confront the defendant can be traumatic and may be one reason the University of Michigan had such a low sexual assault and harassment reporting rate.

B. Office for Civil Rights, “Dear Colleague Letter”

⁴⁰ OFFICE OF STUDENT CONFLICT RESOLUTION, DEFINITIONS (archived on June 2010), *available at* <http://web.archive.org/web/20100604231937/http://www.oscr.umich.edu/Definitions/definitions.html#ViolationB> (last viewed Apr. 4, 2014).

On April 4, 2011, the Office for Civil Rights published a Dear College Letter explaining that Title IX of the Education Amendments of 1972 prohibits sexual harassment and violence, in addition to sexual discrimination.⁴¹ The Dear Colleague Letter, although advisory in nature, contained a combination of minimum standards that schools must adopt to comply with Title IX, and recommended guidelines that schools could choose to adopt.

The Dear College Letter required that schools respond to and investigate all complaints regarding sexual harassment and violence, publish a notice of nondiscrimination, designate an employee to coordinate Title IX compliance, and adopt grievance procedures designed to ensure the prompt and equitable resolution of sex discrimination complaints. The grievance procedures should include notice of where complaints can be filed, an impartial investigation where both parties can present witnesses and evidence, prompt time-frames, notice to parties of the outcome of the complaint, and an assurance that the school will take steps to prevent the recurrence of any harassment. Furthermore, a school must not wait until a criminal investigation concludes before taking steps to protect the complainant, must adopt the preponderance of evidence standard, must maintain documentation of all proceedings, and must provide due process to the alleged perpetrator.

The Dear Colleague Letter recommends that schools do not allow for the direct cross-examination of survivors and provide an appeals process, but schools can adopt policies varying in detail, specificity, and components based on the age of students involved and additional state legal requirements. As such, aside from meeting the minimum requirements set forth by Title IX in the Dear Colleague Letter, schools have considerable discretion in crafting their individual policies.

Universities across the nation adopted varying amounts of the Dear Colleague Letter. For example, Georgetown University,⁴² Northwestern University,⁴³ Duke

⁴¹ U.S. DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS: DEAR COLLEAGUE LETTER (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

⁴² GEORGETOWN UNIVERSITY DIVISION OF STUDENT AFFAIRS, SEXUAL MISCONDUCT & SEXUAL ASSAULT, <http://studentaffairs.georgetown.edu/policies/student-conduct/sexual-misconduct/> (last viewed Apr. 4, 2014).

⁴³ NORTHWESTERN UNIVERSITY DIVISION OF STUDENT AFFAIRS, SEXUAL ASSAULT HEARING & APPEALS SYSTEM, <http://www.northwestern.edu/student-conduct/conduct/formal/sahas/> (last viewed Apr. 4, 2014).

University,⁴⁴ University of Virginia,⁴⁵ Virginia Commonwealth University,⁴⁶ and William & Mary⁴⁷ all adopted sexual misconduct policies that involve a student hearing board which makes factual findings. The University of Michigan uses University investigators to make findings of fact. Other Universities, such as Columbia University, still do not publish sexual misconduct statistics or even provide an overview of the sexual misconduct grievance process.⁴⁸

C. August 2011 U of M Interim Sexual Misconduct Policy⁴⁹

In response to the Dear Colleague Letter, the University adopted an interim Sexual Misconduct Policy. The faculty Student Relations Advisory Committee (“SRAC”) that oversees all amendments to the *Statement* considered input to the interim policy. SRAC briefly discussed the interim policy on two dates: March 18, 2011 and April 15, 2011. On March 18, 2011, the Director of OSCR informed SRAC that Title IX requirements may change and that OSCR was considering using an investigative process.⁵⁰ Overall, the presentation was brief. In April 2011, OSCR provided an overview of the Dear Colleague Letter and highlighted some of the interim changes the University would need to adopt.⁵¹ Even though the discussion was brief, the OSCR Director emphasized SRAC would

⁴⁴ DUKE UNIVERSITY STUDENT AFFAIRS, STUDENT CONDUCT, <https://studentaffairs.duke.edu/conduct/z-policies/sexual-misconduct> (last viewed Apr. 4, 2014).

⁴⁵ UNIVERSITY OF VIRGINIA, POLICY AND PROCEDURES FOR STUDENT SEXUAL MISCONDUCT COMPLAINTS, http://www.virginia.edu/sexualviolence/documents/sexual_misconduct_policy070811.pdf (last viewed Apr. 4, 2014).

⁴⁶ VIRGINIA COMMONWEALTH UNIVERSITY, STUDENT SEXUAL MISCONDUCT POLICY, <http://www.provost.vcu.edu/pdfs/sexualmisconduct.pdf> (last viewed Apr. 4, 2014).

⁴⁷ WILLIAM & MARY, SEXUAL MISCONDUCT POLICY AND PROCEDURE, http://www.wm.edu/offices/deanofstudents/services/studentconduct/studenthandbook/sexual_misconduct_policy/index.php (last viewed Apr. 4, 2014).

⁴⁸ COLUMBIA UNIVERSITY STUDENT SERVICES FOR GENDER-BASED AND SEXUAL MISCONDUCT, GENDER-BASED MISCONDUCT POLICIES FOR STUDENTS, <http://ssgbsm.columbia.edu/> (last viewed Apr. 4, 2014); Ariel Kaminer, *Facing Complaints, Columbia’s President Calls for Transparency in Complaint Inquiries*, THE NEW YORK TIMES, Jan. 29, 2014, available at http://www.nytimes.com/2014/01/30/nyregion/facing-complaints-columbias-president-calls-for-transparency-in-assault-inquiries.html?_r=0.

⁴⁹ OFFICE FOR STUDENT CONFLICT RESOLUTION, SUMMARY OF INTERIM PROCEDURE, <http://oscr.umich.edu/article/summary-interim-procedure> (last viewed Apr. 4, 2014).

⁵⁰ SRAC Meeting Minutes, Mar. 18, 2011, available at <http://www.sacua.umich.edu/srac/srac03-18-11.pdf> (last viewed Feb. 24, 2014).

⁵¹ SRAC Meeting Minutes, Apr. 15, 2011, available at <http://www.sacua.umich.edu/srac/srac04-15-11.pdf> (last viewed Feb. 24, 2014).

provide input on the final policy.

When the interim Sexual Misconduct Policy was adopted, Vice President Harper's email to the student body stated that the interim sexual misconduct policy superseded the permanent policy set forth in the *Statement*.⁵² University spokesman Rick Fitzgerald said the *Statement* has not changed for good and that the interim policy would remain in place until a permanent amendment is adopted in the *Statement*. He further stated that hopefully the interim policy will prompt MSA and the University community to discuss and create a fixed procedure in the *Statement* regarding the standard of evidence needed in substantiating cases of alleged sexual misconduct.

The interim Sexual Misconduct Policy adopted a significant number of the changes recommended in the Dear College Letter. Unlike the final policy, the interim policy did not allow a student to appeal a Resolution Officer's finding on the grounds that the evidence does not support the findings, the definition of support person/ personal adviser explicitly allowed an attorney to serve in this role, and the policy could be modified by OSCR without notice to the student body. Under the interim policy, the University received sixty-two complaints of sexual misconduct during the 2011-2012 academic year.⁵³ Of these sixty two complaints, eight students were found responsible for violating the *Statement*.

With the interim Sexual Misconduct Policy in place, the University began working on the final version of the Sexual Misconduct Policy. President Mary Sue Coleman created an Institutional Advisory Committee ("IAC") to draft the final Sexual Misconduct Policy. A small Core Planning Team served as a subgroup of the IAC and drafted the actual language of the Sexual Misconduct Policy. The IAC included the following members: Royster Harper, Suellyn Scarnecchia, Jennifer Schrage, Laura Blake-Jones, Rick Fitzgerald, Greg Harden, Simone Himbeault-Taylor, Maya Kobersy, Linda Newman, Greg O'Dell, Holly Rider-Milkovich, Anthony Walesby, Jay Wilgus, and Julio Cardona (student). The Core Planning Team included Holly Rider- Milkovich, Anthony Walesby, Jay Wilgus, and Suellyn Scarnecchia. The Core Planning Team drafted the final Sexual Misconduct Policy

⁵² Goldberg, *supra* note 35.

⁵³ 2011-2012 OSCR ANNUAL REPORT, http://oscr.umich.edu/sites/oscr.umich.edu/files/2011-2012_OSCR_Annual_Report_Final.pdf.

and proposed policy language to the Institutional Advisory Committee for final approval. No students participated on the Core Planning Team.

The IAC received student input on the final Sexual Misconduct Policy through presentations to the CSG Assembly and through a dialogue session between members of CSG and the Core Planning Team. Members of CSG raised a number of concerns that related to the standard of evidence, the lack of a student panel designed to make findings of fact, a potential conflict of interest arising from the Resolution Coordinator reporting to the Title IX Coordinator, a potential conflict of interest arising from appealing the Resolution Coordinator's findings to the Title IX Coordinator, the vague definition of consent, the uncertainty regarding due process in sexual misconduct cases, and the uncertainty regarding whether students could retain a lawyer throughout the resolution process. The Core Planning Team improved the appellate process, but failed to make any other changes. It is also important to note that every amendment to the *Statement* adopted during the summer of 2013 was supported by a CSG Assembly resolution – except for the final Sexual Misconduct Policy.⁵⁴

SRAC also played an integral role in discussing the final Sexual Misconduct Policy. Alex Brown, a LSA student appointed by CSG, served on SRAC when the committee first considered the contents of the final Sexual Misconduct Policy. Under the old Sexual Assault Policy, the student resident advisor and the hall director would connect the survivor to University resources, but no confidential information would be shared outside of those three individuals. The student representative was concerned that survivors would be deterred from discussing sexual misconduct with their student resident advisors under the new Sexual Misconduct Policy because all reported sexual misconduct would be referred to the Title IX Coordinator, and could be investigated without the consent of the survivor.⁵⁵ Other members of SRAC also shared this concern but ultimately no changes were made to reporting requirements under the Sexual Misconduct Policy. On February 22, 2013, SRAC voted unanimously to approve the Sexual Misconduct Policy amendment to the *Statement*.⁵⁶

⁵⁴ CENTRAL STUDENT GOVERNMENT, ASSEMBLY RESOLUTIONS 2-010, 2-014, 2-015, <https://csg.umich.edu/legislative-branch/assembly/resolutions>.

⁵⁵ See SRAC Meeting Minutes, Mar. 16, 2012, <http://www.sacua.umich.edu/srac/srac03-16-12.pdf>.

⁵⁶ SRAC Meeting Minutes, Feb. 22, 2013, <http://www.sacua.umich.edu/srac/srac02-22-13.pdf>.

This vote occurred after a thirty-five minute executive session where no minutes exist regarding the committee's discussions of the final Sexual Misconduct Policy.

D. August 2013 U of M Final Sexual Misconduct Policy

On August 28, 2013, Vice President Harper notified students that the University adopted the final version of the Sexual Misconduct Policy. Among other changes, the new policy incorporates a definition of consent, increases the number of mandatory reporters of sexual misconduct, incorporates a review panel to evaluate situations where the survivor does not want to proceed, allows third parties to report allegations of sexual misconduct, and requires professional schools to sign a memorandum of understanding ("MOU") with OSCR regarding enforcement of the policy.

The new Sexual Misconduct Policy changed the definition of consent from a force-based definition to an agreement-based definition. The final Sexual Misconduct Policy defines consent as:

Consent. Clear and unambiguous agreement, expressed in mutually understandable words or actions, to engage in a particular activity. Consent can be withdrawn by either party at any point. Consent must be voluntarily given and may not be valid if a person is being subjected to actions or behaviors that elicit emotional or psychological pressure, intimidation, or fear. Consent to engage in one sexual activity, or past agreement to engage in a particular sexual activity, cannot be presumed to constitute consent to engage in a different sexual activity or to engage again in a sexual activity. Consent cannot be validly given by a person who is incapacitated. For purposes of this policy, the issue is whether the Respondent knew, or should have known, that the activity in question was not consensual.⁵⁷

⁵⁷ UNIVERSITY OF MICHIGAN, STUDENT SEXUAL MISCONDUCT POLICY: DEFINITIONS, <http://studentsexualmisconductpolicy.umich.edu/definitions> (last viewed Apr. 4, 2014).

The new definition of consent is a significant departure from the previous definition of consent. Consent is defined more narrowly than the previous policy and the law in the State of Michigan. While drafting this policy, the student representative on the IAC raised concerns that further discussions about the new definition of consent were needed because the definition was vague and did not include examples of permitted conduct. When asked why the IAC did not entertain a further discussion on the matter, the SAPAC director stated that an explicit decision was made to not include examples. No changes were made to the definition of consent.

The final Sexual Misconduct Policy greatly expands the number of mandatory reporters of sexual misconduct, including student Resident Advisors (RAs). Mandatory reporters are University of Michigan employees that must disclose all allegations of sexual misconduct to the Title IX Coordinator, regardless of the wishes of the survivor. The old Sexual Assault Policy stated: “All University personnel are encouraged to immediately refer sexual assault survivors to SAPAC.”⁵⁸ The new policy states: “Reports should be made to the U-M Title IX Coordinator at the Office for Institutional Equity. Reports or disclosures made to any other non-confidential University employee will be directed to the Title IX Coordinator for further review.”⁵⁹ The student representative on SRAC was concerned that survivors would be deterred from discussing sexual misconduct with their student RAs under the new Sexual Misconduct Policy because all reported sexual misconduct would be referred to the Title IX Coordinator, and could be investigated without the consent of the survivor. Even though other members of SRAC shared this concern, the broader list of mandatory reporters was included in the new Sexual Misconduct Policy.

The interim and final Sexual Misconduct Policies include a Review Panel of University employees to advise the Title IX Coordinator on whether to pursue an investigation of alleged sexual misconduct if the survivor does not want the University to proceed. The University of Michigan is one of the first universities to use a Review Panel to

⁵⁸ UNIVERSITY OF MICHIGAN, SEXUAL ASSAULT POLICY (archived on May 28, 2010), *available at* <http://web.archive.org/web/20100528042535/http://www.umich.edu/~spolicy/assault.html> (last viewed Apr. 4, 2014).

⁵⁹ UNIVERSITY OF MICHIGAN, STUDENT SEXUAL MISCONDUCT POLICY: NON-CONFIDENTIAL REPORTS, <http://studentsexualmisconductpolicy.umich.edu/non-confidential-reports> (last viewed Apr. 4, 2014).

advise the Title IX Coordinator. “These panel members will represent the interests of the university, law enforcement, survivors of sexual misconduct, persons accused of sexual misconduct, and/or other offices as deemed necessary and appropriate under the circumstances.”⁶⁰ The Review Panel is composed of: OSCR Director, SAPAC Director, Title IX Coordinator, DPS member, and a law school professor. The review panel’s recommendations are not binding on the Title IX Coordinator. The Title IX Coordinator stated that the review panel always recommends that the Title IX Coordinator investigate alleged sexual misconduct if the name of the perpetrator is known. Usually cases that are closed pending further information involve cases where the mandatory reporter did not know the name of the perpetrator. The Review Panel under the interim Sexual Misconduct Policy contained an associate from the Office of General Counsel, but this position was removed from the final Sexual Misconduct Policy. Unfortunately, the University does not report statistics in the OSCR Annual Reports regarding the number of cases the Review Panel recommends proceed to investigation.

Third parties can report allegations of sexual misconduct under the final Sexual Misconduct Policy. The old Sexual Assault Policy limited complaints to “any student, faculty member, or staff member”⁶¹ but the final Sexual Misconduct Policy states that a report may be made by “[a] person who has information that sexual misconduct may have been committed by a University student or a participant in a University Program.”⁶² The practical difference between the two policies is that under the new policy *anyone* can file a complaint of sexual misconduct. This broad definition includes members of the community with access to a police report or further information. Once a third party files a complaint with OIE, OIE contacts the survivor of sexual misconduct. If the survivor does not wish to participate in the OIE investigation, the Review Panel will advise the Title IX Coordinator on how to proceed. If the Title IX Coordinator decides to move forward with an investigation, the investigation follows the same process as investigations initiated by

⁶⁰ UNIVERSITY OF MICHIGAN PUBLIC AFFAIRS, QUESTIONS AND ANSWERS, Feb. 3, 2014, <http://www.vpcomm.umich.edu/pa/key/policyresponse.html>.

⁶¹ UNIVERSITY OF MICHIGAN OFFICE OF STUDENT CONFLICT RESOLUTION, STATEMENT OF RIGHTS AND RESPONSIBILITIES, <http://oscr.umich.edu/statement>.

⁶² UNIVERSITY OF MICHIGAN, STUDENT SEXUAL MISCONDUCT POLICY: REPORTING SEXUAL MISCONDUCT, <http://studentsexualmisconductpolicy.umich.edu/reporting-sexual-misconduct>.

survivors.

Professional schools signed MOUs with OSCR which requires the professional schools to follow the Sexual Misconduct Policy.⁶³ MOUs are required because the *Statement* allows individual degree-granting units and schools to develop their own standards of conduct so the Sexual Misconduct Policy would not apply to programs with their own standards of conduct absent a MOU.⁶⁴ The MOU between the law school and OSCR was signed on February 14, 2014 – six months after the University approved the final Sexual Misconduct Policy.⁶⁵ The law school MOU requires OSCR to communicate the outcomes of sexual misconduct cases to the law school and consult with the law school on appropriate sanctions. These decisions may not be appealed to the law school. Non-sexual misconduct allegations are addressed separately under the law school's procedures and the law school will inform OSCR of the outcomes of these cases.

⁶³ Appendix B: Non-Academic Misconduct MOU, *infra*.

⁶⁴ Section 1, Statement of Rights and Responsibilities, *supra* note 6161.

⁶⁵ Appendix B: Non-Academic Misconduct MOU, *infra*.

V. CSG Task Force Findings

The CSG Task Force made the following findings pursuant to Executive Order 3-030. The findings are organized by each question delegated to the CSG Task Force by the CSG President.

I. **Did OSCR, or any other person employed by the University, intentionally delay the completion of the investigation of the allegations of sexual misconduct against Brendan Gibbons until late Fall of 2013?**

The CSG Task Force finds that University failed to explain the four-year delay between Brendan Gibbons's conduct and the permanent separation. Despite a statement by President Coleman that she is "very comfortable with the processes and what happened,"⁶⁶ University officials erroneously relied on FERPA to deny requests for information regarding procedures followed in the Gibbons case. Second, the CSG Task Force finds that the University failed to investigate third-party complaints of Gibbons's conduct within sixty days of receiving the complaint. Third, the CSG Task Force believes Brady Hoke knowingly issued false statements in December 2013 concerning the status of Gibbons.

First, University officials claimed that FERPA and University policies protect information regarding procedures followed in the Gibbons case from disclosure. A brief review of FERPA forecloses this argument because FERPA explicitly allows the University to disclose the final results of disciplinary proceedings when a student is found responsible for a non-forcible sex offense.⁶⁷ In addition, members of the CSG Task Force offered to sign a confidentiality agreement, allowing the University to disclose this type of documentation.⁶⁸ University officials failed to produce written privacy policies preventing

⁶⁶ Claire Bryan, *Fireside Chat Addresses Array of Concerns*, MICHIGAN DAILY, Feb. 24, 2014, available at <http://www.michigandaily.com/news/coleman-answers-students-questions-fireside-chat>.

⁶⁷ Family Educational Rights and Protection Act, 20 U.S.C. § 1232g(b)(6)(B) (2013) ("Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence (as that term is defined in section 16 of title 18), or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense."), available at <http://www.law.cornell.edu/uscode/text/20/1232g>.

⁶⁸ Appendix D: Proposed Confidentiality Agreement, *infra*.

the disclosure of these communications since policies regarding student records are almost copied verbatim from FERPA.⁶⁹ Fortunately, a third party will review documents sought by the CSG Task Force. On February 21, 2014, the Department of Education Office for Civil Rights announced it will investigate the University's handling of the Gibbons expulsion.⁷⁰ The University is required to send all documents and communications related to all sexual misconduct cases (occurring after 2011) to the Office for Civil Rights, or the University risks losing its federal funding.

Second, the University failed to investigate Gibbon's alleged sexual misconduct within the sixty-day period specified in the Sexual Misconduct Policy.⁷¹ In August 2013, a third party phoned a complaint to the Title IX Coordinator alleging that Gibbons committed sexual misconduct in 2009. When asked why the University failed to investigate a third-party complaint of sexual misconduct in the Gibbons case, the OSCR Director responded "which one?" This leads the CSG Task Force to conclude that more than one third party reported Gibbon's alleged sexual assault to the University. The University is encouraged to investigate all complaints of sexual misconduct within sixty days of receiving the complaint,⁷² but the Michigan Daily reported that Gibbons was not found responsible until November 20, 2013 – almost ninety days after the third party complaint occurred.⁷³ When asked about the delay, the Title IX Coordinator responded that the University would delay investigations if important witnesses or resources were unavailable.

Furthermore, the Office for Civil Rights Notice of Investigation letter cites an August 2012 complaint made by a student to the University.⁷⁴ In order for that individual's January 16, 2014 complaint to OCR to be timely it must be filed within 180 days of the University's last action related to the August 2012 complaint.⁷⁵ If the University properly

⁶⁹ THE UNIVERSITY OF MICHIGAN STUDENT RIGHTS AND STUDENT RECORDS, <http://www.ro.umich.edu/ferpa/> (last viewed Apr. 4, 2014).

⁷⁰ Appendix E: Department of Education Notice of Investigation, *infra*; Woodhouse, *supra* note 37.

⁷¹ UNIVERSITY OF MICHIGAN, STUDENT SEXUAL MISCONDUCT POLICY: INVESTIGATION, <http://studentsexualmisconductpolicy.umich.edu/investigation>.

⁷² *Id.*; UNITED STATES DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

⁷³ Slovin and Rubenfire, *supra* note 3.

⁷⁴ Appendix E: Department of Education Notice of Investigation, *infra*.

⁷⁵ DEPARTMENT OF EDUCATION, OCR COMPLAINT PROCESSING PROCEDURES, <https://www2.ed.gov/about/offices/list/ocr/complaints-how.html#ftn1> (last viewed Apr. 4, 2014).

investigated the August 2012 complaint within sixty days, the January 16, 2014 OCR complaint would not be timely. In addition, the 2012-2013 OSCR Annual Report states that one instance of sexual misconduct filed during the 2012-2013 school year was “Unresolved: investigation in process.”⁷⁶ This designation is the first of its kind in a sexual misconduct case. While the CSG Task Force cannot conclusively state that this designation refers to the Gibbons case, the University should provide more details about the delay. If the August 2012 complaint is indeed related to the Gibbons case, the University investigation lasted over 445 days – much longer than the recommended sixty-day deadline.

The CSG Task Force also learned that OSCR and OIE could not adequately respond to the drastic increase in sexual misconduct cases reported under both the interim and final Sexual Misconduct Policies. Initially an OIE staff member, Pamela Heatlie, investigated claims of sexual misconduct under the interim Sexual Misconduct Policy. In early 2012, OSCR hired Heather Cowan to handle sexual misconduct investigations. According to the OSCR Director, within six months it was clear that OSCR was not the best resource for the investigator because OSCR does not normally conduct investigations. Within the year, Ms. Cowan relocated to the Office for Institutional Equity which routinely handled investigations into allegations of faculty and staff sexual misconduct. In the spring of 2013, Elizabeth Lefond replaced Ms. Cowan as the OIE investigator assigned to student sexual misconduct cases. By the beginning of the 2012-2013 academic year, the University realized one investigator was not sufficient to address the increased caseload. According to the OSCR Director, OIE routinely failed to meet its recommended sixty-day deadline to conduct investigations due to the increased caseload under the new policy. In early 2014, OIE hired Rebecca Veidlinger as the second investigator assigned to student sexual misconduct cases. The University did not hire the second investigator until more than a year after it should have realized that one investigator was not sufficient.⁷⁷

⁷⁶ 2012-2013 OSCR ANNUAL REPORT, <http://oscr.umich.edu/sites/oscr.umich.edu/files/2012-2013%20OSCR%20Annual%20Report%20%282-27-2014%29.pdf>.

⁷⁷ The vacancy for the second OIE investigator position appeared on OIE’s website in October 2012 and remains unfilled until after September 2013. UNIVERSITY OF MICHIGAN, OFFICE OF INSTITUTIONAL EQUITY: OUR OFFICE (archived on October 20, 2012 and September 21, 2013), *available at* <http://web.archive.org/web/20121020191245/http://hr.umich.edu/oie/office.html> (last viewed April 4, 2014).

Third, the Athletic Department plays an integral role in disciplinary actions regarding students athletes. Student athletes sign a Financial Aid Agreement with the University which requires that the student athlete follow the University's policies and rules.⁷⁸ The University also requires student athletes to sign a schedule attached to the Financial Aid Agreement which states that the financial aid can be revoked if the student athlete is convicted of criminal offense.⁷⁹ The schedule does not list violating the Sexual Misconduct Policy or other portions of the *Statement* as grounds for reducing or revoking financial aid, but the Financial Aid Agreement requires full compliance with University policies as a condition for the financial aid.

Both the Title IX Coordinator and Director of OSCR contact Athletic Department administrators, including Associate Athletic Director Greg Harden, when accusations of misconduct are filed with the University. It is the practice of OIE to notify the Athletic Department when student athletes are accused of sexual misconduct. OIE can request that the Athletic Department implement interim measures – including no contact orders, dorm relocations, and class modifications – but will wait until OIE and OSCR make final factual findings before the Athletic Department takes further action. Associate Athletic Director Greg Harden has previously contacted the Title IX Coordinator and OIE investigators (he would not elaborate on the nature of these conversations), and believes that the two departments have communicated consistently under the new sexual misconduct policy. To his knowledge, OIE has not failed to notify him when a student athlete was accused of sexual misconduct. The Athletic Department also facilitates communication between OSCR/OIE and student athletes involved in the University disciplinary process. This communication occurs regardless of whether the student athlete is a complainant, respondent, or witness.

In addition, members of the Athletic Department support staff, including the Associate Athletic Director himself, can serve as an advocate during disciplinary hearings. During his tenure in the Athletic Department, Associate Athletic Director Greg Harden represented several student athletes during formal University disciplinary proceedings. He

⁷⁸ Appendix C: Student Athlete Financial Aid Agreement, *infra*.

⁷⁹ *Id.*

represented both student athletes who filed complaints and student athlete who were respondents.

The Athletic Department routinely notifies coaches when student athletes are accused of serious misconduct by either OIE or OSCR. Coaches routinely consult with their sports administrator before finding a student athlete committed a serious violation of team rules. The football program does not have written rules and Dave Brandon is the sports administrator responsible for the football program. The Michigan Daily reported that OIE found Gibbons responsible for violating the Sexual Misconduct Policy on November 20, 2013.⁸⁰ Assuming the Athletic Department followed, as representatives of the department stated it did, student discipline communication practices in the Gibbons case, Brady Hoke and Dave Brandon would have known about the allegations of sexual misconduct when Brady Hoke stated that Gibbons could not play in the December 28, 2013 Buffalo Wild Wings game due to a “family matter”.⁸¹ The Michigan Daily reported that Gibbons was permanently separated on December 20, 2013 and the signed permanent separation letter was sent from a fax machine in the Athletic Department.⁸² The UM Office of General Counsel confirmed that a facsimile machine located in a Schembechler Hall work room sent the signed permanent separation letter. The Director of Football Facilities includes this facsimile machine number in his contact information.⁸³

Either OIE/OSCR failed to consistently communicate with the Athletic Department, the Athletic Department failed to consistently communicate with its coaches regarding ongoing student athlete disciplinary matters, or Brady Hoke knowingly issued false statements in December 2013 concerning the status of Gibbons. Representatives from the Athletic Department believe that OIE has not failed to notify the department when a student athlete was accused of sexual misconduct. When the Athletic Department is notified that a student athlete is under investigation for sexual misconduct, the Associate

⁸⁰ Slovin and Rubenfire, *supra* note 3.

⁸¹ *Id.*

⁸² Slovin and Rubenfire, *supra* note 3; Adam Rubenfire and Matt Slovin, *Gibbons Document Faxed from Athletic Department Offices Before Dec. 23 Press Conference*, MICHIGAN DAILY, Jan. 30, 2014, available at <http://www.michigandaily.com/article/gibbons-document-faxed-athletic-department-offices-dec-23-press-conference>.

⁸³ *E.g.*, GLIAC OFFICIALS, Men’s, available at http://gliacrefs.com/GLIAC_Officials%20_Mens.pdf (last viewed Apr. 9, 2014) (*see* Larry Martin).

Athletic Director stated it is the practice of the department to notify the head coach of the team. Representatives from the Athletic Department reassured the CSG Task Force that administrators have consistently communicated under new policy they have no reason to believe that any practices regarding communication have not been followed under the new policy. As a result, CSG Task Force believes Brady Hoke knowingly issued false statements in December 2013 concerning the status of Gibbons. The CSG Task Force found no evidence that any members of the Athletic Department influenced the timing of OIE's findings or OSCR's sanctions.

II. Did OSCR properly apply the Statement of Student Rights and Responsibilities throughout their investigation of the allegations of sexual misconduct against Brendan Gibbons?

No. The CSG Task Force finds that the University did not properly apply the *Statement of Student Rights and Responsibilities* to cases of sexual misconduct that occurred prior to 2011 but were investigated under either the interim or final Sexual Misconduct Policy. Question IV (below) discusses this finding in more detail.

III. Did any person employed by the University leak any confidential information, including the decision to expel Brendan Gibbons, with regards to the investigation of the allegations of sexual misconduct against Brendan Gibbons?

Probably not. Initially the CSG Task Force was concerned that a University official leaked information to the Michigan Daily regarding the Gibbons case. If this were the case, the CSG Task Force feared that personal information about the survivor may also be shared. Even though the Michigan Daily will not share its source for the information published regarding the Gibbons case, the risk of disclosing information about the survivor seems low. The Michigan Daily most likely only had access to two letters sent from the University to third parties. Once the University shared the letter with third parties, the probability that the letter was leaked to the press by a University official greatly decreases.

IV. Would a hypothetical case that is being investigated in 2013, but is surrounding incidents that took place in 2009, be investigated under the student sexual misconduct policy in place in 2009 or the policy adopted in 2013?

The CSG Task Force recognizes the need of finality in investigations regarding sexual misconduct so survivors are not required to constantly recall their difficult experiences. Unfortunately, the University improperly handled a handful of sexual misconduct cases where the conduct occurred prior to the adoption of the new Sexual Misconduct Policy, but were investigated under the new Sexual Misconduct Policy.⁸⁴ The difference in prohibited conduct between the two policies is small and examining the case under the appropriate policy is unlikely to change OIE's determination in those cases, but nonetheless the University needs to be held accountable in its administration of policies governing student conduct. In addition, if a student switched degree-granting units after the conduct occurred, the University must apply the code of conduct governing the degree-granting unit in which the student was enrolled at the time the conduct occurred. The CSG Task Force finds that the University improperly prohibited student conduct retroactively, but properly allowed the new Sexual Misconduct Policy to govern the investigation of conduct that occurred prior to the adoption of the new Sexual Misconduct Policy.

The CSG Task Force distinguishes between parts of the new Sexual Misconduct Policy that govern student conduct and other parts that govern investigations. First, the CSG Task Force finds that the new Sexual Misconduct Policy cannot prohibit conduct that occurred before the policy went into effect. Second, the CSG Task Force finds that the Sexual Misconduct Policy can govern investigations of sexual misconduct, even if the sexual misconduct occurred prior to the adoption of the new Sexual Misconduct Policy.

⁸⁴ Slovin and Rubenfire, *supra* note 3 (the language in the Nov. 20, 2013 to Gibbons cites the 2013 Sexual Misconduct Policy – “Respondent engaged in unwanted or unwelcome conduct of a sexual nature, committed without valid consent, and that conduct was so severe as to create a hostile, offensive, or abusive environment.”). In addition, the Directors of OSCR and SAPAC stated during a CSG Assembly meeting that the University applies the new sexual misconduct policy to all allegations of sexual misconduct, even if the misconduct occurred multiple years ago. CENTRAL STUDENT GOVERNMENT, ASSEMBLY MEETING MINUTES, Feb. 5, 2014.

First, the CSG Task Force finds that the new Sexual Misconduct Policy cannot prohibit conduct that occurred before the policy went into effect. The CSG All-Campus Constitution and principles of fairness require that student conduct should not be prohibited retroactively. Article 1, Section 9, Clause 3 of the United States Constitution states that, “No Bill of Attainder or ex post facto Law shall be passed.” Article 1, Section 10 of the Constitution of Michigan states that, “No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted.” In other areas of the law, policies are not retroactive unless the policy explicitly states that it shall be retroactive.⁸⁵

University of Michigan policies also require policies to be fairly published so students have fair notice regarding what conduct is prohibited. Section 3 of the Student Rights in the CSG All-Campus Constitution states that, “Students shall be free from all rules and regulations not uniform in nature or not fully and clearly formulated, published, and made known to all students. No student shall be subject to any non-academic rule over which no democratic constituency to which that student belongs may amend.” Section 2 of the *Statement of Student Rights and Responsibilities* states that, “Students have the right to be protected from capricious decision-making by the University and to have access to University policies which affect them.”

The above rights suggest that even if the University could adopt retroactive policies, it cannot do so without an explicit intent to adopt retroactive rules. Students involved with SRAC and the adoption of the Sexual Misconduct Policy affirmed that no discussion occurred regarding the retroactive application of the Sexual Misconduct Policy.⁸⁶ Neither the Sexual Misconduct Policy nor the October 30, 2012 presentation of the Sexual Misconduct Policy to the CSG Assembly stated that the Sexual Misconduct Policy would apply retroactively.⁸⁷ Finally, the April 4, 2011 Dear College Letter which encouraged the University to change its sexual assault policy does not explicitly encourage the University to adopt retroactive policies. The distinct lack of evidence of an intent for the Sexual

⁸⁵ *E.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (in administrative law, agencies cannot adopt retroactive rules without explicit congressional authorization).

⁸⁶ See SRAC Meeting Minutes, March 2011 – February 2013, <http://www.sacua.umich.edu/srac/srac-minutes.html>.

⁸⁷ CENTRAL STUDENT GOVERNMENT, ASSEMBLY MEETING MINUTES, Oct. 30, 2012, <https://csg.umich.edu/files/files/Ninth%20Meeting%20Minutes%20%2810-30-12%29%282%29.pdf>.

Misconduct Policy to apply retroactively suggests that the policy cannot be fairly applied to students retroactively.

Second, the CSG Task Force finds that the Sexual Misconduct Policy can govern investigations of sexual misconduct, even if the sexual misconduct occurred prior to the adoption of the new Sexual Misconduct Policy. The parts of the Sexual Misconduct Policy that are not retroactive include the definitions of consent and sexual misconduct. The parts of the Sexual Misconduct Policy that are retroactive include: the reporting procedure for third parties and mandatory reporters, the University's response procedure, sanctioning, the standard of evidence, the appeals process, and other all parts of the policy that do not define prohibited student conduct.

It is important to note that the differences in prohibited conduct between the old Sexual Assault Policy and the final Sexual Misconduct Policy is fairly small and a re-examination of facts under the appropriate policy are unlikely to change the outcome of OIE determinations. CSG must clearly establish that the University cannot retroactively prohibit student conduct without unambiguously notifying students that conduct would be retroactively prohibited. Today CSG is investigating the application of the Sexual Misconduct Policy, but tomorrow the University may retroactively apply a much less sympathetic policy.

V. Can the University reopen investigations of sexual misconduct absent new evidence? If the investigation closed prior to the adoption of the new student sexual misconduct policy, under which policy would the reopened case be considered?

Yes but this answer differs slightly depending on the applicable Sexual Misconduct Policy. Under the old Sexual Assault Policy, the University conducted no investigations. Allegations of sexual misconduct were completely adversarial and student driven. Survivors were responsible for collecting their own evidence, presenting the evidence, questioning witnesses, and arguing on their own behalf. Under the both the interim and final Sexual Misconduct Policies the University can essentially reopen any investigation at any time because investigations are "closed pending further information" if OIE is unable to reach a

finding of responsible or not responsible. If OIE makes a finding, a party could appeal the decision based on “new and relevant information that was unavailable, with reasonable diligence and effort, at the time of the investigation that could reasonably affect the investigation findings,” but appeals must typically be filed within ten days of notification of OIE’s findings or OSCR’s sanctions.⁸⁸ The University typically does not reopen a case after a determination of responsibility is made.

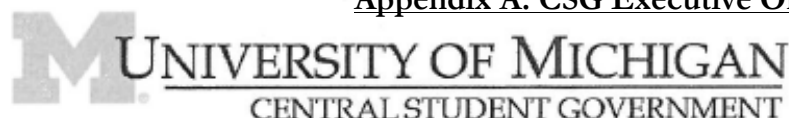
⁸⁸ UNIVERSITY OF MICHIGAN, STUDENT SEXUAL MISCONDUCT POLICY, <http://studentsexualmisconductpolicy.umich.edu/review-decision> (last viewed Apr. 4, 2014).

VI. Recommendations to the CSG President

The CSG Task Force recommends that the CSG President take the following actions pursuant to Executive Order 3-030:

- Work with University Regents and administrators to rewrite Chapter 7 of the University of Michigan Regent Bylaws to ensure students are more involved in the development and oversight of *all* policies that affect students.
- Work with the Student Relations Advisory Committee and the Office of Student Conflict Resolution to ensure that the Central Student Government continues to regularly access and review Office of Student Conflict Resolution and Office of Institutional Equity records related to student disciplinary actions.
- Encourage the Office of Student Conflict Resolution and the Office of Institutional Equity to review every case of sexual misconduct that occurred prior to the adoption of the interim Sexual Misconduct Policy, but was investigated under either the interim or final Sexual Misconduct Policy, to ensure that every student found responsible for sexual misconduct was found responsible under the version of the *Statement* in effect when the conduct occurred. Neither new evidence nor survivor participation is needed for this review.
- Encourage the Office of Student Conflict Resolution and the Office of Institutional Equity to issue a report after the above review is complete. The report should include actions taken both before and after the review, but under no circumstances should it include personal information about the survivor.
- Work with the Office of Student Conflict Resolution, the Office of Institutional Equity, and the Athletic Department to develop clear and published policies regarding when and what student-athlete disciplinary information should be shared between the different departments.
- Work with the Ann Arbor Police Department, University of Michigan Police Department, OSCR, and OIE to establish written policies to govern when each department should share information regarding student conduct, and define what information should be shared.

Appendix A: CSG Executive Order



EXECUTIVE ORDER 3-030

ESTABLISHING AN EXECUTIVE TASKFORCE TO INVESTIGATE THE OFFICE OF STUDENT CONFLICT RESOLUTION'S IMPLEMENTATION OF THE NEWLY ADOPTED STUDENT SEXUAL MISCONDUCT POLICY AND THE EXPULSION OF BRENDAN GIBBONS FROM THE UNIVERSITY OF MICHIGAN

By the authority vested in me as President and Chief Executive Officer of the University of Michigan Student Body by the Constitution of the Student Body of the Ann Arbor Campus of the University of Michigan,

I, Michael Proppe, Student Body President of the University of Michigan, hereby order the establishment of an executive taskforce to investigate the Office of Student Conflict Resolution's implementation of the newly adopted student sexual misconduct policy and the expulsion of Brendan Gibbons from the University of Michigan.

A. Establishment

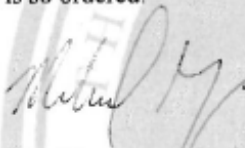
- a. The Vice President of the Central Student Government, Bobby Dishell, shall lead the taskforce. Student General Counsel Jeremy Keeney and Speaker of the Assembly Meagan Shokar shall serve as its other members.
- b. The taskforce shall investigate the following open questions surrounding the Office of Student Conflict Resolution, the newly adopted student sexual misconduct policy, and the expulsion of Brendan Gibbons from the University of Michigan:
 - i. Did the Office of Student Conflict Resolution, or any other person employed by the University, intentionally delay the completion of the investigation of the allegations of sexual misconduct against Brendan Gibbons until late Fall of 2013?
 - ii. Did the Office of Student Conflict Resolution properly apply the Statement of Student Rights and Responsibilities throughout their investigation of the allegations of sexual misconduct against Brendan Gibbons?
 - iii. Did any person employed by the University leak any confidential information, including the decision to expel Brendan Gibbons, with regards to the investigation of the allegations of sexual misconduct against Brendan Gibbons?
 - iv. Would a hypothetical case that is being investigated in 2013, but is surrounding incidents that took place in 2009, be investigated under the student sexual misconduct policy in place in 2009 or the policy adopted in 2013?
 - v. Can the University reopen investigations of sexual misconduct absent new evidence? If the investigation closed prior to the adoption of the new student sexual misconduct policy, under which policy would the reopened case be considered?
- c. The scope of the taskforce's investigation shall not necessarily be limited to the questions posed above.

- d. Student General Counsel Jeremy Keeney shall be the student designated under Section VIII.F of the Statement of Student Rights and Responsibilities to review all confidential and non-confidential Office of Student Conflict Resolution documents pertaining to investigations of students for violations of the Statement of Student Rights and Responsibilities and/or the student sexual misconduct policy.
- e. The taskforce is authorized to request other documentation from the University as it deems necessary.
- f. The taskforce shall present its findings in a report to Central Student Government President Michael Proppe. The report shall be compliant with all FERPA laws.

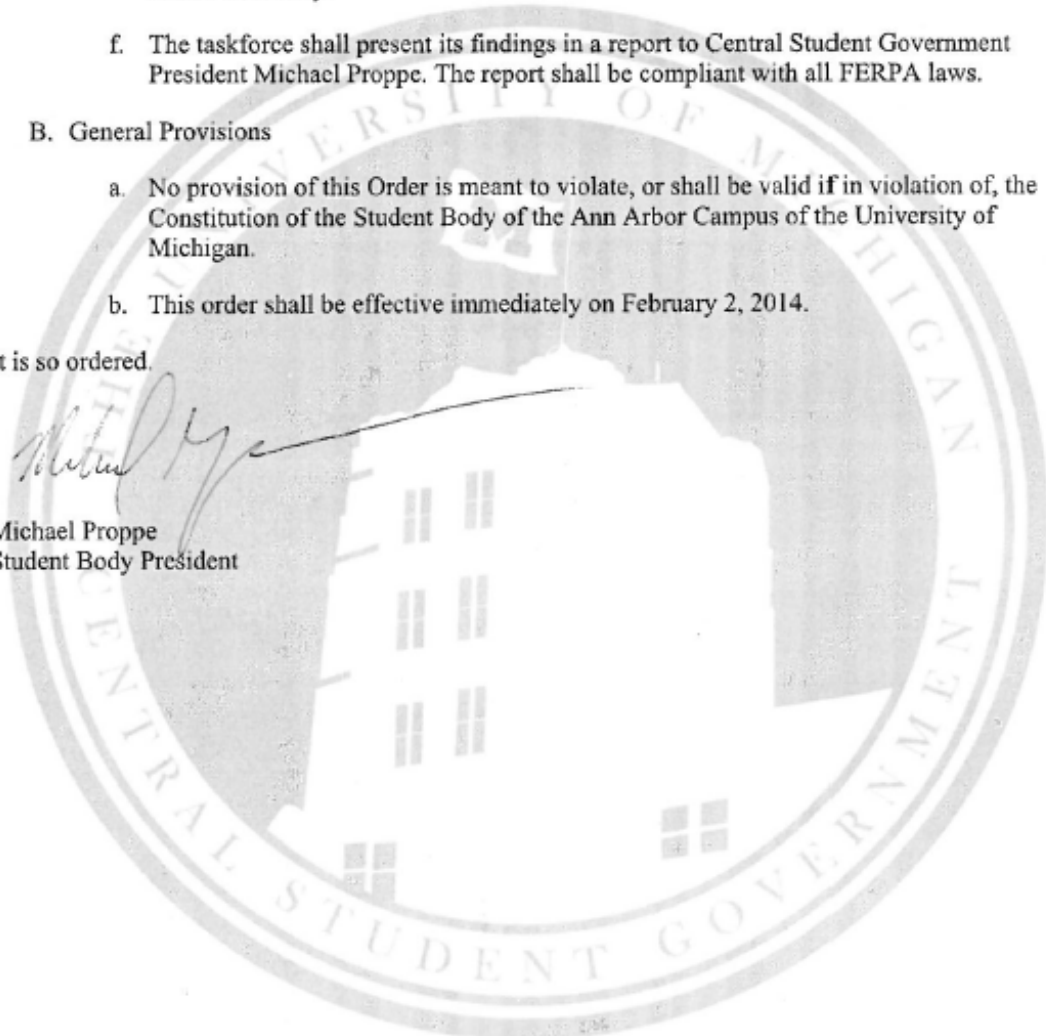
B. General Provisions

- a. No provision of this Order is meant to violate, or shall be valid if in violation of, the Constitution of the Student Body of the Ann Arbor Campus of the University of Michigan.
- b. This order shall be effective immediately on February 2, 2014.

It is so ordered.



Michael Proppe
Student Body President



Appendix B: Non-Academic Misconduct MOU



OFFICE OF STUDENT CONFLICT RESOLUTION

100 STUDENT ACTIVITIES BUILDING

515 EAST JEFFERSON

ANN ARBOR, MI 48109-1316

734-936-6308 FAX: 734-615-8826

Memorandum of Understanding Regarding Non-Academic Misconduct Involving Law Students

This Memorandum of Understanding between the UM Office of Student Conflict Resolution (OSCR) and the UM Law School confirms verbal agreements for managing non-academic misconduct allegations involving students enrolled in a degree program at the Law School.


OSCR and the Law School recognize that non-academic misconduct matters involving law students as Respondents may be addressed through the process outlined in the *Statement of Student Rights and Responsibilities* or under applicable Law School policies. As such, OSCR and the Law School are committed to working collaboratively to resolve behavioral issues when they arise to make sure the most appropriate forum is utilized. OSCR and the Law School strive to complete this work in the following ways:

- OSCR will inform the Law School when OSCR becomes aware of any allegations of non-academic misconduct involving a law student Respondent. A determination will be made collaboratively about how to proceed on a case-by-case basis, but in most instances the following will occur:
 - The Law School will request that the matter be referred to the Law School for handling under the Law School *Standards of Conduct and Student Disciplinary Procedures*. This applies to all formal written complaints as well as citations routed through OSCR's Adaptable Conflict Resolution for Alcohol and Other Drugs (ACRAOD) program. In limited circumstances, e.g. when the Complainant is a non-law student, non-academic misconduct matters involving law students as Respondents may be adjudicated by OSCR under the *Statement of Student Rights and Responsibilities*. In those instances, outcomes resulting from OSCR's process will be communicated directly to the Law School by OSCR, since there may be implications for the Law School's provision of information to state bar organizations as part of a character and fitness evaluation process. Decisions adjudicated under the *Statement of Student Rights and Responsibilities* may not be appealed to the Law School.
- When allegations are related to the *UM Policy on Sexual Misconduct by Students* and are reported to OSCR or the Law School, the matter will be addressed as outlined in the sexual misconduct policy.
 - Any outcomes resulting from that process will be communicated directly to the Law School by OSCR. OSCR will consult with the Law School on sanctioning components as necessary if the student is found responsible for violating the sexual misconduct policy.
 - If additional non-sexual misconduct behaviors are alleged at the time, those behaviors will generally be addressed separately under the Law School's process, and the Law School will inform OSCR of the outcome since there may be implications for OSCR sanctions.
 - Decisions adjudicated under the *UM Policy on Sexual Misconduct by Students* may not be appealed to the Law School.

- The Law School will, as needed, refer students to OSCR for matters involving interpersonal conflict that could be addressed through OSCR's Adaptable Conflict Resolution program. In these instances, there is not an expectation that OSCR communicate outcomes to the Law School.

The agreements outlined above may be revised in the future by mutual agreement of the Law School and OSCR.


For Office of Student Conflict Resolution:

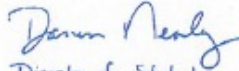


Jay Wilgus
Director, Office of Student Conflict Resolution

Date: 2/14/14

For UM Law School:

Name: 
Title: ASSISTANT DEAN
FOR STUDENT AFFAIRS
Date: 1/27/14


Director of Student
Services
1/27/14

Appendix C: Student Athlete Financial Aid Agreement



BIG TEN TENDER OF FINANCIAL AID
SIGNED FOR ENROLLMENT IN ACADEMIC YEAR 2014-15

From University of Michigan Date _____ Sport _____
(Institution)

To _____ Date of First Attendance: _____
(Name)

_____ At this institution _____ At any institution _____
(Street Address)

_____ Period of Award: _____
(City, State, Zip)

(Please specify applicable academic years and/or terms)

Type of Award: Initial
 Initial w/ Letter of Intent
 Renewal
 Noncounter (Competition completed/
Medical Exemption)

CONDITIONS OF FINANCIAL AID

1. This Tender covers the following as checked:
 - (A) Full Grant [includes tuition, fees, room, board and books (per NCAA legislation)]
 - (B) The following items (per NCAA legislation):
 - (1) Tuition
 - (2) Fees
 - (3) Board
 - (4) Room
 - (5) Books
 - (6) Other explanation of award: _____
 2. This Tender is subject to your fulfillment of the admission requirements of this institution.
 3. Your receipt of financial aid under this Tender is subject to your full compliance with the institution's policies and the rules, regulations, bylaws and other legislation of the Big Ten Conference and the NCAA.
 4. This Tender, if for a period less than your full eligibility period at the institution, is not automatically renewed. Your eligibility for a renewal of this Tender in such event is subject to this institution's renewal policies at the end of its term.
 5. This Tender is also subject to the additional conditions of financial aid, if any, that are established by the institution and set forth on Schedule A, a copy of which is attached hereto and incorporated herein.
 6. This Tender applies to the receipt of financial aid on or after August 1, 2014, for the academic year 2014-15 and, if applicable, any such later academic year(s).
 7. If this Tender is issued with a National Letter of Intent, it must be signed in accordance with the National Letter of Intent procedures, signing and filing dates.
- If you wish to accept this Tender, return this form to the Financial Aid Office of this institution BY: _____

SIGNED *Scott Sandor* SIGNED *Shuler*
Director of Athletics Financial Aid Director

ACCEPTANCE *By signing this offer of financial aid and Schedule A, I understand and agree to the "Conditions of Financial Aid" set forth above and further that:*

1. I will become ineligible for intercollegiate athletics competition if I receive any financial assistance other than that authorized by the NCAA or exceed the financial aid limits stipulated under NCAA Bylaw 15 (Financial Aid).
2. I am ineligible to receive this Tender, and this Tender will be void, if I am under contract to or currently receiving compensation from a professional sports organization except as provided under NCAA Bylaw 12 (Amateurism) and NCAA Bylaw 15 (Financial Aid).
3. Any modification or cancellation of this Tender must be in compliance with institutional policies and with Big Ten Conference and NCAA rules, regulations, bylaws and other legislation.
4. My eligibility to receive financial aid under this Tender is subject to my full compliance with the institution's policies, including without limitation any of the conditions set forth on Schedule A attached hereto, and with the rules, regulations, bylaws and other legislation of the Big Ten Conference and the NCAA.
5. After signing this Tender, I may not represent any other Big Ten Conference institution in athletics competition until I have served one (1) year of residence (a "year of residence" is defined under NCAA Bylaw 14.02.13) at that Big Ten Conference institution. Further, upon my enrollment at any other Big Ten Conference institution, I will be charged with the loss of one (1) season of athletics eligibility in all sports.

SIGNED _____ DATE _____ STUDENT ID # (optional) _____
Student's Signature


SIGNED _____ DATE _____
Parent or Legal Guardian's Signature

SCHEDULE A TO TENDER OF FINANCIAL AID
DURING ACADEMIC YEAR(S) 2014-15 - 2017-18

Pursuant to paragraph 5 of the "Conditions of Financial Aid" section and paragraph 4 of the "Acceptance" section of the Tender of Financial Aid, the following additional conditions of financial aid apply at this institution:

~~UofM reserves the right to reduce athletic or other countable aid if their combined value exceeds the value of the award(s).~~

Michigan Athletics reserves the right to reduce the right to reduce or cancel this athletics aid in the event that the student-athlete is convicted of a criminal offence.

SIGNED 
Director of Athletics

SIGNED 
Financial Aid Director

SIGNED _____ DATE _____ STUDENT ID # (optional) _____
Student's Signature

SIGNED _____ DATE _____
Parent or Legal Guardian's Signature

Appendix D: Proposed Confidentiality Agreement

CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT

This confidentiality and non-disclosure agreement (“Agreement”) dated as of February __ 2014, is made by and between the University of Michigan Central Student Government (“CSG”) and the University of Michigan (the “University, and together the “Parties”).

WHEREAS

On December 20, 2013, former University student Brendan Gibbons was expelled/permanently separated from the University for violation of the University’s sexual misconduct policy;

On February 3, 2014 University of Michigan Central Student Government President Michael Proppe signed an executive order to establish an executive taskforce to investigate the Office of Student Conflict Resolution’s (“OSCR”) implementation of the newly adopted Student Sexual Misconduct Policy and the expulsion/ permanent separation of Brendan Gibbons from the University of Michigan (the “Investigation”);

The taskforce will comprise of CSG Student General Counsel Jeremy Keeney, as well as CSG Vice President Robert “Bobby” Dishell and Speaker of the Assembly Meagan Shokar (each a “Taskforce Member” and collectively the “Taskforce”);

The Taskforce intends to publish a written report memorializing the results of the Investigation (the “Written Report”);

Keeney is designated under Section VIII.F of the University’s Statement of Student Rights and Responsibilities to review all confidential and non-confidential OSCR and Office of Institutional Equity documents pertaining to investigations of students for violations of the Statement of Student Rights and Responsibilities and/or the student sexual misconduct policy;

CSG has requested Keeney have access to University records in furtherance of the Investigation; and

The University has asserted that certain records pertaining to the Investigation are protected from public disclosure pursuant to the Family Educational Rights and Privacy Act (“FERPA”).

NOW, THEREFORE, THE PARTIES AGREE AS FOLLOWS

1. Consistent with Section VIII.F of the University’s Statement of Student Rights and Responsibilities, the University will provide Keeney with all documents that Keeney requests in furtherance of the Investigation.
2. For the purposes of this agreement, “Confidential Information” means any information that is protected from public disclosure pursuant to the Family Educational Rights and Privacy Act (“FERPA”).
3. To the extent that the University believes in good faith that any document Keeney requests in connection with the Investigation contains Confidential Information, the

University shall stamp each page of such document “CONFIDENTIAL,” and the University shall clearly indicate on the face of each document which portions it contends comprise Confidential Information.

4. Notwithstanding the foregoing, the Parties agree that Confidential Information does not include information that (i) is or becomes generally available to the public other than as a result of an unauthorized disclosure under this Agreement, (ii) is or becomes available to CSG or any Taskforce Member from a source not known to be bound by any confidentiality agreement with the University, (iii) was otherwise within CSG or any Taskforce Member’s possession prior to its being furnished by the University or on the University’s behalf, or (iv) was independently developed by CSG or any Taskforce Member (collectively, “Independently-Sourced Information”).

5. Except as provided in Paragraph 6 or otherwise agreed to in writing by both Parties, Keeney shall not disclose or otherwise produce any Confidential Information to any persons.

6. Keeney shall not make Confidential Information available to any person except:

(a) Taskforce Members who: (1) have a good faith need to know such Confidential Information for the exclusive purpose of evaluating the Confidential Information as is relevant to the Investigation; (2) have been informed by Keeney of the confidential nature of the Confidential Information; and (3) agree to comply with the terms of this Agreement.

(b) The CSG’s counsel and assistants to counsel who are necessary to assist in the review of Confidential Information.

7. The University acknowledges that the Taskforce and/or the CSG may make the Written Report publicly available to the fullest extent allowed by FERPA. In connection with the Written Report, the Parties agree to undertake the following steps:

(a) The Taskforce shall prepare a draft of the Written Report (which may include Confidential Information), but the Taskforce shall not share such draft of the Written Report with any person who is not the University or is not a Taskforce Member. The draft of the Written Report shall not include the Task Force's recommendations to the CSG President.

(b) The Taskforce shall transmit the draft Written Report to the University, which shall have five (5) days to redact any information that it contends is Confidential Information.

(c) To the extent that any information redacted by the University comprises Independently-Sourced Information, the Taskforce may remove redactions as appropriate.

(d) The Taskforce may thereafter publish a public version of the Written Report that does not disclose Confidential Information.

8. To the extent that Keeney reasonably believes that the University has designated information not protected from public disclosure by FERPA as Confidential Information, Keeney may request, and the University shall provide within five (5) days, a

detailed, written explanation as to why the information in question is protected from public disclosure by FERPA.

9. In the event of inadvertent or accidental disclosure of any Confidential Information to persons not subject to this agreement, the Parties agree to cooperate in good faith to retrieve such Confidential Information from such persons and prevent its dissemination.

10. Any dispute arising from or in connection with this Agreement, including any dispute as to whether information comprises Confidential Information, shall be subject to the jurisdiction of the courts of the State of Michigan.

11. Within 60 days of the end of the Investigation and publication of the Written Report, all those with access to Confidential Information shall return or destroy all Confidential Information provided, except that one copy may be retained under measures reasonably designed to ensure continued confidentiality.

12. The terms of this Agreement shall be made known to all persons to whom such Confidential Information is disclosed, and such persons shall agree prior to such disclosure to the terms herein by signing Exhibit A hereto.

13. This Agreement sets forth the entire understanding and agreement of the parties hereto with respect to the subject matter hereof and supersedes all other oral or written representations and understandings. This Agreement may be amended or modified only in writing signed by the parties hereto and shall be binding upon the successors and assigns of both parties.

SO AGREED HERETO as of the date first written above.

UNIVERSITY OF MICHIGAN CENTRAL STUDENT GOVERNMENT

By: _____
Name: _____
Title: _____

THE UNIVERSITY OF MICHIGAN

By: _____
Name: _____
Title: _____

Confidentiality Agreement: EXHIBIT A

I, _____, state that:

1. My address is _____.
2. My present employer is _____.
3. My present occupation or job description is _____.
4. I have received a copy of the confidentiality and non-disclosure agreement (“Agreement”) dated as of February __ 2014, made by and between the University of Michigan Central Student Government (“CSG”) and the University of Michigan.
5. I have carefully read and understand the provisions of the Agreement.
6. I will comply with all of the provisions of the Agreement.
7. I will hold in confidence, will not disclose to anyone not qualified under the Agreement, and will use only for purposes of this Investigation, any Confidential Information that is disclosed to me.

Dated: _____

Appendix E: Department of Education Notice of Investigation



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION XV

1350 EUCLID AVENUE, SUITE 325
CLEVELAND, OH 44115

FEB 21 2014

REGION XV
MICHIGAN
OHIO

Mary Sue Coleman, Ph.D.
President
University of Michigan
503 Thompson Street
2074 Fleming Administration Building
Ann Arbor, Michigan 48109-1340

Re: OCR Docket #15-14-2111

Dear Dr. Coleman:

On January 16, 2014, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received a complaint filed against the University of Michigan (the University). The complaint alleges that the University discriminated on the basis of sex. Specifically, the complaint alleges that the University failed to promptly and equitably respond to complaints, reports and/or incidents of sexual violence of which it had notice, including an August 2012 report of sexual assault made by a female student (the Student), and, as a result, students, including the Student, were subjected to a sexually hostile environment.

OCR is responsible for enforcing Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, and its implementing regulation, at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in education programs and activities operated by recipients of Federal financial assistance from the Department. As a recipient of such financial assistance, the University is subject to Title IX.

Because OCR has determined that we have jurisdiction over the allegation and that this complaint was filed timely, we are opening the allegation for investigation. Based on the complaint allegation, we will investigate the following legal issues:

1. Whether the University provided prompt and equitable responses to sexual violence complaints, reports, and/or other incidents of which it had notice (knew about or should have known about) as required by the Title IX implementing regulation at 34 C.F.R. §§ 106.8 and 106.31.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.
www.ed.gov

- a. Whether the University complied with the requirements of the Title IX regulation at 34 C.F.R. § 106.9 regarding notice of nondiscrimination.
 - b. Whether the University complied with the requirements of the Title IX regulation at 34 C.F.R. §§ 106.8 and 106.9(a) regarding the designation and notice of a Title IX coordinator.
2. Whether any failure by the University to provide a prompt and equitable response allowed a student or students and/or the campus, generally, to continue to be subjected to a sexually hostile environment that denied or limited a student or students' ability to participate in or benefit from the University's programs, in violation of the Title IX implementing regulation at 34 C.F.R. §§ 106.8 and 106.31.

Please note that opening an allegation for investigation in no way implies that OCR has made a determination with regard to its merits. During the investigation, OCR is a neutral fact-finder, collecting and analyzing relevant evidence from the complainant, the recipient, and other sources as appropriate. OCR will ensure that the investigation is legally sufficient and is dispositive of the allegation in accordance with the provisions of Article III of OCR's Case Processing Manual.

For your reference, the enclosed document, entitled "OCR Complaint Processing Procedures," includes information about:

- OCR's complaint evaluation and resolution procedures, including the availability of Early Complaint Resolution (ECR);
- regulatory prohibitions against retaliation, intimidation and harassment of persons who file complaints with OCR or participate in an OCR investigation; and
- the application of the Freedom of Information Act and the Privacy Act to OCR investigations.

Additional information about the laws OCR enforces is available on our website at <http://www.ed.gov/ocr>.

OCR intends to conduct a prompt investigation of this complaint. The Title VI regulation, at 34 C.F.R. § 100.6, requires that a recipient of Federal financial assistance make available to OCR information that may be pertinent to reaching a compliance determination. The Title IX regulation incorporates those requirements by reference at 34 C.F.R. §106.71. In addition, in accordance with the Title VI regulation at 34 C.F.R. § 100.6(c) and with the regulation implementing the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, at 34 C.F.R. § 99.31(a)(3)(iii), OCR may review personally identifiable records without regard to considerations of privacy or confidentiality.

Accordingly, we are requesting that you forward the following information to us within 15 calendar days of the date stamped at the top of this letter. Wherever possible, please provide the requested information on a CD (and bates-labeled if you have that capability); otherwise please provide the information via hard copy:

1. a copy of any University policies or procedures in effect during the 2011-2012, 2012-2013, and 2013-2014 school years that address discrimination and harassment based on sex, including sexual violence, involving students, employees, and third parties, including sexual violence/misconduct/harassment policies and procedures, Title IX grievances, applicable disciplinary procedures and codes, appeal procedures, and nondiscrimination notices;
2. if any of the above policies or procedures changed over the applicable time period, please provide a copy of all documents that reflect each change and note the date(s) when the new policy or procedure became applicable;
3. the name(s) and title(s) of the University's Title IX coordinator(s), and any deputy or co-coordinator(s). In addition, please note when each individual assumed his or her position, and provide an explanation of how that person or persons' identity and contact information are disseminated to students, faculty, staff, and administrators;
4. the names and titles of any University personnel responsible for investigating incidents of discrimination and harassment based on sex or implementing any part of the University's Title IX grievance process;
5. a description of how the University handles criminal complaints and the effect that criminal complaints have on the University's Title IX investigation process; the names and titles of any University designated contact person for related criminal investigations; and the process used by the University in communicating with local prosecutors about the status of criminal investigations;
6. a description of law enforcement's role in the University's Title IX investigation process, including a copy of any memoranda of understanding with campus and local law enforcement or related protocols;
7. a description of how the University handles requests for confidentiality by those reporting incidents of discrimination and harassment based on sex, including sexual violence;

8. a copy of all documentation concerning any formal or informal complaints or reports of sexual harassment made to the University (including, but not limited to those received by University personnel, campus police, the Office of Student Conflict Resolution, University Housing, or those received elsewhere and then referred to the University) or investigated/resolved by the University during the 2011-2012, 2012-2013, and 2013-2014 school years, including:
 - a. a copy of any written complaints or reports, and a detailed description of any verbal complaints;
 - b. a copy of all investigative files, interview memoranda, witness statements, and related documents concerning any University investigation of these complaints or reports;
 - c. a copy of any documents showing the steps of the investigation and the results of the University's investigation, including any correspondence, e-mails, and other documents, as well as how the University notified pertinent parties of the outcome of each investigation;
 - d. a detailed description of any action the University took to stop any harassment or discrimination and to prevent any additional discrimination or harassment based on sex, while each complaint or report identified in response to request 8(c) above was being investigated (interim measures) or after the investigation concluded;
 - e. a copy of any documents, including student discipline records, memoranda, e-mails, notes, or other documents, that discuss or relate to any disciplinary or other remedial action the University took in response to each complaint or report identified in response to request 8(c) above; and
 - f. for each complaint or report of alleged sexual harassment and/or violence responsive to this request, identify (1) whether the University found that the complainant and/or other students were sexually harassed/assaulted; (2) whether the University found that any complaint was part of a larger pattern of similar complaints; and (3) whether the University made any conclusion about whether the complainant and/or other students were subject to a sexually hostile environment;
9. if not included in responses above, copies of all communications, including letters, e-mails, notes, memoranda, reports, notices, or other communications sent or received by University faculty, staff,

- administration, and/or Regents during the 2011-2012, 2012-2013 and 2013-2014 school years that discuss, relate or refer to the complaints or reports identified under request 8 above;
10. copies of any notes, agendas, summaries or follow-up communication related to any meetings during the 2011-2012, 2012-2013, and 2013-2014 school years between University staff and the complaining student(s) regarding any allegations of, or remedies for, sexual harassment;
 11. a description and copies, if applicable, of any steps the University took during the 2011-2012, 2012-2013, and 2013-2014 school years to make students, faculty, and staff at the University aware of the policies and procedures identified in response to requests 1 or 2 above, such as publications, website statements, and/or training;
 12. a description of the ways in which the University communicates with students, staff, and other members of the campus community about its processes for addressing sexual harassment and violence (for example, through its web site, specific publications, specific other electronic means, etc.);
 13. a description of any training regarding Title IX as it applies to sexual harassment, including sexual assault and violence, the University provided or offered to (1) University personnel; and (2) University students during 2011-2012, 2012-2013, and 2013-2014 school years. For each training, include the date of the training; the target audience (e.g., coaches, residence hall staff, etc.); copies of any related materials distributed at the trainings; and a description of the background/expertise of the individual who provided training;
 14. copies of any and all brochures, pamphlets, or other materials that are disseminated to by the University to students regarding sexual harassment, the rights of complainants and accused individuals, and/or other campus resources available to assist those facing sexual harassment/violence;
 15. a description of the University's collaborative efforts with any advocacy groups on and off campus to prevent sexual harassment, misconduct, and violence and to notify students and employees of their rights under Title IX;
 16. a list of campus organizations and other resources for students that address students' concerns or issues related to sexual harassment, including contact information for each organization, and how information about these organizations is disseminated to students;
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17. a list of any women's organizations on campus, including contact information for each organization, and how information about these organizations is disseminated to students;
18. a list of any lesbian, gay, bisexual, transgender, or alliance organizations on campus including contact information for each organization, and how information about these organizations is disseminated to students;
19. please identify any rape crisis center(s), sexual assault support network, or other similar agency on the University's campus, and provide contact information for any such agency or agencies;
20. a description of how the University has assessed the campus climate regarding sexual harassment issues, conducted self-assessments, collected data, or monitored sexual harassment, misconduct, or violence on campus, if at all, for school years 2011-2012, 2012-2013, and 2013-2014. Please provide any summaries or interim or final reports that describe the outcome of these efforts; and
21. any other information you believe relevant to the complaint allegations.

Thank you for your cooperation in this matter. We also may need to interview individuals at the University with knowledge of the facts of this case. If we determine that an on-site visit is necessary, we will contact you to schedule a mutually convenient time for our visit.

Upon receipt of this letter, please notify OCR of the name, address, and telephone number of the person who will serve as the University's contact person during OCR's investigation. If you have any questions, please contact Gayle Horwitz, the OCR attorney who has been assigned to investigate this complaint, by telephone at (216) 522-2681 or by e-mail at Gayle.Horwitz@ed.gov.

Sincerely,



Donald S. Yarab
Team Leader

Enclosure