Faculty Senate Executive Committee
Questions/Comments in Re:
Interim Sex and Gender-Based Discrimination, Harassment, and Retaliation Policy

Deborah Wilkins' Responses

October 16, 2020 (Friday)

1. Section I.C: "The University specifically reserves the right to modify and/or amend the policy and procedures outlined herein as circumstances may require; affected parties will be notified in the event circumstances arise that warrant amendments." - *What is the point of having a policy and set of procedures if the Coordinator can make changes on a case by case basis? What are situations where things would need to be amended?*

This is generic language typically included in policies that include investigations and/or hearings. It is not intended to be utilized, except in extreme cases where some circumstance has caused an unforeseen disruption or delay in the *process*. For example, a need may arise, in which an Investigator needs to be replaced due to a conflict of interest (e.g., a family member of the Respondent, exhibited evidence of being unfair to the Complainant and/or Respondent). As another example, a deadline may need to be extended due to an emergency (e.g., snowstorm, COVID-19 outbreak). In summary, I would not "modify and/or amend" a substantive part of our Interim Policy.

2. Section I.E.: I'm having trouble finding the exact text of the definition she's citing online. I don't believe the emphasis placed on the "and"s is in the original. I get that it's the difference that is trying to be shown, but I feel there's a better way to do that. Reading the first few sentences, I questioned whether a one-time sexual assault would count (not really pervasive although the effects are). It later says that sexual assault counts as sexual harassment in this paragraph but it doesn't mention it again later on when the definition of severe and pervasive and objectively offensive is mentioned again. I would prefer to simply say "sexual harassment and sexual assault" rather than defining sexual assault as sexual harassment.

Definitions used in our Interim Policy were determined, and required, by the Department of Education's Office for Civil Rights (OCR) and cannot be modified by WKU. Language cited by the SEC member above (in Section I.E.) notes that conduct can be assessed under the standards set for Title IX ("and, and"; severe, and pervasive, and objectively offensive) and Title VII ("or, and"; severe, or pervasive and objectively offensive), depending on circumstances. The new OCR regulations convey sexual harassment as an overarching concept that includes sub-concepts of sexual assault, domestic violence, dating violence, and stalking.

3. Section IV.A.: I still have strong reservations about mandated reporting by employees. I believe that chills help seeking by those who are vulnerable and removes agency from victims who need it. This is a federal mandate that we can't go against.

Correct. Mandatory reporting is federally required; however, there are additional resources victims can utilize who are not required to report (e.g., counselors, medical doctors). Another perspective is that WKU has investigators who are extensively trained in creating safe-havens and environments of support for victims to convey what they experienced.

4. Section IV. B.: So if a student makes a report and doesn't specifically request for it to be investigated (1) or include a physical or digital signature (2), it won't be? How does that contact go to clarify with the complainant (3): "Hi we got your complaint that you were raped on Saturday but you didn't include an electronic signature so can you please resubmit the report including that? Also, you must specify that you want us to investigate or nothing will be done. Have a nice day."

The new OCR regulations distinguish between a "report" and a "complaint." If a student makes any kind of "report", I (the Title IX Coordinator) will reach out to them and have a conversation. This dialogue will provide an opportunity for me to walk the student through our Interim Policy and process, explore options, and allow them to decide if they wish to file a formal complaint and be noted as a Complainant. For a rape case, used as an example in the above inquiry, if the student does not specifically request that their allegations be investigated, I would type and send them a summary of notes from their report (based on what I understood), and request that they review, revise, and approve them. Part of this follow-up communication would allow me to clarify with the student that in order for them to become a Complainant, if so desired, I would need their signature.

If the student chooses not to become a Complainant, I have the option to file a formal complaint on their behalf and investigate the allegations. To assist me in making a final determination, however, notes taking from/during the initial report would be utilized. The Title IX Coordinator has completed many hours of training and works closely with the University's Coordinator of Sexual Assault Services. Victims of sexual assault are, and will continue to be, treated with discretion, respect, and dignity in all aspects of the process.

5. Section IV.C.: So employees must make a formal report to Title IX Coordinator, but if Title IX Coordinator receives information, then she can use her judgement to decide to make contact or not? How can supportive measures be offered regardless of whether contact is made?

An attempt to contact the alleged impacted party will always be made, once a report is received. The important takeaway is that supportive measures *are always offered to the alleged victim of any report from a Third Party*. The University's Interim Policy is compliant, in so far as supportive measures are immediately offered to the alleged victim AND at the same time, the alleged victim *is informed of their right to file a formal complaint and provided with information regarding how to do so*. The *rule* allows the Title IX Coordinator to "exercise their [my] best judgement to initiate contact", but WKU's Interim Policy is clear and conveys that contact with the alleged victim will always occur. If the alleged victim does not respond to my initial attempt of contacting them within a reasonable timeframe (2 to 3 days), I will provide supportive measures based on information I received from the initial report and re-iterate to the alleged victim that they can still contact me if they wish to converse/proceed further.

6. Section IV.D: An exact timeline was specified in the previous policy. That should be included here.

Because of the additional steps required under the new regulations (e.g., creation and submission of multiple reports, communication with the Complainant and Respondent before the hearing, the length of time to coordinate a pre-hearing and hearing), working through an investigation, conducting a hearing, and participating in an appeals process cannot be reasonably accomplished within 60-days.

What I noted in the previous sentence, which is exceptionally complex and time consuming, is a structure for one case. Our University normally works through a significant number of cases simultaneously; therefore, specifying a timeframe within our Interim Policy would more than likely provide unreasonable expectations and undue hardships for all individuals involved. In addition, federal law does not identify or require a specific time frame for an investigation or complaint resolution; the substantial nature of these complaints make it unreasonable to set a specific time frame for a determination. The University will always strive to act promptly and avoid unnecessary delays; however, each complaint is fact specific, which makes it impossible to state (with certainty) how long a thorough, reliable, and impartial investigation may take to complete.

7. Section IV.H.: Cite the WKU policies that are referred to.

The following are some policies referred to in the aforementioned section:

- ***0.2040, Discrimination and Harassment Policy***;
- ***4.800, Standards of Conduct Policy***;
- ***5.5023, Information Technology Acceptable Use Policy***.

8. Section V.A.3.: Especially if everyone else is a mandated reporter, there need to be policies and procedures here regarding how the Title IX Coordinator executes this conversation so Complainants aren't steered into decisions they don't want to make regarding informal vs administrative resolutions.

I am willing to discuss this comment with the concerned SEC member(s).

9. Section IV.B.1.b.: So off campus, after hours harassment is not subject to this policy?
   Section IV.B.1.d.: So WKU activities in international settings are not subject to this policy?
   For both of these, this is part of the new federal guidelines but our university needs to do better. If a student is sexually assaulted off campus, the university should still be doing everything possible to help our students.

In reference to the "off-campus" and "after hours harassment" inquiry, the following response is appropriate: it depends. For example, if sexual harassment occurred off-campus (and after hours) at an event sponsored by WKU (for educationally related programs and activities) on WKU property, the alleged incident could potentially be subject to our Interim Policy. An assessment and determination regarding policy jurisdiction would depend on if the incident was severe, and pervasive, and objectively offensive. In reference to the "international settings" inquiry, international settings are not subject to our Interim Policy. However, WKU has other policies (e.g., Discrimination and Harassment, the Student Code of Conduct, Standards of Conduct, Workplace Violence) that are, and will be, applicable for assessing and addressing sexual discrimination and/or assault that occurs off campus or in international settings. Our Interim Policy is specifically written to address the narrow requirements of new rules issued by the OCR in May 2020; however, WKU will continue to address all incidents of sexual harassment that occur in educational programs or activities through the most appropriate policy.

10. Section IV.B.1.e.: So if a senior is harassed during their last semester by someone who will continue to be at WKU, the process stops as soon as that senior graduates?

Under our Interim Policy, if the senior filed a formal complaint (or a formal complaint was filed on their behalf) the following response is appropriate for the above inquiry: technically, yes. However, and as noted in my response to question #9, there are additional policies that may be utilized to continue assessing the allegations.

11. Section IV.I.2: This is actually an improvement over what we had.

12. Section VI. C. and D. Should be moved up or at least defined in Section V.A.1 and 2.

Ok. Thanks for the recommendation. This is a primary reason why our policy is interim; to allow an opportunity for feedback to be offered, received, and implemented.

13. Section V.2.c: Such as? If the respondent simply doesn't respond, does that count?

Our Interim Policy does not have a "V.2.c" section; however, from searching through the document, I believe the above inquiry sought to reference "V.B.2.c" that states "specific circumstances prevent WKU from gathering evidence sufficient to reach a determination as to the formal complaint or allegation(s) therein." If this is correct, the lack of response by a Respondent could count as meeting this threshold if no witnesses were involved (whether primarily or by way of the Complainant or Respondent talking about what allegedly occurred), for example.

14. Section VI.B.: Who can be chosen as an advisor? Is it the list of Title IX Investigators? (No, it wouldn't be them but it should be specified who can be – also, what is their training and what is their role?) How are complainants notified of their ability to choose an advisor and how to do so?

The Complainant and Respondent are advised (verbally and in writing) of their right to have an Advisor upon completion of the Title IX Coordinator's initial assessment (Section V.A.). If the Complainant or Respondent do not identify and choose an Advisor, one will be identified and appointed for them by the University. The Department of Education's rules do not define the word "Advisor", nor specify the role of an "Advisor" except to the extent that only the parties' Advisors may pose questions to the other party, investigator(s), and/or witness(es). The Department of Education's rules do not permit the Complainant or Respondent to question each other, the investigator(s), or the witness(es), however. The Department of Education (DOE) does not require any specific prerequisite training for persons who serve as Advisors, nor does our Interim Policy. However, an Investigator who did not serve in such role for a particular case may serve as an Advisor.

15. Section VI.C.: This is a logical conflict here. The first paragraph in this section conflicts with subsection 1 where it says "any party participating in an Informal Resolution can stop the process at any time and Request an Administrative Resolution."

The DOE's rules require that either party may cease discussion of an Informal Resolution, and proceed to an Administrative Resolution with [a] Hearing at any time. What I can do within our Interim Policy is add "with Hearing" after each time "Administrative Resolution" is utilized so the terminology will reflect "Administrative Resolution with Hearing." I can see how current wording could be misinterpreted as the Informal Resolution being the same as an "Administrative Resolution" that does not include a hearing. The Informal Resolution is an "agreed" upon form of resolution by both parties; however, if the parties are not making progress, or perceive they are at a stalemate, one or both should have the right to move forward and pursue the Administrative Resolution with [a] Hearing. An Informal Resolution can be attempted prior to, or after, an Administrative Resolution with [a] Hearing has been enacted.

16. Section VI.D.4: Time frame should be specified.

Please see response provided for question #6.

17. Section VI.E.: "An investigation will proceed under the presumption that the respondent has not engaged in conduct in violation of this policy…"??? Again in VI.E.5.d. (Innocent until proven guilty?)

This is correct. The new OCR regulations places a significant emphasis on due process, especially for the Respondent. A number of issues previously handled nationally presumed a Respondent was guilty of the allegations without providing them with due process.

18. Section VII overall: This is the worst part of the new federal guidelines. It is crazy to make a complainant sit in a room and be cross-examined by the respondent or a representative of the respondent. The university should do everything possible to make sure that the complainant and the respondent do not see each other or have to interact with each other and, at minimum, there should be no penalty if they do not want to be in that situation (like it seems to say in VII.B.2.c).

Yes, I completely feel the same about cross examinations being a significant challenge that could create environments of discomfort. However, measures will be taken to provide a supportive milieu for the Complainant and Respondent. Either party can request that the hearing be conducted by videoconference, for example, with the other party (and their Advisor) in separate (virtual) rooms. Because postsecondary institution hearings must be live and conducted in real time, all participants (e.g., parties, advisors, witnesses, the decision-maker), must be able to see and hear each other at all times.

19. Section VII.A.6.: Does this exclude Regents? It needs to.

Correct, this section means a Board of Regents' member cannot serve as a Hearing Officer/Decision-Maker.

20. Section VII.A.: There is no process outlined for how a Hearing Officer/Decision-Maker is selected. Who pays for them?

The Kentucky Council on Postsecondary Education has issued a Review for Proposal to generate a list of attorney "contractors" who can serve as hearing officers for the state universities in Kentucky. In

addition to being licensed to practice law in Kentucky, and in good standing with the Kentucky Bar Association, the person must have training and continuing education requirements of hearing officers set forth in KRS 13B.030 and 40 KAR 5:010. The rate charged cannot exceed $125.00 per hour, which would be paid by the state university utilizing the Hearing Officer/Decision-Maker. Selection of a Hearing Officer/Decision-Maker to oversee a particular WKU hearing would likely be from a pool of individuals, based on their availability, proximity to Bowling Green/Warren County, and absence of having a conflict of interest (i.e., with parties, WKU, etc.). Ultimately, the person chosen to serve in this role would be based on these factors.

21. Section VII.B.2.c.: If a complainants witnesses cannot show up at a given hour with ten days notice, all their previous statements and interviews simply aren't considered?

This is correct, absent compelling circumstances (e.g., hospitalization). The same would be true if a Complainant or Respondent could not be present; only information conveyed during a hearing is allowed to assess the allegations and provide a finding.

22. Section VII.B.2.g.: The Respondent gets to submit an impact statement? (also part of new federal guidelines – we have to care more about the respondent and they have to get equal treatment in this process)

That is correct. In addition, my response to question #17 is also pertinent here.

23. Section VII.C.1.b.: This conflicts with Section VII.B.2.c. pertaining to the issue addressed above. So potentially allowing witness statements to be considered if they are not present at the hearing is only allowed if the Hearing Officer/Decision-Maker decides to convene a pre-hearing meeting?

No, this provision in our Interim Policy pertains to excusing witnesses because their testimony has been deemed "not relevant or directly related" to the matter.

24. Section VII.C.2.: "The investigation does not consider…questions and evidence about the Complainant's or Respondent's sexual predisposition or prior sexual behavior unless … the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent." ?!?!?!?!

I would be willing to discuss this question/comment with the concerned SEC member(s). In summary, questions regarding a Complainant's or Respondent's predisposition or sexual past could be deemed as a form of bullying. However, if the Complainant and Respondent have been in a consensual relationship and cohabitating for an extended period of time at the time of the alleged policy violation, this "prior sexual behavior" could be relevant information to a Hearing Officer/Decision Maker.

25. Section VII.E.5.: This conflicts with Section VII.C.1.b. regarding consideration of statements by witnesses not present at the hearing.

Let me see if I can provide some clarity here. Section VII.E.5 addresses a party or witness who does not attend a hearing, or who attends but refuses to be cross-examined. Section VII.C.1.b, however, relates to witnesses being excused from participating in a hearing because their testimony has been

deemed (by the Hearing Officer/Decision-Maker) as "not relevant or directly related" to the matter. Based on these distinctions, there is no conflict.

26. Section VII.F.2.: Avoid NO abbreviation and just spell out Notice of Outcome each time.

We will take this under consideration.

27. Section VII.F.2.c.: What are the criteria for granting an extension of this time period?

Because an extension would requested by the Hearing Officer/Decision-Maker, a descriptive list of criteria was intentionally not included. Stated another way, the Hearing Officer/Decision-Maker should have broad discretion in the reasoning or basis for requesting an extension, given it is the Title IX Coordinator's decision whether to grant it or not.

28. Section VII.G.1: At WKU, the Title IX student investigator and the Director of Student Conduct, who administers the sanctions, is the same person. This goes against regulations and best practices.

I appreciate this comment but it is not accurate. The confusion is understandable and will be clarified by an amendment we will make to the Interim Policy. The Office of Student Conduct is not one and the same as the Office of Student Conduct Director. The intent was, and is, that the Student Disciplinary Committee (SDC) will determine appropriate sanctions for student violations of our Interim Policy. The SDC operates under the auspices of, and is a body convened and coordinated by, the Office of Student Conduct. However, since the Interim Policy was drafted, the DOE issued a guidance letter (September 4, 2020 – Friday), that stated a written decision that determines whether a violation has occurred, must also include the remedies and disciplinary sanctions.

In this regard, the Interim Policy will be amended to include that no less than three members of the SDC (to be identified by the SDC membership) will attend all parts of the hearing, and may (at the Hearing Officer/Decision-Maker's discretion), assist in her/his/their deliberation. In the event the Hearing Officer/Decision-Maker determines a violation has occurred, the SDC members will (as part of the hearing process) determine appropriate remedies or disciplinary sanctions; the remedies or sanctions will be incorporated into the Hearing Officer/Decision-Maker's Notice of Outcome.

29. Section VII.G.3.: The Title IX coordinator could not be informed for two weeks after sanctions have been implemented? This is actually an improvement over what we had previously where the Title IX Coordinator was never notified about sanctions and therefore had no idea if they were carried out or not.

Thanks for this feedback. The above refers to a being notified "no later than" (two weeks philosophy) and was included to provide appropriate persons (e.g., supervisors) with time to address sanctions and draft appropriate documents, for example.

30. Section VIII.: Process for appointment of Appeal Decision-Maker?

The process will be the same as that implemented for the Hearing Officer/Decision Maker selection. This was/is described in my response to question # 20.

31. Section VIII.B.1.b.: The “and” at the end of this needs to be an “or” otherwise grounds for appeal will never be satisfied.

Thank you. This correction will be made.