

# Report of External Review

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Eastern Michigan University

Devon T. Riley, Esq.  
Maureen P. Holland, Esq.



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## **I. Overview**

In the summer and fall of 2020, Dustyn Durbin, D’Angelo McWilliams, and Thomas Hernandez, all former Eastern Michigan University (“EMU”) students, were arrested for multiple incidents of sexual assault that are reported to have occurred between 2015 and 2019, while each was enrolled at EMU.<sup>1</sup>

In September 2020, the University engaged Cozen O’Connor to conduct an external fact-gathering investigation to determine whether the University had prior notice of potential sexual assaults by Durbin, McWilliams, and Hernandez, and if so, what actions, if any, the University took in response.<sup>2</sup>

### **A. Timeline of Social Media Activity and Subsequent Arrests**

In July and August 2020, several individuals publicly posted details regarding incidents of sexual assault at EMU on social media platforms, including Twitter, Instagram, and Facebook. Shortly thereafter, the Ypsilanti Police Department (“YPD”) received a series of reports that Durbin, McWilliams, and/or Hernandez had sexually assaulted multiple female students during their time at the University.<sup>3</sup> Initially, ten former EMU students reported to YPD that they were sexually assaulted between 2015 and 2019 by Durbin, McWilliams, and/or Hernandez.<sup>4</sup>

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<sup>1</sup> This report identifies Durbin, Hernandez, and McWilliams by name, as their names have previously been released in publicly available law enforcement and government records.

<sup>2</sup> This review was conducted by Devon T. Riley and Maureen P. Holland, former sexual assault and child abuse prosecutors and senior members in Cozen O’Connor’s Institutional Response Group, a practice group dedicated to helping institutions, including colleges and universities, prevent sexual and gender-based harassment and violence and improve institutional responses. Riley and Holland had no prior relationship with the University, or any of the individuals relevant to the review, that presented a conflict of interest or detracted from the impartiality of the review. Riley and Holland worked closely on this review with Adam M. Shapiro, an attorney and experienced investigator who is also a member in the Institutional Response Group.

The Institutional Response Group is led by Gina Maisto Smith and Leslie Gomez. Smith and Gomez provided Title IX training for EMU in the fall of 2011 and subsequently provided policy advice and limited legal advice about responding to historical allegations of abuse in 2016, both prior to joining Cozen O’Connor in 2017. Smith and Gomez did not provide legal advice with respect to any contemporaneous reports of sexual or gender-based harassment or violence during the time of this review or at any prior or subsequent time.

Significantly, members of the Institutional Response Group do not participate in any civil litigation, either for or against educational or other child-serving institutions, and have never represented EMU in any form of civil litigation or regulatory enforcement action.

We recognize that multiple plaintiffs have sued the University and that Washtenaw County and Jackson County initiated criminal proceedings in connection with allegations relating to the subject matter of this review. The cases were recently transferred to the Michigan Department of Attorney General. Cozen O’Connor was not engaged to defend EMU in response to any litigation and has not participated in any discussions related to the resolution of the civil lawsuits.

<sup>3</sup> EMU is located in Ypsilanti, Michigan. YPD has jurisdiction over criminal conduct occurring on or near EMU’s campus.

<sup>4</sup> Since August 2020, additional former students have reported that they were sexually assaulted by Durbin, Hernandez, or McWilliams.

In the ensuing weeks, YPD completed their investigations and arrested Durbin, McWilliams, and Hernandez. Durbin was arrested on July 31, 2020, and was initially charged with nine counts of criminal sexual conduct. McWilliams was arrested on August 5, 2020, and was initially charged with three counts of criminal sexual conduct and one count of domestic violence. Hernandez was arrested on September 24, 2020, and was initially charged with four counts of criminal sexual conduct.<sup>5</sup>

## **B. Summary of Engagement**

The University engaged Cozen O'Connor to conduct a fact-gathering investigation to determine whether the University had notice of potential misconduct by Durbin, Hernandez, and McWilliams, and what actions, if any, the University took based on available information. As part of the engagement, EMU also asked Cozen O'Connor to prepare a report summarizing the information gathered in the fact-gathering process. The University committed to share Cozen O'Connor's report publicly.<sup>6</sup>

Throughout the review, Cozen O'Connor sought to gather facts in a neutral and informed manner to understand the University's awareness of and response to any notice of allegations of misconduct involving Durbin, McWilliams, and Hernandez. The University provided Cozen O'Connor with access to relevant documents and records management systems, and facilitated interviews with current and former employees. Between October 2020 and May 2022, Cozen O'Connor interviewed or met with 25 individuals, including the University's former and current Title IX Coordinator, the University's former Greek Life Coordinator, former and current members of the Eastern Michigan University Police Department ("EMUPD"), current faculty members involved with implementation of Title IX-related initiatives, a former EMU student, and employees of local law enforcement agencies. Current and former employees participated voluntarily in our review. Cozen O'Connor appreciates all of the individuals who shared information, communications, and records as part of this process.

In addition, Cozen O'Connor reviewed email correspondence and other contemporaneous documents maintained by the University, as well as documents from local law enforcement that were procured through Freedom of Information Act ("FOIA") requests, publicly available records from related civil and criminal proceedings, and public social media posts and news articles. The University provided Cozen O'Connor with unfettered access to the University's Title IX database system, Advocate, which allowed Cozen O'Connor to review relevant case files, as well as a random sample of Title IX files from 2015 to 2019.

As explained in greater detail below, during the course of the review, Cozen O'Connor attempted to contact numerous potential witnesses. Cozen O'Connor specifically sought to speak with the known complainants in the criminal and civil cases, including by contacting civil counsel for all

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<sup>5</sup> Law enforcement subsequently charged Durbin, Hernandez, and McWilliams with additional counts of criminal conduct. The criminal proceedings for each of these three defendants are ongoing.

<sup>6</sup> See e.g., *EMU Today*, "University statement: Sexual assault cases investigation," published on September 23, 2020, <https://today.emich.edu/story/statement/11533> (last visited May 10, 2022).

individuals identified in related civil lawsuits as having experienced sexual assault.<sup>7</sup> Some potential witnesses did not respond to outreach or declined to participate in the review. Counsel for civil plaintiffs stopped responding to Cozen O'Connor's multiple requests to interview the civil plaintiffs. Cozen O'Connor acknowledges and appreciates the willingness of all witnesses to participate fully in this investigation on a voluntary basis. Cozen O'Connor also acknowledges that the choice to participate in a review of this nature is a personal and individual choice and Cozen O'Connor makes no negative inference regarding any individual who did not respond to outreach or declined to participate. Cozen O'Connor continues to encourage anyone who was impacted by sexual assault while at the University to contact the University or external law enforcement authorities.

Our scope focused on gathering facts relevant to whether University officials received reports of sexual or gender-based harassment or violence regarding Durbin, McWilliams, and Hernandez.<sup>8</sup> To the extent such reports were made, Cozen O'Connor sought to understand the context of such reports, including when the reports were made; to whom they were made; the substance of the reports; and what actions, if any, were taken by the University in response.

This report synthesizes the most salient information gathered during Cozen O'Connor's review. It does not catalog every meeting, communication, or event relevant to our review. It also does not catalog every document or communication reviewed by Cozen O'Connor. Rather, it provides a chronology of key events, communications, and interactions as they bear on the collective institutional response by the University to the matters defined to be within the scope of Cozen O'Connor's engagement.<sup>9</sup>

Our review, observations, and factual synthesis were not influenced or directed by the University, and the information in this report represents a neutral, impartial, and external accounting of the available information.

### **C. Summary of Findings**

Cozen O'Connor found that the former Title IX Coordinator<sup>10</sup> received at least one direct report of sexual assault each against Durbin, Hernandez, and McWilliams while they were students at EMU, as follows:

- On November 10, 2018, the University received an anonymous report of sexual assault against Durbin. The reporter did not provide their name or contact information and no investigation was conducted by the Title IX Office based on the limited information

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<sup>7</sup> In this report, the term "complainant" is used to refer to any individual who is reported to have experienced sexual harassment, including sexual assault, dating violence, domestic violence, or stalking. We recognize that individuals may choose to self-identify as a victim or survivor in lieu of the term complainant and respect their right to do so.

<sup>8</sup> Our scope did not include assessing the credibility of any underlying reports of sexual misconduct. For the purposes of this review, we presume that the underlying reports of sexual misconduct are true.

<sup>9</sup> The information in this report includes relevant information received by Cozen O'Connor as of May 18, 2022.

<sup>10</sup> Unless otherwise noted, all references to "the Title IX Coordinator" in this report refer to the University's former Title IX Coordinator, who was employed as the full-time, designated Title IX Coordinator from June 2015 to November 2019.

available. In addition, we identified other information related to Jane Doe 0, Jane Doe 5, and Jane Doe 9 made in the civil lawsuit; however, for the reasons described below, we do not conclude that this information constituted notice to a University employee.

- On March 7, 2018 and on April 9, 2018, the University received reports from two separate individuals (third parties) that Hernandez and McWilliams jointly sexually assaulted Jane Doe 1. The Title IX Office identified and met with Jane Doe 1, who declined to participate in an investigation. The University provided Jane Doe 1 with interim measures in the form of academic accommodations.
- On March 21, 2018, the University received a third party report that Hernandez engaged in stalking of Student A,<sup>11</sup> who declined to participate in an investigation.

As noted, in each case, the report was either anonymous or the complainant affirmatively chose not to proceed with a formal Title IX investigation.

Cozen O'Connor did not find documentation or other evidence that the additional reports of misconduct involving Durbin, Hernandez, and McWilliams outlined in the criminal and civil complaints were known to the University until around the time of the filing of those complaints.

Cozen O'Connor also gathered facts that showed that the Title IX Coordinator and Greek Life Coordinator<sup>12</sup> were aware of more generalized concerns raised by students relating to incidents of sexual assault occurring within the Greek system. In or around October 2018, the Greek Life Coordinator received a letter from an anonymous female sorority member reporting a pervasive culture of sexual assaults at fraternity parties. This, coupled with the Title IX Coordinator's own observation that she had been receiving an increasing number of reports of sexual assault in Greek Life, prompted additional University action. This response included expanded education and prevention programming, the development of an action plan to address sexual assault by the student-led Inter-Fraternity Council ("IFC"), and a resolution by the University's Student Government to educate and hold the IFC accountable for implementing the plan.

Finally, we note that the Title IX Office's case files did not consistently include all relevant documentation, including key communications with parties, meeting notes, and the rationale for key case-related decisions such as whether to honor a complainant's request not to proceed with an investigation. This incomplete record-keeping limited our ability to provide as full and complete a picture of the University's response as might have been possible had the Title IX Coordinator and the Greek Life Coordinator maintained more complete and contemporaneous documentation.

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<sup>11</sup> As noted below, to the extent a student complainant is referenced in the civil pleadings, we refer to that student as "Jane Doe [number]." To the extent a student complainant is not referenced in the civil pleadings, we refer to that student as "Student [letter]."

<sup>12</sup> All references to "the Greek Life Coordinator" in this report refer to the University's former Greek Life Coordinator, who was employed from June 2017 to June 2019.

#### **D. Statements by the University Related to the Review**

Following the arrests of Durbin and McWilliams, the University issued two initial public statements to the EMU community.

- On August 6, 2020, the University published on its website an official statement, which said that it was “deeply concerned about these reports of criminal sexual conduct involving our students” and would be “taking immediate steps to look into the original allegations.” In the statement, the University committed to a “thorough investigation of these incidents,” including an “exhaustive review of our Title IX and Public Safety records regarding these allegations.” The communication encouraged community members to contact EMUPD or the EMU Title IX Office with any information regarding sexual assault or misconduct.<sup>13</sup>
- On August 7, 2020, University President James Smith sent a letter to the University community expressing sadness regarding the allegations, condemning the conduct, and reinforcing the University’s commitment to “create and maintain a safe, thriving, and welcoming community for our students.” President Smith vowed to support survivors and urged all members of the community to “step forward” and “let us know what happened” regarding any incident of sexual assault, regardless of when the incident occurred. President Smith included contact information for EMUPD, the EMU Title IX Office, and YPD, as well as the University’s Counseling and Psychological Services, which offers free and confidential counseling to EMU students.<sup>14</sup>

Following these communications, the University’s Title IX Coordinator made outreach, in the form of telephone calls, emails, and letters, to the former students who EMU learned had reported sexual misconduct to YPD. The outreach included information about available supportive measures and the University’s Title IX policies and procedures.

On September 23, 2020, the University issued another statement in which it updated the community regarding the initial steps it had taken in response to the reports of campus sexual assaults. Among these steps was the engagement of Cozen O’Connor, who the University said it had directed to “tak[e] a further look at the specific handling of these incidents.” In the statement, the University committed to make public the results of Cozen O’Connor’s review.<sup>15</sup>

Following this September 2020 statement, the University has continued to provide periodic updates to the EMU community regarding the Cozen O’Connor review, has reiterated its

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<sup>13</sup> *EMU Today*, “University statement in response to off-campus sexual assault cases involving two former students,” published on August 6, 2020, <https://today.emich.edu/story/statement/11480> (last visited May 10, 2022).

<sup>14</sup> *Office of the President*, “Recent Sexual Assault Cases Involving Former Students,” published on August 7, 2020, <https://www.emich.edu/president/communications/campus-messages/2020-08-07-sa.php> (last visited May 10, 2022).

<sup>15</sup> *EMU Today*, “University statement: Sexual assault cases investigation,” published on September 23, 2020, <https://today.emich.edu/story/statement/11533> (last visited May 10, 2022).

commitment to publicize the results of the Cozen O'Connor review, and has shared the steps it has taken to bolster student safety and redress the impacts of campus sexual assault.<sup>16</sup>

## **II. Overview of Engagement**

### **A. Scope of Review**

The University engaged Cozen O'Connor to conduct an external fact-gathering review of the University's response to allegations of sexual misconduct involving Durbin, Hernandez, and McWilliams. As part of this review, Cozen O'Connor sought information, primarily through relevant University records management databases and witness interviews, to understand whether contemporaneous reports were made to University officials regarding these three former students. To the extent such reports were made, Cozen O'Connor sought to understand the context of such reports, including when the reports were made and to whom they were made; the substance of the reports; and what actions, if any, were taken by the University in response.

For the purposes of this review, Cozen O'Connor accepted as true the underlying allegations of sexual assault against Durbin, Hernandez, and McWilliams. The veracity of these allegations is being adjudicated elsewhere, including the criminal proceedings against these three individuals. Consistent with the scope and purpose of our review, Cozen O'Connor instead focused on the nature and manner in which University officials responded to information regarding potential misconduct involving these individuals.

Cozen O'Connor's review focused on the fall 2015 to spring 2019 time frame, when Durbin, Hernandez, and McWilliams were EMU students and when the relevant assaults reportedly occurred. During the course of the external review, civil counsel, on behalf of former EMU students, filed several lawsuits against the University. These lawsuits related to the University's response to alleged sexual assaults involving Durbin, Hernandez, and McWilliams, as well as its response to allegations against multiple other alleged assailants raised by approximately two dozen current and former EMU students. The allegations related to individuals other than Durbin, Hernandez, and McWilliams fall outside of Cozen O'Connor's defined scope. Nonetheless, we reviewed the University's Title IX records, EMUPD's records, and targeted email correspondence involving the University's Title IX Coordinator relating to any reports to University officials involving these other allegations. We reviewed the available information to better inform our understanding, and the broader context, of the University's response to the allegations involving Durbin, Hernandez, and McWilliams.

During our review, we noted that the Title IX Office's case files did not consistently include all relevant documentation, including key communications with parties, meeting notes, and the rationale for key case-related decisions such as whether to honor a complainant's request not to

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<sup>16</sup> See, e.g., *Office of the President*, "Campus Update: Title IX Investigation," published on March 24, 2021, <https://www.emich.edu/president/communications/campus-messages/2021-03-24.php> (last visited May 10, 2022); *EMU Today*, "Eastern Michigan University continues extensive, state-supported project to support survivors of sexual assault," published on March 31, 2021, <https://today.emich.edu/story/news/11732> (last visited May 10, 2022); *Office of the President*, "Sexual assault awareness, training, new initiatives and fraternities review," published on September 16, 2021, <https://www.emich.edu/president/communications/campus-messages/2021-09-16-sexual-assault-awareness.php> (last visited May 10, 2022).

proceed with an investigation. For that reason, our review relied upon narrative information learned through interviews in addition to the contemporaneous records.

## **B. Investigative Approach**

We conducted the review with a commitment to open-ended exploration of the issues and sought to follow the facts wherever they led. Our review process integrated investigative protocols designed to support a neutral, impartial, and thorough gathering of facts and to synthesize the information gathered in an objective and dispassionate manner. We sought to gather all relevant information and rigorously tie the fact-finding to available contemporaneous documents and witness interviews. As noted above, Cozen O'Connor's Institutional Response Group was not engaged to, and will not, defend the University in response to any litigation, current or future.<sup>17</sup>

During the course of our review, the University provided us with access to requested documents, information, and personnel, and was cooperative with the review. The University also provided Cozen O'Connor with direct access to Advocate, the records management database of the University's Title IX Office. The University respected the impartiality of the external review process.

## **C. Interviews**

From October 2020 to May 2022, Cozen O'Connor conducted interviews and/or met with 25 individuals in connection with this review. The witnesses included the University's former and current Title IX Coordinators, the University's former Greek Life Coordinator, former and current members of EMUPD, current faculty members involved with implementation of Title IX-related initiatives, a former EMU student, and employees of local law enforcement agencies.

In order to ensure a full and fair opportunity to participate in the review, to share relevant documents, and to provide full context and an opportunity to respond to questions, Cozen O'Connor interviewed some of these individuals on more than one occasion.

Cozen O'Connor conducted these interviews to gather relevant information through an open and neutral process. At the beginning of each interview, we identified ourselves, described our role, and explained the scope of our review. We explained that we had been retained by the University as outside counsel and that our review was attorney-client privileged, but that the privilege belonged to the University, and only the University could decide whether to maintain or waive that privilege. We also described how information provided to us would and could be used, and that the University had publicly committed to releasing a written report. Cozen O'Connor provided each witness a full and fair opportunity to share any relevant information, ask questions, and follow up with any additional information. Due to the COVID-19 pandemic, all interviews were conducted over Zoom or telephone.

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<sup>17</sup> As noted above, Cozen O'Connor's Institutional Response Group does not engage in any civil litigation, either for or against educational institutions. The University has engaged separate civil counsel from a different law firm to represent EMU in the civil lawsuits.

Cozen O'Connor specifically requested interviews with the individuals identified as having been sexually assaulted by Durbin, Hernandez, or McWilliams, as well as all of the plaintiffs in the civil lawsuits. Cozen O'Connor sent email and hard copy letter outreach to each of these individuals at their last-known addresses on file with the University; to the extent they were represented by counsel, Cozen O'Connor sent outreach to these individuals through plaintiffs' counsel. Cozen O'Connor also spoke with counsel. None of these individuals agreed to meet with Cozen O'Connor.

As noted above, Cozen O'Connor acknowledges that the choice to participate in a review of this nature is a personal and individual choice and Cozen O'Connor makes no negative inference against individuals who did not respond to outreach or declined to participate.

Cozen O'Connor did not seek to meet with Durbin, Hernandez, or McWilliams as the scope of the review was centered on what information the complainants shared with the University, not whether the underlying allegation of sexual assault occurred.

Given the highly sensitive nature of this review, and in deference to the privacy of student complainants and current and former employees, these individuals are not identified by name. To the extent a student complainant is referenced in the civil pleadings, we refer to that student as "Jane Doe [number]." To the extent a student complainant is not referenced in the civil pleadings, we refer to that student as "Student [letter]." Additionally, we refer to University employees by their titles only.

#### **D. Document Review**

Cozen O'Connor also reviewed available documents. These materials were housed across various locations and were maintained by various offices and custodians. The documents reviewed consisted of materials provided by the University, materials provided by local law enforcement agencies in response to FOIA requests, civil litigation materials, records of criminal proceedings, media coverage, and public social media postings.

With respect to materials provided by the University, we reviewed:

- Records maintained by the University's Title IX Office regarding individuals referenced in civil filings, search warrants from law enforcement, or in our witness interviews;<sup>18</sup>
- Records maintained by EMUPD regarding individuals referenced in civil filings, search warrants from law enforcement, or in our witness interviews;

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<sup>18</sup> As noted above, the University provided Cozen O'Connor with unrestricted access to Advocate, the records management database of the University's Title IX Office.

- Search results from a targeted search for emails between the former Title IX Coordinator and either (i) Durbin, Hernandez, or McWilliams, or (ii) any individuals listed in search warrants from law enforcement or identified in our witness interviews;<sup>19</sup>
- The University's Title IX policies and procedures from the relevant time period;
- The University's Annual Security Reports and selected Daily Crime Logs from the relevant time period that were prepared pursuant to the University's federal Clery Act obligations;
- Other relevant documents, including: a November 2019 Action Plan from the Inter-Fraternity Council; a 2019-21 EMU Campus Survey on Sexual Misconduct Culture by the University's Title IX Research Committee; and a 2019 external Title IX policy audit.

In order to inform our work and better understand the context within which the University's Title IX Office operated during the relevant time period, Cozen O'Connor also conducted a review of a representative sample of five academic years' worth of Title IX case files saved within the Advocate case management system. We reviewed 50 randomly selected case files per academic year, from 2015-16 to 2019-20.

We also reviewed the following documents received in response to FOIA requests:

- YPD records relating to their investigation into Durbin, McWilliams, and Hernandez;
- Washtenaw Country criminal court records; and
- Testimony from the preliminary hearings in related criminal proceedings.

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<sup>19</sup> These email searches were conducted by EMU's Director of Network and Systems Services, based on a list of names identified by Cozen O'Connor.

### III. Relevant Legal and Policy Framework

The institutional response to sexual and gender-based harassment and violence is governed by two primary federal statutes: Title IX of the Education Amendments of 1972 (“Title IX”),<sup>20</sup> and the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act (“Clery Act”),<sup>21</sup> as amended by Section 304 of the Violence Against Women Reauthorization Act of 2013 (VAWA).<sup>22</sup> In addition, in Michigan, public universities must publicize certain campus safety information and comply with particular reporting, certification, training, and procedural requirements.<sup>23</sup>

The legal framework outlined below relates to institutional compliance obligations under federal law, as enforced by federal regulatory agencies. This legal framework differs from the legal framework for assessing civil liability.<sup>24</sup>

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<sup>20</sup> 20 U.S.C. § 1681 *et seq.* Title IX is accompanied by implementing regulations that have the force and effect of law. These implementing regulations are codified at 34 C.F.R. § 106. Following the issuance of a November 2018 Notice of Proposed Rulemaking, the Department of Education promulgated updated regulations May 2020. The regulations took effect on August 14, 2020. *See* 85 Fed. Reg. 30026 (May 19, 2020).

The U.S. Department of Education’s Office for Civil Rights (“OCR”) promulgates regulations and more informal guidance and interpretive documents, which do not have the force of law but provide assistance to educational institutions in understanding and meeting their Title IX compliance obligations.

During the time period relevant to this review (the 2015-16 academic year through the 2018-19 academic year), the guidance documents evolved in nature, and with them, the standard of care within higher education. In April 2011, OCR issued its Dear Colleague Letter (“2011 DCL”), which it designated as a significant guidance document. The 2011 DCL followed the 1997 Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (“1997 Guidance”) and the 2001 Revised Sexual Harassment Guidance (“2001 Guidance”). 62 Fed. Reg. 12,034 (Mar. 13, 1997); 62 Fed. Reg. 66,092 (Nov. 2, 2000). The 2001 Guidance replaced the 1997 Guidance. Both have now been rescinded. In response to questions about implementation of the 2011 DCL, on April 29, 2014, OCR published its *Questions and Answers on Title IX and Sexual Violence* (“2014 Q&A”), which it also designated as a significant guidance document. While these guidance documents did not purport to create or add legally binding requirements to applicable law, enforcement efforts by OCR until 2017 held institutions accountable for the tenets set forth in them.

On September 22, 2017, OCR issued a Dear Colleague Letter (“2017 DCL”) rescinding the 2011 DCL and the 2014 Q&A, and expressing an intent to implement a policy, through a notice-and-comment rulemaking process. OCR concurrently issued interim guidance entitled *Questions & Answers on Campus Sexual Misconduct* (“2017 Q&A”). The 2017 Q&A outlined how OCR intended to review a school’s compliance with Title IX, and stated that it would continue to rely on the 2001 Guidance.

<sup>21</sup> 20 U.S.C. § 1092(f).

<sup>22</sup> Pub. L. 113-4, Violence Against Women Act of 2013 (Mar. 7, 2013).

<sup>23</sup> *See* Michigan H.B. 5579 (P.A. 265 of 2018).

<sup>24</sup> *See Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 630 (1999). As the Supreme Court explained in *Davis*, an institution acts with deliberate indifference only when it has actual knowledge of sexual harassment and responds in a manner that is “clearly unreasonable in light of the known circumstances.” The Court wrote, “A private Title IX damages action may lie against a school board in cases of student-on-student harassment, but only where the funding recipient is deliberately indifferent to sexual harassment, of which the recipient has actual knowledge, and that harassment is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.” As detailed in footnote 33, the deliberate

## A. Title IX

Title IX is a federal civil rights law that provides that “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>25</sup> Title IX prohibits discrimination on the basis of sex in all of an institution’s programs and activities, including an institution’s education programs and activities and in employment.<sup>26</sup>

Title IX applies to all forms of sex discrimination, including sexual and gender-based harassment and violence. Sexual harassment by an individual, or a failure by an institution to properly respond to notice of potential sexual harassment by an individual, can itself constitute sex discrimination by an institution in violation of Title IX when that harassment limits or denies an individual the ability to participate in or benefit from the institution’s program on the basis of sex.

Under the Title IX guidance in effect during the time relevant to this review, when an educational institution knew or reasonably should have known about sexual harassment that created a hostile educational or working environment, the institution was required to take immediate and appropriate steps to investigate or otherwise determine what occurred; if an investigation revealed the existence of a hostile educational or employment environment, the institution was then required to take prompt and effective steps reasonably calculated to eliminate the hostile educational and employment environment, prevent its recurrence, and address its effects.<sup>27</sup> An institution violated Title IX if it had “notice” of a sexually hostile educational or employment environment and failed to take immediate and corrective action.

Once an institution had notice (knew or should have known) of an allegation of sexual or gender-based harassment or violence within its educational or employment activities, it was required to promptly take steps to ensure equal access to its education programs and activities and protect the complainant as necessary, including taking reasonably available interim measures while the investigation was pending.<sup>28</sup> Institutions were advised to notify the complainant of reasonably available measures and any available resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance.<sup>29</sup> Institutions were also advised to inform the complainant of their Title IX rights and the right to report a crime to campus or local law enforcement.<sup>30</sup> The institution was also required to take immediate and appropriate steps to investigate or otherwise determine what

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indifference framework has been incorporated into the current Title IX regulations, which became effective in August 2020.

<sup>25</sup> 20 U.S.C. § 1681(a).

<sup>26</sup> See generally 20 U.S.C. § 1681 *et seq.*; 34 C.F.R. Part 106.

<sup>27</sup> *Id.* at 4; 1997 Guidance; 2014 Q&A at 2-3.

<sup>28</sup> 2014 Q&A at 32-33.

<sup>29</sup> 2014 Q&A at 32-33.

<sup>30</sup> *Id.*

occurred.<sup>31</sup> If an investigation revealed the existence of a hostile environment, the institution was required to take prompt and effective steps reasonably calculated to eliminate the hostile environment and prevent its recurrence.<sup>32</sup>

## 1. Notice

Under the guidance in effect at the times relevant to this review, an institution was deemed to have notice if a responsible employee knew or, in the exercise of reasonable care, should have known, about the harassment.<sup>33</sup> Notice could come from a direct report or complaint by a student, employee, or third party complainant, or from a responsible employee who observed or witnessed prohibited conduct. Notice could also be derived from indirect sources such as a parent, friend, or third party witness; social networking sites; the media; an open, pervasive, or widespread pattern; or other facts and circumstances that should have caused an institution, in the exercise of reasonable care, to initiate an investigation that would have led to the discovery of additional incidents.<sup>34</sup>

To facilitate the institution's compliance with Title IX, responsible employees were required to share with the Title IX Coordinator all relevant details about the reported incident, including identifying information about the complainant, respondent, other witnesses, and relevant facts, including the date, time, and location.<sup>35</sup>

The institution's Title IX obligations existed regardless of whether the individual who was harassed made a complaint or asked the institution to take action,<sup>36</sup> although the institution was

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<sup>31</sup> 2001 Guidance at 15; 2014 Q&A at 2.

<sup>32</sup> 2001 Guidance at 12-13.

<sup>33</sup> 2001 Guidance at 13. A responsible employee was defined to include any employee who: (1) had the authority to take action to redress the harassment; (2) had the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees; or (3) a student could reasonably believe had the authority or responsibility to take action. 2001 Guidance at 13; 2014 Q&A at 15-16. The 2017 Q&A did not alter this definition.

Under the new Title IX regulations, in effect since August 2020, "notice" requires *actual knowledge* and not merely constructive knowledge. Pursuant to the revised 2020 definitions, "actual knowledge" means:

[N]otice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient . . . . Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. "Notice" as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator . . . . 34 C.F.R. § 106.30(a) (2020)

<sup>34</sup> 2001 Guidance at 13-14; 2014 Q&A at 2.

<sup>35</sup> 2014 Q&A at 16.

<sup>36</sup> 1997 Guidance.

allowed to consider a complainant's request for anonymity, or not to pursue an investigation, when determining an appropriate institutional response.

## 2. Complainant Agency and Autonomy

Under the Title IX guidance in effect during the relevant years, OCR recommended that educational institutions obtain a complainant's consent before beginning an investigation.<sup>37</sup> However, OCR made clear that there were certain circumstances in which institutions were required to take some action despite a complainant's request that the institution not initiate a formal investigation.<sup>38</sup> OCR advised that institutions were required to balance the interests of the complainant with their own dual obligations (a) to provide a safe and non-discriminatory environment for all community members and (b) to fulfill principles of fundamental fairness that required notice and an opportunity to respond before action was taken against a respondent. In making this determination, institutions were advised to consider several factors, including the following:

- Whether circumstances suggested there was an increased risk of the respondent committing additional acts of sexual violence or other violence (for example, whether there had been other complaints or reports of harassment or misconduct against the respondent; whether the respondent had a history of arrests or records from a prior school indicating a history of violence; whether the respondent threatened further sexual violence or other violence against the student or others; and whether the complainant's report revealed a pattern of perpetration, such as via the illicit use of drugs or alcohol);
- The seriousness of the conduct alleged (including whether the sexual violence was perpetrated with a weapon or committed by multiple perpetrators);
- The respective ages of the complainant and respondent;
- The rights of the respondent to receive notice and relevant information before disciplinary action was sought; and
- Whether the institution possessed other means to obtain relevant evidence (for example, security cameras or personnel, or other physical evidence).<sup>39</sup>

According to the guidance from OCR, where an institution had no credible information about a respondent's prior sexual violence, the alleged sexual violence was not committed using a weapon or accompanied by threats of further violence, and the alleged sexual violence was not part of a larger pattern at a given location or by a particular group, these factors would typically compel an institution to respect a complainant's request for confidentiality.<sup>40</sup>

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<sup>37</sup> 2011 DCL at 5.

<sup>38</sup> 2014 Q&A at 18-19.

<sup>39</sup> 2014 Q&A at 19-22.

<sup>40</sup> *Id.* at 22.

To the extent an institution weighed these factors and decided to respect a complainant’s request for confidentiality or request to not pursue a formal investigation, OCR advised that the institution should nonetheless take all reasonable steps to respond to the complaint, recognizing that its ability to respond would be limited.<sup>41</sup> According to the Title IX guidance, the educational institution should “determine whether interim measures [were] appropriate or necessary” and take other steps to limit the effects of the alleged sexual or gender-based harassment or violence and prevent its recurrence.<sup>42</sup> Potential remedies included providing increased monitoring, supervision, or security; providing training and education materials for students and employees; changing and publicizing institutional policies on sexual and gender-based harassment and violence; conducting climate surveys regarding sexual violence; imposing short- or long-term protective measures for a complainant; and other measures that could be tailored to the facts and circumstances.<sup>43</sup>

## **B. Clery Act**

The Clery Act is a federal statute enacted in 1990 that requires all public and private postsecondary institutions that participate in any of the federal financial aid programs under Title IV of the Higher Education Act of 1965<sup>44</sup> to keep and publish information about crime on or near their campus.<sup>45</sup> The purpose of the Clery Act is to provide students, their families, and employees with accurate, complete, and timely information about campus safety to better inform future decisions.<sup>46</sup> The Clery Act requires that schools report offenses and disclose statistics for crimes that were reported to the local police or campus security authorities (“CSA”) in their annual security reports.<sup>47</sup>

The Clery Act also requires timely warning notifications to the campus community of an enumerated set of Clery Act crimes reported to CSAs or local police that the school considers a serious or continuing threat to students and employees.<sup>48</sup> Finally, the Clery Act mandates that schools develop policies, procedures and programs regarding sexual assault, dating violence, domestic violence, and stalking.<sup>49</sup> These procedures must include a clear statement that the proceedings will entail a prompt, fair, and impartial investigation and resolution.<sup>50</sup>

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> 2014 Q&A at 20.

<sup>44</sup> 20 U.S.C. § 1001 *et seq.*

<sup>45</sup> *See generally* 20 U.S.C. § 1092(f); 34 C.F.R. § 668.46. In addition to reports on crime and dating violence, the Clery Act also requires institutions to submit reports on fire prevention procedures, missing person procedures, and on-campus safety procedures.

<sup>46</sup> 34 C.F.R. § 668.46.

<sup>47</sup> 20 U.S.C. § 1092(f)(1)(F); 34 C.F.R. § 668.46(c).

<sup>48</sup> 20 U.S.C. § 1092 (f)(3); 34 C.F.R. § 668.46(e).

<sup>49</sup> 20 U.S.C. § 1092 (f)(8); 34 C.F.R. § 668.46(b)(11).

<sup>50</sup> 34 C.F.R. § 668.46 (k)(2)(i).

Additionally, the Clery Act, as amended by VAWA, requires post-secondary institutions to include in their annual security report a statement of policy regarding the institution's programs to prevent dating violence, domestic violence, sexual assault, and stalking.<sup>51</sup> The statement must include a description of the institution's educational programs and campaigns that promote awareness of domestic violence, dating violence, sexual assault, and stalking.<sup>52</sup> Primary prevention and awareness programs must be provided to all incoming students and new employees, and ongoing prevention and awareness campaigns must be provided for students and faculty.

In addition, the Clery Act requires that schools develop and distribute policies regarding procedures they will follow once an incident of domestic violence, dating violence, sexual assault, or stalking is reported.

Of particular relevance, the Clery Act requires that a school's written policy contain:

- a list of all possible sanctions and the range of protective measures that the school may impose following a final determination of sexual assault, domestic violence, dating violence, or stalking;<sup>53</sup>
- procedures individuals should follow if a sex offense, domestic violence, dating violence, sexual assault or stalking occurs;<sup>54</sup>
- information regarding the importance of preserving evidence;<sup>55</sup>
- identification of the administrator to whom alleged offenses should be reported;<sup>56</sup>
- options regarding notifying law enforcement and campus authorities about alleged offenses, including the option to be assisted by campus authorities in notifying law enforcement authorities or to decline to notify authorities;<sup>57</sup> and
- individuals' rights and the school's responsibilities regarding orders of protection, no contact orders, restraining orders, or similar lawful orders issued by a criminal, civil or tribal court.<sup>58</sup>

Educational institutions must also notify individuals regarding: on and off-campus counseling, health, mental health, victim advocacy and legal assistance programs; interim remedies that are

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<sup>51</sup> 34 C.F.R. § 668.46(j).

<sup>52</sup> *Id.*

<sup>53</sup> 34 C.F.R. § 668.46 (k)(1)(iii) and (iv);

<sup>54</sup> 34 C.F.R. § 668.46 (b)(11)(ii).

<sup>55</sup> 34 C.F.R. § 668.46 (b)(11)(ii)(A).

<sup>56</sup> 34 C.F.R. § 668.46 (b)(11)(ii)(B).

<sup>57</sup> 34 C.F.R. § 668.46 (b)(11)(ii)(C)(1)(2) and (3).

<sup>58</sup> 34 C.F.R. § 668.46 (b)(11)(ii)(D).

available regardless of whether an individual chooses to report an alleged crime to campus police or law enforcement; and a written explanation of an individual's rights and options when a student or employee reports that they have been a victim of on or off-campus domestic violence, dating violence, sexual assault, or stalking. VAWA also requires schools to prohibit retaliation, intimidation, threats, coercion, or any other type of discrimination against any individual for reporting domestic violence, dating violence, sexual assault, or stalking.

### **C. The University's Applicable Policy and Procedure**

During the time period relevant to this review, EMU's response to reports of sexual violence was governed by the University's Sexual Misconduct and Interpersonal Violence Policy ("Policy"). The Policy prohibited sexual harassment, gender-based harassment, sexual assault, sexual exploitation, intimate partner violence, stalking, and retaliation and provided definitions of those terms. The Policy provided that reports of prohibited conduct involving an EMU student, faculty member, or staff member, regardless of when it occurred, could be reported to the Title IX Coordinator by telephone, email, in person, or an online reporting form, which was directed to the Title IX Coordinator. Reports could be made by the person who experienced the prohibited conduct, by third parties (e.g., witnesses, friends, co-workers), and/or anonymously by clicking the box next to "submit anonymously?" at the top of the online form.<sup>59</sup> In addition to the Policy, the University also had a dedicated Title IX webpage that provided the aforementioned reporting options and a link to the online reporting form.

The Policy was accompanied by the Student Sexual Misconduct and Interpersonal Violence Investigatory Procedure ("Procedures"), which provided, in pertinent part:<sup>60</sup>

*When a report is made, the Title IX Coordinator will conduct an initial Title IX assessment. The first step of this assessment will usually be a preliminary meeting between the Complainant and the Title IX Coordinator. In the course of this assessment, the University will consider the interest of the Complainant and the Complainant's expressed preferences for manner of resolution. Where possible and when supported by the facts and circumstances, the University will seek action consistent with the Complainant's request.*

*As part of the initial assessment of the facts, the University will:*

- *Assess the nature and circumstances of the allegation;*

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<sup>59</sup> The University's online reporting form did not inform submitters that the Title IX Office would be limited in its ability to address anonymous reports. The online reporting form, as it existed in August 2018, is accessible at <https://webstage.emich.edu/title-nine-v2018/reporting/index.php>.

<sup>60</sup> The Procedures were effective July 1, 2016. An Interim Student Investigative Procedures was published on November 28, 2018 to account for the change in applicable law requiring a hearing, but the initial Title IX assessment quoted in the report did not change.

The University also published a separate procedure titled, "Discrimination/Harassment Complaint Investigation Procedure for Complaints against Faculty, Staff, or Visitors" but as Cozen O'Connor's review involved reports against students, only the policies and procedures applicable to students are discussed in the report.

- *Address immediate physical safety and emotional well-being;*
  - *Discuss the Complainant's expressed preference for manner of resolution and any barriers to proceeding;*
  - *Notify the Complainant of the right to contact or decline to contact law enforcement if the conduct is criminal in nature, and if requested, assist them with notifying law enforcement;*
  - *Notify the Complainant of the availability of medical treatment to address physical and mental health concerns and to preserve evidence;*
  - *Notify the Complainant of the importance of the preservation of evidence;*
  - *Provide the Complainant with information about on-and off-campus resources;*
  - *Notify the Complainant of the available interim measures;*
  - *Provide the Complainant with an explanation of the procedural options, including informal resolution and formal resolution;*
  - *Inform the Complainant and the Respondent they may seek an advisor of their choosing to assist them throughout the investigation and resolution of the complaint, and that the advisor may accompany them to any meeting or proceeding under this policy;*
- (Additional guidance about the role of the advisor is contained in the Appendix).*
- *Assess for pattern evidence or other similar conduct by the Respondent;*
  - *Explain the University's policy prohibiting retaliation.*

*The initial interview review will proceed to the point where a reasonable assessment of the safety of the individual and of the campus community can be made, and the University has sufficient information to determine the best course of action.*

*At the conclusion of the Title IX Assessment, the Title IX Coordinator will determine the appropriate manner of resolution, which may include Informal Resolution or the initiation of an investigation to determine if disciplinary action is warranted. It is at the discretion of the Title IX Coordinator to determine which method of resolution is appropriate. Any individual wishing to explore alternative resolution methods is encouraged to discuss these options with the Title IX Coordinator.*

*Where the Complainant requests that their identity not be shared with the Respondent or that the University not pursue an investigation, the University must consider this request in the context of the University's responsibility to provide a safe and non-discriminatory environment for all University community members. The University, through the Title IX Coordinator, will take all*

*reasonable steps to investigate and respond to the complaint consistent with the request not to share identifying information or pursue an investigation, but its ability to do so may be limited by the request. Under these circumstances, the Complainant's request will be balanced against the following factors:*

- *The seriousness of the conduct;*
- *The roles of the Complainant and Respondent;*
- *Whether there have been other complaints or reports of harassment or misconduct against the Respondent;*
- *Whether the circumstances suggest there is an increased risk of the Respondent committing additional acts of sexual violence or other violence;*
- *Whether the Respondent has a history or arrests or prior conduct violations (At Eastern Michigan or elsewhere) indicating a history of violence;*
- *Whether the alleged Respondent threatened further sexual violence or other violence against the student or others;*
- *Whether the sexual violence was committed by multiple individuals;*
- *Whether the circumstances suggest there is an increased risk of future acts of sexual violence under similar circumstances;*
- *Whether sexual violence was perpetrated with a weapon;*
- *Whether the school possesses other means to obtain relevant evidence (e.g., security cameras or personnel, physical evidence).*

*The University will take all reasonable steps to investigate and respond to the report consistent with the request not to share the identifying information or pursue an investigation, but its ability to do so may be limited based on the nature of the request by the Complainant. Where the University is unable to take action consistent with the request of the Complainant, the Title IX Coordinator will inform the Complainant about the chosen course of action, which may include the University seeking disciplinary action against the Respondent. Alternatively, the course of action may also include steps to limit the effects of the alleged harassment and prevent its recurrence that do not involve formal disciplinary action against a Respondent or revealing the identity of the Complainant.*

*At the conclusion of the initial Title IX assessment, the Complainant will receive a written notice of the determination about how the University plans to proceed. Depending on the circumstances and requested resolution, the Respondent may or may not be notified of the report or resolution.*

*A Respondent will be notified when the University seeks action that would impact a Respondent, such as protective measures that restrict the Respondent's*

*movements on campus, the initiation of an investigation, or the decision to request the Respondent's involvement in an Informal Resolution.*

#### **IV. Overview of the University's Title IX Office**

During the relevant timeframe, the University's Title IX Office consisted of a full-time Title IX Coordinator (beginning in June 2015), a full-time Title IX investigator (beginning in June 2017), and a part-time administrative staff position that was filled by interns, volunteers, or part-time employees. Prior to hiring a full-time investigator in June 2017, the Title IX Coordinator trained other University staff to serve as Title IX investigators or contracted with external investigators. Based on Cozen O'Connor's interview with the Title IX Coordinator and our review of case files and communications, the Title IX Coordinator served primarily to provide support and resources, oversee the resolution process, and deliver prevention and education training to the campus. The Title IX Coordinator did not conduct investigations or render decisions on individual cases.

The Title IX Coordinator reported to Cozen O'Connor that upon receipt of a report, she would seek to meet with the complainant to conduct the initial assessment, as outlined in the Procedures. She said she used a form checklist for that meeting that outlined the role of the investigator, the role of the advisor, the difference between anonymity and confidentiality, a description of remedial and interim measures, an overview of the investigation process and potential outcomes, the differences between university and criminal processes, the prohibition against retaliation, and available resources and support. The Title IX Coordinator reported that she deferred to the complainant's choice on whether to pursue an investigation. That is, in instances when a complainant did not want to pursue an investigation, the Title IX Office honored that decision and did not pursue an investigation.

The Title IX Coordinator reported that she provided regular training to faculty and staff on their role as "responsible employees." She also said she presented the University's Policy and an overview of the Title IX Office annually at new student orientation, and would meet with sororities, fraternities, and athletics teams regularly about how to make reports of prohibited conduct and the available resources and support the Title IX Office could provide students. She described having good working relationships with campus constituents, and said she met routinely with EMUPD and the Greek Life Coordinator.

#### **V. Overview of Facts Gathered: Dustyn Durbin**

Dustyn Durbin attended EMU as an undergraduate student from August 2014 to April 2019. The civil complaints describe more than one dozen EMU students who allege that Durbin sexually assaulted them during and after his time as an EMU student. These assaults reportedly occurred between November 2015 to September 2019. With the exception of one anonymous report described below, we found no documentation or other information that incidents involving Durbin were reported contemporaneously to EMU officials.

Based on our review of available information, in November 2018, Jane Doe 7 made an anonymous report to the Title IX Office that Durbin had assaulted her months earlier. The student, who did not share her name with the Title IX Office at the time, also wrote that Durbin had sexually assaulted other women.

In addition, we identified other information related to the allegations involving Durbin made in the civil lawsuit. These additional pieces of information related to Jane Doe 0 (a non-student for whom Durbin called EMUPD to assist after she became overly intoxicated in January 2016), Jane Doe 5 (who, in March 2019, drafted but did not send an email to the Title IX Coordinator referencing her sexual assault by Durbin), and Jane Doe 9 (who, in or around May 2019, disclosed to student members of Durbin’s fraternity that Durbin had sexually assaulted her).

**A. November 2018: Jane Doe 7<sup>61</sup>**

The University first received a report of sexual assault involving Durbin in November 2018. On November 10, 2018, an unknown individual submitted an anonymous online Sexual Misconduct Reporting Form to the University’s Title IX Office.<sup>62</sup> The anonymous report identified Durbin by name and stated that the underlying incident occurred in February 2018 (*i.e.* nine months earlier) on the night of a “DSP party,” and took place at “ASP.”<sup>63</sup> The description of the incident on the form stated:

I went over there and [t]here was drinking and I ended up blacking out. I puked and he still took advantage of me in that state. I woke up only remember[ing] bits and pieces and with bruises. I thought it was my fault for drinking too much but he was basically feeding me the alcohol that night. Since the event I found out he had done this before to other girls and that is why I am sending in this report because I don’t want him to do this to other people.

On November 12, 2018, the Title IX Coordinator forwarded this information by email<sup>64</sup> to the Greek Life Coordinator. In her email to the Greek Life Coordinator, the Title IX Coordinator wrote:

This is confidential. But I did receive this anonymous report and it refers to a “DSP” party at “ASP.” Is this a Greek thing? I am not familiar with those acronyms. Trying to do my due diligence to get some additional information and so I’m starting with you. Thank you!

There are no other documented follow-up steps taken by the Title IX Coordinator saved to Advocate, the records management database for the University’s Title IX Office, nor was any

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<sup>61</sup> As noted above, for ease of reference, where an individual discussed in this report is referenced in the civil lawsuits, we refer to that complainant by the Jane Doe pseudonym designated in the civil pleadings.

<sup>62</sup> The current online form is available at <https://www.emich.edu/title-nine/reporting/reporting-form.php> and is linked from the University’s main Title IX website. The online form as it existed in 2018 when Jane Doe 7 filed her anonymous report is available at <https://webstage.emich.edu/title-nine-v2018/reporting/index.php>.

<sup>63</sup> “DSP” stands for the fraternity Delta Sigma Phi. “ASP” stands for the fraternity Alpha Sigma Phi. Durbin belonged to ASP.

<sup>64</sup> Less than one month before this email, the Greek Life Coordinator had shared with the Title IX Coordinator a letter sent by an anonymous female sorority member. In that letter, from in or around October 2018, the anonymous sorority member wrote to the Greek Life Coordinator that she was concerned with what she described as the “many incidents of sexual assault in the greek [sic] community this semester in particular.” The letter did not name or reference Durbin or the fraternity to which he belonged, but it identified several fraternities where there had allegedly been recent sexual assaults. The letter also accused the Greek Life Coordinator of sweeping these assaults under the rug. We address this letter further in V.I.C. of the report.

In his interview with Cozen O’Connor, the Greek Life Coordinator said that shortly after he received this letter, he urged EMU’s student-led Inter-Fraternity Council (“IFC”) to take preventative steps. In response, in November 2018, the IFC developed an “Action Plan” to address what the IFC called the “high reports of sexual assault to

relevant email correspondence identified in the Title IX Coordinator's email account between or among the Title IX Coordinator and other individuals identified in this review. The only other information in Advocate regarding this report was a summary note that stated, "Unable to determine identity of complainant. Will reopen if more information becomes available."<sup>65</sup>

## **B. Other Reports Regarding Durbin**

In addition to this one instance of notice via an anonymous report about Durbin, the civil complaints allege that EMU officials were or should have been aware of two other alleged sexual assaults committed by Durbin, one involving Jane Doe 0 and one involving Jane Doe 9. Cozen O'Connor did not locate any evidence that EMU officials received notice of either incident. To the contrary, as detailed below, the available evidence reflects that the University did not receive such notice contemporaneously.

### **1. January 2016: Jane Doe 0<sup>66</sup>**

According to allegations in the civil complaint, Durbin sexually assaulted Jane Doe 0 in January 2016. According to contemporaneous EMUPD records, EMUPD responded to an emergency call from Durbin regarding Jane Doe 0, who was incapacitated based on her level of alcohol consumption. EMUPD initiated an investigation. As part of that investigation, EMUPD interviewed several witnesses, including Durbin and Jane Doe 0 herself. None of the witnesses, including Jane Doe 0, alleged at that time that Jane Doe 0 had been sexually assaulted on the evening in question.

According to the EMUPD report, in the early morning hours of January 30, 2016, Durbin called EMUPD to report that Jane Doe 0 was in his residence hall room and was heavily intoxicated. EMUPD responded to the scene, where Durbin reported that Jane Doe 0 was in the residence hall bathroom. Upon entering the bathroom, EMUPD found Jane Doe 0 lying unresponsive in a shower stall.<sup>67</sup> After moving Jane Doe 0 to another room, Jane Doe 0 said "please, please, please," and then said "keys" and "pants" repeatedly, and "penis" twice.

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Title IX and the Greek Life Office." Additionally, in December 2018, the Student Government passed a resolution supporting IFC's Action Plan. These steps are addressed further in VII.B. of the report.

In her interview with Cozen O'Connor, the Title IX Coordinator said that during her time as the Title IX Coordinator, she noted an increasing trend in reports relating to incidents at fraternity parties; however, she said the reports were often second- and third-hand. In response, the Title IX Coordinator said she engaged in increased prevention programming by meeting with "every single fraternity president" to discuss prevention strategies. She recalled discussing the fraternities' efforts to designate an individual at parties who would remain sober and "ensure that no one goes upstairs." As part of Cozen O'Connor's targeted email review, we located a November 1, 2018 email in which Hernandez, who was then the President of the IFC, sought the Title IX Coordinator's input in drafting an action plan to address sexual assault.

<sup>65</sup> The anonymous complainant was subsequently identified as Jane Doe 7 in a complaint filed with YPD in July 2020, and in the civil lawsuit filed in federal court in March 2021.

<sup>66</sup> Jane Doe 0 was not an EMU student and is not among the civil plaintiffs.

<sup>67</sup> In an interview with Cozen O'Connor, the responding officer reported that Jane Doe 0 was clothed in either yoga pants and a bra, or a bra and underwear.

According to the EMUPD report, an ambulance subsequently transported Jane Doe 0 to a local hospital. While at the hospital, EMUPD made three attempts to interview Jane Doe 0, but she was unresponsive each time.<sup>68</sup> Later that morning, while Jane Doe 0 was still at the hospital, EMUPD interviewed Jane Doe 0. During the interview, Jane Doe 0 told EMUPD that she “did not remember much of the previous night.” According to Jane Doe 0, she attended a party with her friends (including Durbin) and proceeded to consume roughly one pint of vodka. She did not recall lying unresponsive in the shower or any of her subsequent statements to EMUPD later that evening. She told EMUPD that she was feeling “OK.”

EMUPD interviewed several witnesses, including Durbin, regarding the events of January 29-30, 2016. EMUPD also reviewed security camera footage from that evening and located a video of two male students pulling an unconscious Jane Doe 0 into the residence hall and up a flight of stairs. EMUPD interviewed those two male students, who said they were trying to assist Jane Doe 0, who was very intoxicated. They said that Durbin (who was friends with Jane Doe 0) then came to look after Jane Doe 0, at which point they left.

EMUPD subsequently attempted to call Jane Doe 0 five times over the course of three days (February 1, February 2, and February 4, 2016) after she had been released from the hospital. Jane Doe 0 did not respond to those outreach attempts and EMUPD closed the investigation. There is no mention in the EMUPD report of Jane Doe 0 or any of the other witnesses alleging to EMUPD that a sexual assault occurred on the evening in question.

## **2. May 2019 (approx.): Jane Doe 9**

According to allegations in the civil complaint, Durbin sexually assaulted Jane Doe 9 in September 2018 and May 2019, and Jane Doe 9 disclosed these assaults to ASP fraternity members during an internal fraternity process for dispute resolution called a “Mystic Circle.” The civil complaint alleges that ASP’s then-Chapter President subsequently told EMU’s then-Police Chief about the assaults.<sup>69</sup>

Cozen O'Connor did not locate sufficient evidence to conclude that the Police Chief was made aware of Jane Doe 9’s allegations against Durbin in real time. There were no contemporaneous EMUPD records regarding Jane Doe 9. Additionally, Cozen O'Connor interviewed both the Police Chief and ASP’s Chapter President, and each emphatically stated that they had not discussed Jane Doe 9 or any Mystic Circle with the other. The Chapter President said that Jane Doe 9 initiated the Mystic Circle<sup>70</sup> but explicitly said she did not want to make a formal

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<sup>68</sup> In an interview with Cozen O'Connor, the responding officer reported that “unresponsive” meant Jane Doe 0 was not awake and grunted in response to questions posed to her by the responding officer.

<sup>69</sup> The complaint identified EMU’s then-Police Chief as the uncle of ASP’s then-Chapter President. The Chapter President and the Police Chief both told Cozen O'Connor that they were not uncle and nephew; rather, the Police Chief’s ex-wife’s sister is the Chapter President’s mother.

<sup>70</sup> The Chapter President explained that during Mystic Circles at ASP, participants would sit in a circle in the dark with their arms crossed and linking fingers in a sign of unity. He said the individual who requested a Mystic Circle would sit in the center and would say whatever they wanted to without interruption. He explained that Mystic Circles occurred several times per semester and were not used solely for responding to allegations of sexual assault; rather, they were initiated to resolve a whole host of issues, including disagreements between brothers.

report regarding Durbin; rather, according to the Chapter President, she simply wanted ASP to ban Durbin from the fraternity house.<sup>71</sup> Pursuant to EMU's Title IX Policy and applicable law at the time, neither the Chapter President nor any other fraternity member would have been designated as a "responsible employee" and required by regulatory guidance or the University's Policy to forward the report to the Title IX Coordinator.

## **C. Other Information Gathered**

### **1. Criminal Proceedings**

Of the nine complainants who testified at Durbin's preliminary hearing on October 14, 2020 in connection with his criminal proceedings, only one (Jane Doe 7) testified that she reported the incident to the University. She did not explicitly testify that her report was anonymous; however, based on the date, it is believed that Jane Doe 7 was referring to the anonymous report. This testimony is consistent with Jane Doe 7's anonymous November 2018 report to the University, described above. YPD's case files also include a reference to Jane Doe 7 making a report to the University in November 2018.

Two other complainants (Jane Doe 6 and Jane Doe 9) testified at Durbin's preliminary hearing that they did not report their experiences to the University, and the remaining six complainants did not provide testimony regarding whether they reported their experiences to the University. YPD's case files do not reflect that any of the complainants, aside from Jane Doe 7, made a contemporaneous report to the University about Durbin. This information largely corroborates the University's records relating to reports about Durbin.

### **2. Unsent March 2019 Draft Email: Jane Doe 5**

As part of its targeted search for emails between the Title IX Coordinator and other identified individuals,<sup>72</sup> Cozen O'Connor located a March 19, 2019 draft email from Jane Doe 5<sup>73</sup> that was addressed to the Title IX Coordinator. The draft email, which does not mention Durbin by name, stated:

My name is [Jane Doe 5] and I am the past president of a social sorority here on campus. I am reaching out in hopes of finding clarification on how to proceed after finding out about a very unsettling situation.

*[continued on next page]*

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<sup>71</sup> The Chapter President told Cozen O'Connor that ASP did ban Durbin from the fraternity house following this Mystic Circle, but a fraternity member subsequently allowed Durbin to enter the house.

<sup>72</sup> As noted above, Cozen O'Connor reviewed the results of a targeted search for emails between the former Title IX Coordinator and either (i) Durbin, Hernandez, or McWilliams, or (ii) any individuals listed in search warrants from law enforcement or identified in our witness interviews.

<sup>73</sup> Based on information in the civil and criminal proceedings, Jane Doe 5 alleged that Durbin forcibly sexually assaulted her in November 2015. Jane Doe 5 was identified in a complaint filed with YPD in July 2020, and is among the plaintiffs in the civil lawsuit that was filed in federal court in March 2021.

On Sunday, I was told by a younger member of my chapter that she had been raped and had reported it. She then went into more detail and soon described [the] acts of two men who allegedly assaulted many women and still currently are. What concerns me the most is this is possibly the 4-5th person to report similar actions from one of these men.

As a survivor of one of these men personally [email cuts off]

The University informed Cozen O'Connor that this email was saved to Jane Doe 5's draft email folder and was never in fact sent to the Title IX Coordinator. Cozen O'Connor undertook its own forensic analysis of the email and independently confirmed that it was never sent to the Title IX Coordinator. Cozen O'Connor also searched Advocate for any documents or files relating to Jane Doe 5; none existed.

## **VI. Overview of Facts Gathered: Thomas Hernandez and D'Angelo McWilliams<sup>74</sup>**

Thomas Hernandez attended EMU as an undergraduate student from August 2015 to May 2019, and D'Angelo McWilliams attended EMU as an undergraduate student from August 2015 to December 2018. Hernandez and McWilliams both belonged to the EMU chapter of the Delta Tau Delta fraternity, and Hernandez served as President of EMU's Inter-Fraternity Council in 2018.

Cozen O'Connor is currently aware of seven individuals who have reported to YPD or alleged in civil litigation that they were harmed by Hernandez and/or McWilliams during their time at EMU. Some of these alleged incidents involved physical violence by Hernandez or McWilliams; another involved stalking by Hernandez; and three involved joint forcible sexual assaults by both Hernandez and McWilliams.

Based on our review of available information, EMU's Title IX Office received third-party reports in March and April 2018 regarding two March 2018 incidents involving Hernandez and/or McWilliams. One of these incidents involved what the reporting party described as a "brutal" sexual assault of Jane Doe 1 by Hernandez and McWilliams, and the other involved an allegation of stalking of Student A against Hernandez only.

In both of these cases, the Title IX Coordinator deferred to the complainant's decision not to pursue a formal investigation. Cozen O'Connor did not locate any documentation in Advocate or its targeted email review reflecting that the Title IX Coordinator evaluated whether the reports indicated a pattern of conduct involving Hernandez, in light of the two separate complaints to the Title IX Office about him within one month. Cozen O'Connor also did not locate any documentation in Advocate or its targeted email review reflecting that the Title IX Coordinator contacted Student A after learning the details of Hernandez's alleged sexual assault of Jane Doe 1, which occurred only one day after Student A had told the Title IX that she did not wish to pursue an investigation against Hernandez in relation to the stalking allegation.

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<sup>74</sup> We discuss Hernandez and McWilliams within the same section because several complainants have come forward alleging that they were sexually assaulted by both Hernandez and McWilliams during joint sexual encounters. For any reports of misconduct described below that involve only Hernandez or McWilliams, we make that distinction.

Below, we provide a chronology of the most salient facts associated with each of these third-party reports and the actions taken by the University in response.<sup>75</sup> We also provide additional contextual information regarding other information reported to the Greek Life Coordinator in October 2018 regarding the campus climate surrounding sexual assaults, including by members of Delta Tau Delta.

#### **A. March 2018: Jane Doe 1**

The University first received a report of sexual assault involving Hernandez and McWilliams in March 2018. On March 7, 2018, an EMU student (the “Reporting Party”) emailed the Title IX Coordinator to seek advice regarding helping his (unnamed) friend (later identified as Jane Doe 1), who he said had been “brutally [sexually] assaulted” in January 2018. He wrote:

I would like to know what I can do about a sexual assault. My friend who would like to remain anonymous was brutally assaulted by two guys on January 18th at the Delta Tau Delta house. The two criminals who committed this crime are Thomas Hernandez who is a members of the Delta Tau Delta fraternity and Dangelo Taylor.<sup>76</sup> I would like to know what I can do. I’ve tried to get her to go to the police but she can not talk about it without shutting down and having a panic attack. So I’m wondering if there is another way to make sure these two never hurt anyone else or hurt her again. If there is anything that can be done please let me know at your earliest convenience.

The Title IX Coordinator responded that day, saying she could help and asking if the Reporting Party and his (then unidentified) friend would be willing to meet with her to discuss her options. After the Reporting Party replied that his friend was reluctant to meet, the Title IX Coordinator wrote:

[T]here is no time frame for when she has to come forward. I am just concerned for her well-being so the sooner the better from my perspective, but she can wait as long as she needs to. If you know the details of the incident, I am happy to meet with you alone and explain things to you so that you can then tell her about what I do and her options.

If you can let her know that meeting with me is safe and private and she gets to decide the action (or inaction) that works for her. It can be very empowering to understand what is available to her. . . . I do not [need to speak with her in person]. We can arrange a phone call if that would be more comfortable for her. You can be on the line with her if she would like that.

The Reporting Party replied to the Title IX Coordinator that he would try to convince his friend to speak with the Title IX Coordinator, but that she was reluctant to do so, in part because of a negative experience another friend had described regarding reporting her own sexual assault to law enforcement.

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<sup>75</sup> We note that in constructing this chronology, we relied primarily on contemporaneous records from the Title IX Office and EMUPD. Although we synthesized information from these sources to the best of our ability, in some cases — and especially in the case of Jane Doe 1 — there was incomplete documentation of substantive communications with the parties or the rationale for decision-making, and in other cases the documentation that did exist contained incomplete information.

<sup>76</sup> In this initial correspondence, the Reporting Party misidentified D’Angelo McWilliams as “Dangelo Taylor.” Based on the context and future communications between the Reporting Party and the Title IX Coordinator, it is clear that the Reporting Party was referring to D’Angelo McWilliams.

In a separate email chain on March 7, 2018, the Reporting Party wrote to Jane Doe 1's dean to ask for a no-contact order between his friend and Hernandez. That email request was subsequently forwarded to the Title IX Coordinator, who emailed the Reporting Party on March 9, 2018 that in order to issue the no-contact order, she needed to know his friend's identity. The Title IX Coordinator also reiterated her offer to meet with the Reporting Party so he could better "understand our process and how we can help."

On or around March 13, 2018, the Title IX Coordinator met with the Reporting Party in person. During this meeting, the Reporting Party disclosed Jane Doe 1's identity. Following her meeting with the Reporting Party, the Title IX Coordinator emailed Jane Doe 1 an outreach letter in which she offered supportive measures and an opportunity to meet to discuss the Title IX complaint process. The March 13 letter stated:

. . . I am the Title IX Coordinator on campus. It is my job to address any acts of sexual discrimination within our EMU community.

Your friend . . . met with me today because he is concerned about your well-being due to the sexual assault that you endured in January. I am very sorry to hear that this happened. I am reaching out to you today to see if you are in need of any help and support from our office. I would also like to give you information about our complaint process should you decide to hold the other party accountable. Meeting with me is safe and private. You do not have to take any action as a result of meeting with me but I'd like for you to know your options.

If you would like to schedule a meeting with me, please call my office . . . or respond to this email  
. . . .

Based on Cozen O'Connor's review of targeted emails and the University's Title IX database system, Advocate, Jane Doe 1 did not reply to this outreach email.

On March 23, 2018, the Reporting Party emailed the Title IX Coordinator that Jane Doe 1 was struggling academically and needed assistance. The Title IX Coordinator replied that Jane Doe 1 herself would have to talk to her about the incident so that she could ascertain and provide appropriate supportive measures for Jane Doe 1. The Title IX Coordinator wrote to the Reporting Party that even though he wanted to help Jane Doe 1, "you aren't going to be able to do this for her. This is a decision she is going to have to make and something she will have to do." The Reporting Party thanked the Title IX Coordinator and wrote that he appreciated her assistance.

On March 26, 2018, the Title IX Coordinator emailed a second outreach letter to Jane Doe 1. She reiterated to Jane Doe 1 that she was "very interested in knowing how you are doing and if I can help you in any way."

On March 27, 2018, the Reporting Party emailed the Title IX Coordinator that Jane Doe 1 "might be willing to come talk." The Title IX Coordinator offered to meet that day, but the Reporting Party subsequently replied that Jane Doe 1 had "changed her mind."

Coincidentally, on March 27, 2018, Hernandez emailed the Title IX Coordinator (copying the Greek Life Coordinator) asking to meet about “a situation where I am honestly lost.”<sup>77</sup> Hernandez wrote that there was a “fishy story” going around that was “dragging [him] down” and causing him to struggle with his studies and his mental state.<sup>78</sup> Although there is no record saved to Advocate of a meeting between Hernandez and the Title IX Coordinator, Cozen O'Connor is aware from other contemporaneous documents including EMUPD records that the Title IX Coordinator did in fact meet with Hernandez and McWilliams and discussed the allegations of sexual assault.<sup>79</sup>

On March 29, 2018, Jane Doe 1 met with the former Title IX Coordinator in person. According to the Title IX Coordinator's summary of the meeting, “Complainant described the sexual assault. Very tearful and sincere. She does not know if she wants to proceed with an investigation at this time. Needs extension for . . . [academic paper].”<sup>80</sup> The meeting summary did not contain any additional information.<sup>81</sup>

Later that day, the Title IX Coordinator contacted Jane Doe 1's professor and requested an extension on her behalf; the extension was granted. The Title IX Coordinator also followed up with Jane Doe 1 by email. In that email, the Title IX Coordinator wrote:

Would you be willing to speak with an EMU police officer who is a member of our Special Victim's Unit? She would provide to you some resources and take a statement from you but she would not do anything with it unless you wanted to. The reason you may want to consider doing this is that if

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<sup>77</sup> Cozen O'Connor located this email as part of the targeted review of emails described above. The email was not saved to Advocate. Similarly, there was no documentation saved to Advocate of the meeting between Hernandez and the Title IX Coordinator—either its existence or its substance.

<sup>78</sup> For context, around this time, the Reporting Party began sending a series of threatening messages to Hernandez and McWilliams, writing to them, among other things, that they were “gonna pay” for raping Jane Doe 1 and that the Reporting Party was “coming for both of you – one of us is going to jail.” According to a contemporaneous EMUPD record, the Greek Life Coordinator became aware of these messages and on March 27, 2018, filed a Campus Security Authority Report with EMUPD pursuant to the Clery Act. EMUPD then opened an investigation into the Reporting Party. As noted below, EMUPD subsequently arrested the Reporting Party on two counts of felony harassing communications for these and similar messages regarding Hernandez and McWilliams.

<sup>79</sup> According to the EMUPD record, “Hernandez had a meeting with [the Title IX Coordinator], and told her he believes the person [who posted the threatening messages] is [the Reporting Party].” As noted below, the EMUPD report also stated that the Title IX Coordinator “had contact with both [the Reporting Party] and [Jane Doe 1] and had talked to Hernandez and McWilliams. Hernandez and McWilliams had gone to [the Title IX Coordinator] without being asked by her when the posts were being made. They talked to [the Title IX Coordinator] about what was being alleged.”

<sup>80</sup> This summary note, which was saved to Advocate, was the only substantive memorialization of the meeting between Jane Doe 1 and the Title IX Coordinator that Cozen O'Connor was able to locate. We note, based on our review of approximately 250 case files in Advocate from the relevant time period, that this was not an aberration; the Title IX Coordinator appears rarely to have saved to Advocate her substantive notes about her meetings with parties.

<sup>81</sup> As noted below, this meeting between the Title IX Coordinator and Jane Doe 1 was also referenced in EMUPD's report relating to the investigation into the Reporting Party's threatening messages towards Hernandez and McWilliams. The EMUPD report stated, “[The Title IX Coordinator] had a private conversation with [Jane Doe 1], the contents of that conversation are not known.”

you ever decided to press criminal charges, there would be a report on file. But again, if you do talk to her, she will not move forward unless you wish to do so.

I meant to ask you this in person but I forgot to, so please excuse the email . . . .”

Based on Cozen O'Connor’s review of targeted emails and the Advocate database, Jane Doe 1 did not reply to this email.

On April 4, 2019, EMUPD interviewed Hernandez and McWilliams as complainants in a separate EMUPD investigation into threatening messages that the Reporting Party sent to Hernandez and McWilliams identifying them as having raped Jane Doe 1. According to EMUPD’s records, during their joint interview with EMUPD, Hernandez and McWilliams each acknowledged that they had engaged in sexual intercourse with Jane Doe 1; they characterized the sexual intercourse as consensual.

On April 9, 2018, an EMU staff member who also served as a sorority chapter advisor emailed the Title IX Coordinator to share that “a couple of the women in my chapter have come to me with a concern regarding a couple men in the Greek system, Thomas Hernandez and Dangelo McWilliams.” The advisor wrote that the women who had come to her said they knew Hernandez had sexually assaulted a woman who did not want to come forward. The advisor wrote that the women expressed concern that no action had been taken with regard to Hernandez and McWilliams, such that they were “getting away with it.” She added that the women felt “uncomfortable around these men and the men of their chapter who are defending them.” The Title IX Coordinator replied to the advisor that she was “aware of this allegation and it is a complicated situation.” The Title IX Coordinator asked the advisor whether the women would be willing to speak with her as part of the “investigation.” We did not locate any response to this email in the Advocate file.<sup>82</sup>

That same day, the Washtenaw County Sheriff’s Office emailed EMUPD’s Police Chief a screenshot of one of the Reporting Party’s social media posts regarding Hernandez and McWilliams.<sup>83</sup> The EMUPD Police Chief forwarded the email to the Title IX Coordinator and asked whether she had “made any progress with [Jane Doe 1].” There was no response to this email filed in Advocate, but the following day (April 10), the Title IX Coordinator emailed Jane Doe 1 to give her a “head’s up” that EMUPD may contact her regarding the investigation into the Reporting Party’s threatening messages to Hernandez and McWilliams.

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<sup>82</sup> Cozen O'Connor’s targeted email search did not include all emails sent between the Title IX Coordinator and this sorority chapter advisor.

<sup>83</sup> EMU is located within the City of Ypsilanti, Michigan. The City of Ypsilanti is located within Washtenaw County, Michigan. The Washtenaw County Sheriff’s Office therefore has jurisdiction over certain criminal matters that occur in or around the University.

In her email to Jane Doe 1, the Title IX Coordinator wrote:

I wanted to give you a head's up that I believe that DPS have become involved and may contact you about a possible harassment issue that is occurring with your roommate (posting accusations on social media). I would like to meet with you, if possible, to talk this through and decide what you might need to help you cope with all that is going on. I want to be sure you are okay.

I could meet today . . . if you would like to do so. Please let me know.

Based on Cozen O'Connor's review of targeted emails and the Advocate database, Jane Doe 1 did not reply to this email.

On April 11, 2018, EMUPD interviewed the Title IX Coordinator in connection with EMUPD's investigation into the reported harassment by the Reporting Party. According to the EMUPD report documenting this interview, "[The Title Coordinator] had contact with both [the Reporting Party] and [Jane Doe 1] and had talked to Hernandez and McWilliams." The EMUPD report stated that Hernandez and McWilliams "talked to [the Title IX Coordinator] about what was being alleged." The EMUPD report further stated that the Title IX Coordinator said in her interview that she had had "a private conversation with [Jane Doe 1]." The EMUPD report stated that the substance of that conversation between the Title IX Coordinator and Jane Doe 1 was "not known," but that the Title IX Coordinator said she had urged Jane Doe 1 to contact the police and that Jane Doe 1 had been unwilling to do so.

That evening, the Title IX Coordinator called EMUPD to report that she had just learned that an EMU student had placed an anonymous note in a stack of class evaluations. The note stated, "Why are we not talking about alleged rape of an EMU student by Thomas Hernandez and Dangelo Williams?" The EMUPD report reflects that EMUPD contacted potential witnesses in an attempt to determine who wrote this note, but was unsuccessful in doing so.

In the ensuing weeks in April 2018, the Title IX Coordinator exchanged emails with McWilliams regarding securing academic accommodations requested by him. EMUPD also conducted outreach on multiple occasions to Jane Doe 1 in connection with the investigation into the Reporting Party, but Jane Doe 1 did not respond to these outreach attempts.<sup>84</sup> EMUPD ultimately arrested the Reporting Party on May 17, 2018 for two counts of felony harassing communications. The Title IX Coordinator emailed Hernandez and McWilliams the following day, asking each to give her a call so that she could provide an update.<sup>85</sup> The Title IX Office subsequently closed its Advocate case file regarding Jane Doe 1. The Advocate file contains a notation accompanying the file closure that stated, "Complainant will not agree to participate."

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<sup>84</sup> In separate interviews, Cozen O'Connor spoke with the Officer In Charge of the EMUPD investigation and the supervising Lieutenant. The Officer in Charge stated that these outreach attempts to Jane Doe 1 were for the purpose of connecting with the Reporting Party, who was friends with Jane Doe 1. She said the outreach attempts were not in connection with the underlying sexual assault allegations involving Hernandez and McWilliams. However, the Officer in Charge said that had she been able to make contact with Jane Doe 1, she would have attempted to talk to her about the sexual assault as well. The Lieutenant reported that he went to the home of Jane Doe 1, who at the time lived with the Reporting Party, in an attempt to talk with the Reporting Party about the online harassment allegations.

<sup>85</sup> Cozen O'Connor located this email as part of its targeted email review. The email was not saved to Advocate.

## **B. March 2018: Student A [Hernandez only]**

In March 2018, the University received a second allegation of misconduct involving Hernandez.

On March 21, 2018, Student A's friend emailed the Title IX Coordinator to express her "concern" that Student A had "been on the receiving end of unwanted attention from a male student." The friend wrote, "On top of making an inappropriate comment to [Student A], [the male student] has stood outside the door during our sorority meeting to stare at her." The friend also wrote that she was aware that the male student had "acted out of turn toward at least one other person aside from [Student A]." The friend noted that Student A had already gone to the Greek Life Coordinator with these concerns.

The Title IX Coordinator replied to the friend, thanking her for raising this issue on behalf of Student A. The Title IX Coordinator sent an outreach email to Student A on March 22, 2018, and met with Student A in person on March 23, 2018. At that meeting, Student A identified the male student as Thomas Hernandez.<sup>86</sup> According to the Title IX Coordinator's notes of her meeting with Student A:

[Student A] described being uncomfortable around [Hernandez] who is the president of IFC because he stares at her a lot and stands close to her and says sexually-charged things to her such as "hey baby girl." [Student A] is engaged. She is going to an event where [Hernandez] will be tonight. She is going to see if his behavior improves or not. If not, she is going to let me know and I will invite [Hernandez] for an informal resolution meeting. [Student A] wants to remain ANONYMOUS if I meet with [Hernandez] because she is concerned he would trash her and is in a position of power.

Student A emailed the Title IX Coordinator on March 28, 2018. She reported that, "Friday went really well [with Hernandez] and I'm going to hold off on any further actions." The Title IX Coordinator thanked Student A and wished her well. In the case closure notes saved to Advocate, the Title IX Coordinator wrote, "[Student A] has stated that the problem seems to be resolved." Cozen O'Connor did not locate any documentation, in Advocate or otherwise, reflecting that the Title IX Coordinator followed up with Student A following receipt of the report involving Jane Doe 1.<sup>87</sup>

## **C. Other Relevant Information**

As noted above, several months after the University received the Spring 2018 reports relating to Jane Doe 1 and Student A's experiences with Hernandez and/or McWilliams, an unknown female sorority member wrote an anonymous letter to the Greek Life Coordinator, accusing the Greek Life Coordinator of sweeping under the rug a recent string of sexual assaults. This letter, sent in or around October 2018 and subsequently forwarded by the Greek Life Coordinator to the

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<sup>86</sup> As described above, the Title IX Coordinator had received a third party complaint about Hernandez in relation to Jane Doe 1 on March 7, 2018 (*i.e.* two weeks prior to this meeting with Student A). The Title IX Coordinator would also meet with Jane Doe 1 on March 29, 2018 (*i.e.* six days after this meeting with Student A) and determined at that meeting that Jane Doe 1 was being "tearful and sincere" in describing her sexual assault by Hernandez.

<sup>87</sup> Again, Jane Doe 1 met with the former Title IX Coordinator in person on March 29, 2018 (*i.e.* one day after Student A informed the Title IX Coordinator that she did not wish to pursue an investigation into Hernandez relating to stalking). According to the Title IX Coordinator's summary of that meeting with Jane Doe 1, "Complainant described the sexual assault. Very tearful and sincere . . ."

Title IX Coordinator, outlined the sorority member’s concerns regarding the “many incidents of sexual assault in the greek [sic] community this semester in particular.”

The anonymous letter did not identify Hernandez or McWilliams by name, but it mentioned several fraternities—including Delta Tau Delta, to which Hernandez and McWilliams belonged—where there had allegedly been recent sexual assaults. The letter stated that “there are certain Delta Tau Deltas who are known BY NAME to have assaulted a girl and nothing has been done in this situation by the Delts or by you.” Finally, the author wrote that she “fe[lt] uncomfortable to be in the home of the Delts” and cautioned that “IFC really needs to re evaluate [sic] the men who sit on that council.”<sup>88</sup>

## **VII. Overview of Other Institutional Actions**

In addition to the Title IX Coordinator’s responses to individual reports, the University undertook broader institutional actions that were designed, in whole or in part, to respond to the concerns regarding student sexual assaults during the relevant time period. These actions included the following initiatives: increased training and prevention programming by the Title IX Coordinator; an action plan drafted by the student-led Inter-Fraternity Council (at the request of the Greek Life Coordinator); a Title IX policy audit; and the creation of a Title IX Research Committee.

### **A. Increased Training and Prevention Programming by the Title IX Coordinator**

In her interviews with Cozen O'Connor, the Title IX Coordinator said that, during her time in the role, she noted an increasing trend in reports relating to incidents at fraternity parties; however, she said the reports were often second- or third-hand. The Title IX Coordinator said that, in response to those reports, she engaged in increased prevention programming with sororities and fraternities.<sup>89</sup> She said that at sorority meetings she educated members about the importance of reporting incidents to the Title IX Coordinator. She also said she highlighted that second-hand and third-hand reports were difficult to meaningfully respond to, given that key details may be unknown and impacted parties may or may not wish to engage in the process. As part of Cozen O'Connor’s targeted email review, we located email exchanges between the Title IX Coordinator and sororities about providing prevention training, which support the Title IX Coordinator’s account that she provided such training.

The Title IX Coordinator also reported engaging in prevention programming with fraternities that included her meeting with “every single fraternity president” to discuss prevention strategies. She recalled discussing the fraternities’ efforts to designate an individual at parties who would remain sober and “ensure that no one goes upstairs.” As part of Cozen O'Connor’s targeted email review, we located a November 1, 2018 email in which Hernandez, who was then

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<sup>88</sup> At the time this letter was sent to the Greek Life Coordinator, Thomas Hernandez was the President of the University’s Inter-Fraternity Council.

<sup>89</sup> The Title IX Coordinator reported that during her time in the role, she engaged in prevention and awareness programming more broadly with the University community. She reported meeting with large groups of students and employees, including Resident Assistants new student employees, and personnel from Housing and Athletics.

the President of the IFC, sought the Title IX Coordinator's input in drafting an action plan to address sexual assault.

## **B. Inter-Fraternity Council**

Following the anonymous letter sent to the Greek Life Coordinator in or around October 2018, the Greek Life Coordinator urged EMU's student-led IFC to take preventative action. On November 1, 2018, then-IFC President Hernandez sought the Title IX Coordinator's input in drafting an action plan to address sexual assault. Hernandez wrote that, in response to "issues happening within the council, along with risk management [issues]," he met with the President of each chapter in the IFC to discuss "many items, all focused around the key subject of sexual assault." Hernandez told the Title IX Coordinator that each president agreed to "go dry and not have any registered or any unregistered event until sanctions are met." Hernandez asked "to sit down with [the Title IX Coordinator] and create an action plan to bring to the Presidents and Vice Presidents [for review]." The Title IX Coordinator replied the same day, "Thank you for this update. It sounds like you are making some great progress in bringing awareness to the issue of sexual assault and that you are working hard to resolve some of the current issues." She also offered times she was available to meet with Hernandez.

Hernandez replied to the Title IX Coordinator on November 7, 2018, apologizing for not setting up a one-on-one meeting with her, and writing, "I will be recommending that each President sets up a one on one meeting with you, to discuss an action plan for each chapter." The Title IX Coordinator replied the same day, "All of that sounds great. Thank you for the update!" As noted above, the Title IX Coordinator reported to Cozen O'Connor that she met with each fraternity president to discuss sexual assault prevention.

On November 13, 2018, the IFC issued a seven-page document titled "Action Planning for IFC at Eastern Michigan University." The document outlined what the IFC called "steps taken to advance the cause of eliminating sexual assault, binge drinking, hyper-masculinity, bystander behavior, and refocusing on what it means to be a fraternity man."

The plan included several key components, including the following:

- IFC placed a hold on all events involving alcohol, including parties, formals and socials. IFC specifically noted that chapter members were still permitted to drink alcohol in their houses but only in the company of other brothers or guests in a non-party setting.
- By February 1, 2019, IFC required at least 80% of each chapter to complete a program with the Coordinator of Greek Life and Leadership Development on the causes and effects of hyper-masculinity, bystander training, and the issue of sexual assault.
- By February 1, 2019, IFC required at least 80% of each chapter to complete GLASS—the Greeks Learning Alcohol Safety Seminar. IFC also required 100% of new members to have completed GLASS by the end of the Winter 2019 semester.
- By February 1, 2019, IFC required newly elected chapter presidents and risk managers to meet with the Title IX Coordinator to create an action plan surrounding sexual assault

prevention for their chapter. The action plans were to be sent to the Coordinator of Greek Life and Leadership Development and IFC so that they could ensure they were adhered to for compliance purposes.

- IFC student leaders committed to working with the Office of Community Health and Wellness to develop a Sober Monitor training that included scenario-based modules.
- IFC encouraged its member chapters to create a culture of reporting social policy violations like serving underage individuals, not having sufficient sober monitors, serving alcohol after hours, and not maintaining a guest list, noting, “As of right now, there have been zero reports made to the Greek Life Office by the IFC regarding social policy violations. We need to create a culture of reporting, not one that does not hold people accountable.”

In November and December 2018, the University’s Student Senate adopted a resolution “to educate and hold the Inter-Fraternity Council accountable for implementing a plan to reduce sexual assault incidents.” The resolution was later adopted by the University’s Student Government.

The text of the Student Senate resolution stated that “[IFC] has six known sexual assault allegations pending against its members,” and “IFC members have engaged in high-risk alcohol consumption [and have] engendered hypermasculinity which creates a toxic environment for the Eastern Michigan University community.” The resolution also stated, “Fraternities associated with IFC have engaged in a culture of non-reporting, actively contributing to an unsafe and illegal environment.” The resolution noted that, on November 13, 2018, the IFC published an action plan to “reverse a culture of adverse behavior.” The Student Government stated that it supported the IFC’s action plan and “urge[d] the IFC to ensure the completion of the current action plan and ... its constant enforcement.”

### **C. Title IX Policy Audit**

In 2019, the University engaged a third party to conduct a review of its Policy and Procedures, including reviewing investigative reports for all completed formal Title IX investigations in academic years 2017-2018 and in the fall of 2018, a sample of Title IX documentation from that timeframe, the Title IX Office’s templates and worksheets, and interviews with EMU’s Title IX implementers.

The audit concluded that EMU had a “high level of compliance” with Title IX and that the University had made a meaningful commitment to Title IX. The audit found that campus Title IX implementers were highly-trained and highly-competent, engaged in widespread prevention education and training, conducted thorough and fair investigations, and were respected and received cooperation from campus partners.

#### **D. Title IX Research Committee**

In 2019, EMU's Provost's Office commissioned a student survey regarding the "sexual misconduct culture" at EMU. The online survey, overseen by the University's Title IX Research Committee<sup>90</sup> and conducted by an independent third party, focused on "EMU students' experiences of sexual misconduct and student perceptions about campus safety and institutional responses."

An invitation to complete the online survey was sent to a sample population of 4,000 EMU students, and approximately 1,300 EMU students completed the survey. In early 2021, after the survey data had been finalized, approximately 70 students participated in 15 focus groups to review the data collected and propose recommendations regarding sexual misconduct prevention.

The Title IX Research Committee compiled the data and drafted a report based on the results. According to the report: "These results suggest that a substantial portion of students do not trust the university and university officials to treat victims/survivors with dignity and respect. Interventions on both sides (students and faculty/staff) are necessary to engender more trust on behalf of the students and knowledge about how best to support them."

A majority of respondents did not know where to get help on campus (60.3%) or where to report sexual misconduct (60.4%). In addition, more than 40% of the respondents did not understand the process for addressing reports of sexual misconduct.

According to the report:

The results . . . provide a framework for current awareness of campus resources, their use, and their efficacy. However, the picture is not entirely positive. A large number of students are not disclosing their experiences of sexual misconduct to EMU. In addition, there is a disparity in reporting between students who live on campus compared to students who live off campus, highlighting the need for more resources geared toward off campus students to both facilitate reporting to EMU and to encourage seeking resources in off campus students' own communities. A partial (but not complete) explanation is that students do not know how to report sexual misconduct, to whom to report sexual misconduct, or about the process after reporting sexual misconduct. Although the university provides ample outreach and education, students are not availing themselves of these resources. It is incumbent upon the university to meet students where they are and provide outreach and education that is timely, relevant, and accessible. Ideally, students should not have to seek out resources on their own; the outreach and education should be pervasive enough that they are impossible to miss.

The final report from the Title IX Research Committee ended with a set of recommendations regarding building capacity in and awareness of the Title IX Office. The Title IX Research Committee further recommended identifying and clarifying reporting mechanisms; addressing online/social media harassment; identifying and addressing barriers to reporting unique to particular populations such as graduate students, LGBTQ+ students, international students, and students from racial or ethnic minorities; and mandating education and training across campus for all populations. The Committee recommended additional EMUPD oversight and campus

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<sup>90</sup> The Title IX Research Committee was comprised of the University's Director of the Office of Research Development and Administration, the Research Compliance Officer, faculty members in the departments of Sociology, Women's and Gender Studies, Criminology, and Philosophy, and the Chair of the President's Commission on Women.

awareness building of EMUPD as a resource and additional campus safety measures such as increased lighting, support for SEEUS (Student Eyes and Ears for University Safety), and other measures. Finally, the Committee recommended more stringent requirements for the Greek system related to sexual misconduct, including investigative responses, online testing, disciplinary measures against organizations with serious or repeated complaints, and further study of root causes. Cozen O'Connor understands that implementation of these recommendations is ongoing.

### **VIII. Review of Report**

Cozen O'Connor shared a high level outline of this report with EMU on April 27 and on May 17, 2022 to provide an opportunity to review the outline, offer any additional information or clarification, and ensure accuracy. Cozen O'Connor did not substantively alter any information, but added clarification and context where needed. Cozen O'Connor appreciates the University's deference to the independence and external nature of the investigation, and no substantive content was eliminated or altered in response to a request or direction by the University.

### **IX. Summary of Facts**

Cozen O'Connor's external review focused on fact-gathering relating to the University's response to known reports of misconduct involving Durbin, Hernandez, and McWilliams. Cozen O'Connor was not asked to make findings in this investigation, but rather to prepare a detailed and comprehensive report where the facts would speak for themselves. As detailed in this report, the facts gathered—without the participation of any of the complainants<sup>91</sup>—reflect that:

(1) On November 10, 2018, the University received one anonymous report of sexual assault by Durbin in which the reporter did not provide their name or contact information, which effectively prevented the Title IX Coordinator from being able to identify the author of the report. The Title IX Coordinator forwarded the report to the Greek Life Coordinator, but ultimately closed the case file with the note, "Unable to determine identity of complainant. Will reopen if more information becomes available."

(2) On March 7, 2018 and on April 9, 2018, the University received reports from two separate third parties that Hernandez and McWilliams jointly sexually assaulted Jane Doe 1. Once the Title IX Coordinator learned the identity of Jane Doe 1, the Title IX Coordinator sent outreach to Jane Doe 1 and requested to meet. On March 27, 2018, Jane Doe 1 met with the Title IX Coordinator, but ultimately declined an investigation. The Title IX Coordinator honored Jane Doe 1's preference to not pursue an investigation. Subsequently, Jane Doe 1 sought and received interim measures in the form of academic accommodations from the Title IX Office.

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<sup>91</sup> The University continues to encourage all community members, both current and former, who were affected by sexual assault while at EMU or who have information regarding such sexual assaults to contact the University or external law enforcement authorities.

(3) On March 21, 2018, the University received a third party report that Hernandez engaged in stalking of Student A. Student A met with the Title IX Coordinator, but also declined an investigation. The Title IX Coordinator honored Student A's request to not investigate the reported conduct. The files do not reflect that the Title IX Coordinator evaluated whether the reports relating to Student A and Jane Doe 1 indicated a pattern of conduct involving Hernandez, in light of the two separate complaints to the Title IX Office about Hernandez within one month.

(4) The additional reports of misconduct involving Durbin, Hernandez, and McWilliams outlined in the criminal and civil complaints were not known to the University until around the time of the filing of those complaints, whereupon prompt outreach to provide supportive measures by the University to the complainants was made.

(5) In October 2018, the Greek Life Coordinator received a letter from an anonymous female sorority member reporting a pervasive culture of sexual assaults at fraternity parties. This letter, coupled with the Title IX Coordinator's observation that she had been receiving an increasing trend of reports of sexual assault in Greek Life, prompted additional University action. That action included the Title IX Coordinator providing education and prevention programming to fraternities and sororities, and the Greek Life Coordinator directing the student-led IFC to develop an action plan. Thereafter, the University's Student Senate adopted a resolution "to educate and hold the Inter-Fraternity Council accountable for implementing a plan to reduce sexual assault incidents." The resolution was later adopted by the University's Student Government.

(6) The Title IX Office's case files did not consistently include all relevant documentation, including key communications with parties, meeting notes, and the rationale for key case-related decisions such as whether to honor a complainant's request not to proceed with an investigation. This incomplete record-keeping limited our ability to provide as full and complete a picture of the University's response as we would have been able to had the Title IX Coordinator and the Greek Life Coordinator kept contemporaneous notes of the totality of their responses to reports of sexual and gender-based harassment and violence.

## **X. Conclusion**

Cozen O'Connor appreciates the opportunity to conduct this external review. This report reflects our best efforts to conduct a neutral, impartial, and thorough fact-gathering process. As described above, our review, observations, and factual synthesis were not influenced or directed by the University, and the information in this report represents a candid, external accounting of the information available to Cozen O'Connor as of the date of this report. We are deeply appreciative of the many individuals who participated in this external review and are grateful to them for sharing their insights and observations. We encourage anyone with additional information to share that information with the University or external law enforcement authorities.