

External Report re:  
University Response to Report of  
Dating/Domestic Violence

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University of Colorado Boulder

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## Table of Contents

	Page
<b>I. Overview .....</b>	<b>1</b>
<b>II. Scope of Engagement.....</b>	<b>2</b>
<b>III. Regulatory Framework .....</b>	<b>2</b>
<b>A. Title IX.....</b>	<b>3</b>
<b>B. Clery Act (as amended by VAWA) .....</b>	<b>4</b>
<b>IV. Policies at Issue.....</b>	<b>6</b>
<b>A. Laws of the Regents .....</b>	<b>6</b>
<b>B. Regent Policy 1(C) – Principles of Ethical Conduct .....</b>	<b>7</b>
<b>C. Sexual Misconduct Policy and Procedures (APS 5014).....</b>	<b>8</b>
<b>D. CU Boulder Discrimination and Harassment Policy and Procedures .....</b>	<b>9</b>
<b>E. OIEC Process and Procedures 2016-2017 .....</b>	<b>11</b>
<b>F. Campus Security Authority Reporting Responsibilities .....</b>	<b>12</b>
<b>G. Specific Contract Provisions .....</b>	<b>13</b>
<b>V. Investigative Chronology.....</b>	<b>16</b>
<b>VI. Factual Chronology .....</b>	<b>17</b>
<b>A. Background and Context .....</b>	<b>18</b>
<b>B. December 6 to 10, 2016: The Complainant’s Disclosure to the University .....</b>	<b>19</b>
<b>C. December 11, 2016 to January 5, 2017: The University’s Response .....</b>	<b>27</b>
<b>D. December 18 to 22, 2016: Temporary Protection Order and Report to Broomfield     Police Department.....</b>	<b>37</b>
<b>E. December 24, 2016 to January 5, 2017: The Alamo Bowl.....</b>	<b>40</b>
<b>F. December 29, 2016 to January 5, 2017: Continued Court Action on the TPO .....</b>	<b>41</b>
<b>G. January 6, 2017: TPO Filing Becomes Public and Tumpkin Placed on Leave.....</b>	<b>42</b>
<b>H. OIEC Investigation into Tumpkin .....</b>	<b>46</b>
<b>I. January 10, 2017: Broomfield PD Announces Criminal Investigation.....</b>	<b>48</b>
<b>J. Inquiry from Sports Illustrated .....</b>	<b>49</b>
<b>K. OIEC Inquiry and Actions re: Tumpkin’s Employment Status .....</b>	<b>53</b>
<b>L. February 2017: Sports Illustrated Article and University Statements .....</b>	<b>55</b>
<b>VII. Overview of Relevant Training and Education .....</b>	<b>58</b>
<b>A. 2014 External Audit.....</b>	<b>58</b>
<b>B. 2013 Training Records and Materials.....</b>	<b>59</b>
<b>C. Intersections with OIEC.....</b>	<b>60</b>
<b>D. Current Training .....</b>	<b>61</b>
<b>VIII. Opportunity for Review and Comment .....</b>	<b>63</b>

<b>IX. Findings.....</b>	<b>63</b>
<b>A. Overview .....</b>	<b>63</b>
<b>B. Sexual Misconduct Policy (APS 5014).....</b>	<b>65</b>
<b>C. Discrimination and Harassment Policy .....</b>	<b>69</b>
<b>D. OIEC Process and Procedures.....</b>	<b>70</b>
<b>E. Regent Policy 1(C) – Principles of Ethical Conduct .....</b>	<b>72</b>
<b>F. Campus Security Authority Reporting Responsibilities .....</b>	<b>73</b>
<b>G. The Laws of the Regents.....</b>	<b>75</b>
<b>H. Employment Contracts.....</b>	<b>75</b>
<b>I. Institutional and Supervisory Authority .....</b>	<b>75</b>
<b>J. Conclusion .....</b>	<b>79</b>
<b>X. Recommendations.....</b>	<b>80</b>

## I. Overview

On December 9, 2016, University of Colorado (CU or Boulder) Head Football Coach Mike MacIntyre received a first-person report of dating/domestic violence involving assistant football coach Joe Tumpkin. Tumpkin's former girlfriend, referred to as the Complainant in this report, contacted MacIntyre by email and Facebook; MacIntyre called the Complainant immediately upon learning the Complainant had been trying to reach him. The Complainant disclosed a two-year history of physical and emotional abuse by Tumpkin, some of which she reported occurred in the context of University programs; she asked for MacIntyre's assistance in getting Tumpkin help and counseling, but said that she did not want to report the abuse to law enforcement. MacIntyre elevated the report to Rick George, CU's Athletic Director, who elevated the report to Chancellor Phil DiStefano. DiStefano erroneously determined that there was no obligation to report Tumpkin's intimate partner violence to the University's Office of Institutional Equity and Compliance (OIEC), and informed George of his determination. Consequently, despite University policy requirements to the contrary, neither MacIntyre, George nor DiStefano reported the allegation to OIEC. No steps were taken to evaluate the nature, extent, or location of the Tumpkin's conduct to inform its impact on the University community or the employment status of Tumpkin. As a result, the Complainant received no outreach from the University until January 9, 2017, a month after her initial report and only after media reports of a protection order she sought against Tumpkin.

In the interim, on December 19, 2016, the Complainant reported Tumpkin's conduct to the Broomfield Police Department and on December 20, 2016, sought a civil protection order. A temporary protection order was issued on December 20, 2016 and acknowledged by Tumpkin's attorney on December 21, 2016. Tumpkin continued to coach during this time, and on December 16, 2016, it was announced that Tumpkin would serve as the play caller in the Alamo Bowl game in late December 2016. On January 6, 2017, *The Boulder Daily Camera* contacted the University to seek comment on a civil temporary protection order. Later that afternoon, after obtaining a copy of the civil temporary protection order, MacIntyre and George placed Tumpkin on administrative leave.

On January 8, 2017, Valerie Simons, the University's Title IX Coordinator and Executive Director of the OIEC, initiated a preliminary inquiry into the Complainant's allegations to determine if OIEC had jurisdiction to pursue action against Tumpkin. OIEC also contacted the Office of Victim Assistance (OVA), which immediately reached out to the Complainant to provide support and advocacy. On January 25, 2017, the Boulder County District Court issued a permanent protection order against Tumpkin. On January 26, 2017, Tumpkin resigned from the University. On January 31, 2017, the Broomfield Police Department charged Tumpkin with multiple counts of felony assault.

OIEC also initiated an inquiry into reports that MacIntyre, George and DiStefano failed to report the dating/domestic violence allegation to OIEC. Because Simons reports directly to DiStefano, and to avoid any conflict of interest, Simons, who later informed the Board of Regents of her decision, retained Gina Maisto Smith and Leslie M. Gomez of Cozen O'Connor to conduct an external review regarding the failure to report the dating/domestic violence allegations.

Cozen O'Connor conducted a robust factual inquiry, made findings, and provided legal advice to the University. In addition, the University engaged Ken Salazar and Bruce Berman of Wilmer Cutler Pickering Hale and Dorr LLP (WilmerHale) to assist and advise the University.

On March 27, 2017, Cozen O'Connor presented preliminary findings to the Board of Regents. At the conclusion of the investigation, Cozen O'Connor presented a written report to the Board of Regents on May 19, 2017. This report presents Cozen O'Connor's factual findings, conclusions and non-disciplinary recommendations. Some private or personnel information has been redacted, and non-essential facts truncated in some areas, in order to facilitate the University's request that the Cozen O'Connor report be made public. The findings and conclusions relevant to the University's response and our findings, however, are presented without redaction.

In sum, we find that MacIntyre, George and DiStefano each failed to report the allegation of dating/domestic violence to OIEC in violation of University policy, and that the explanations offered by each did not justify inaction.

## **II. Scope of Engagement**

On February 14, 2017, CU-Boulder engaged Cozen O'Connor to conduct an impartial, thorough, and prompt inquiry pursuant to applicable university policies and procedures regarding the failure to report allegations of dating/domestic violence involving a University employee, Joe Tumpkin, and the Complainant, his former girlfriend, and to provide recommendations, as necessary, to improve the University's policies and practices.

This external review was conducted pursuant to the *Laws of the Regents*, Regent Policy 1-C, the University of Colorado Boulder Sexual Misconduct Policy (APS 5014, SM Policy), University of Colorado Boulder Discrimination and Harassment Policy (DH Policy), the University of Colorado Boulder Office of Institutional Equity and Compliance (OIEC) Process and Procedures (P&P), related University policies, contract provisions, and related disciplinary authority. For completeness, we include MacIntyre and George's contractual obligations in this report, as they are relevant to understanding their roles and responsibilities, but we defer any determination about whether the contracts have been violated to the University.

Although we present the facts as reported by the Complainant and other individuals for context, we make no finding as to whether Tumpkin engaged in acts of dating/domestic violence. Our review focused on an assessment of the institutional response to the Complainant's report of dating/domestic violence, and for the purposes of this review, we accept the allegations as reported.

## **III. Regulatory Framework**

The institutional response to sexual and gender-based harassment and violence is governed by a complex federal and state regulatory framework. The federal framework is based on two primary statutes: Title IX of the Education Amendments of 1972<sup>1</sup> (Title IX) and the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act<sup>2</sup> (Clery Act or Clery), as amended by Section 304 of the Violence Against Women Reauthorization Act of 2013 (VAWA).<sup>3</sup> This discussion is

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<sup>1</sup>Title IX is codified starting at 20 U.S.C. § 1681.

<sup>2</sup>20 U.S.C. § 1092(f).

<sup>3</sup>Pub. L. 113-4, Violence Against Women Act of 2013 (Mar. 7, 2013).

included to provide context about an institution of higher education’s obligations, which must be reflected in an institution’s written policies and procedures.

### **A. Title IX**

Title IX is a federal civil rights law that provides 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>4</sup> Title IX applies to all educational institutions that receive federal financial assistance, either directly or indirectly, including public and private elementary and secondary schools, school districts, colleges, and universities.<sup>5</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>6</sup> Title IX also applies to a broad spectrum of conduct, including all forms of sex discrimination, sexual and gender-based harassment, sexual misconduct, and sexual violence.<sup>7</sup> Title IX’s protections apply to conduct that occurs on campus, in the context of any institution-related education program or activity, or where there are any continuing effects on campus or in an off-campus education program or activity that create or contribute to a hostile environment. Finally, Title IX applies equally to students, employees and third parties.<sup>8</sup> The nature of the third party’s relationship to the educational institution, including whether the third party is a complainant or respondent, may dictate the manner in which the institution’s policies and procedures are applicable. For example, an educational institution may have limited ability to discipline a third party, but in contrast, may be deemed to be on notice of discriminatory conduct by a student or employee based on the report of a third party. As a result, an educational institution’s legal and policy obligations may not apply to a third party complainant or respondent in the same manner in which they apply to a student or employee.

Under Title IX, when an educational institution knows or reasonably should know about sexual harassment that creates a hostile educational or working environment, the institution must take immediate and appropriate steps to investigate or otherwise determine what occurred; if an investigation reveals the existence of a hostile educational or employment environment, the institution must then take prompt and effective steps reasonably calculated to eliminate the hostile educational and employment environment, prevent its recurrence and address its effects.<sup>9</sup> An institution violates Title IX if it has “notice” of a sexually hostile educational or employment environment and fails to take immediate and corrective action.

An institution is deemed to have notice if a responsible employee knew or, in the exercise of reasonable care, should have known, about the harassment. A responsible employee includes any employee who: (1) has the authority to take action to redress the harassment; (2) has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or

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<sup>4</sup>20 U.S.C. § 1681(a).

<sup>5</sup>20 U.S.C. § 1681(a); 34 C.F.R. § 106.11.

<sup>6</sup>*See generally* 20 U.S.C. § 1681 *et seq.*; 34 C.F.R. Part 106.

<sup>7</sup>U.S. Department of Education, Office for Civil Rights Dear Colleague Letter, April 4, 2011 (2011 DCL) at 1.

<sup>8</sup>*See* 34 C.F.R. § 106.8(b) (requiring schools to adopt and publish grievance procedures for students and employees); 34 C.F.R. § 106.51 (prohibiting discrimination on the basis of sex in employment in education programs or activities); *see also* 2011 DCL at n. 11 (“Title IX also protects employees of a recipient from sexual harassment.”).

<sup>9</sup>*Id.* at 4; 1997 Guidance; Questions and Answers on Title IX and Sexual Violence, Office for Civil Rights, April 29, 2014 (Title IX Q & A) at 2-3.

employees; or (3) a student could reasonably believe has the authority or responsibility to take action.<sup>10</sup> To facilitate the institution's compliance with Title IX, responsible employees are 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>11</sup> The institution's Title IX obligations exist regardless of whether the individual who was harassed makes a complaint or asks the institution to take action<sup>12</sup> although the institution may consider a complainant's request for anonymity, or not to pursue an investigation, when determining an appropriate institutional response.

Once an institution has notice of an allegation of sexual or gender-based harassment or violence allegation within its educational or employment activities, it must 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 is pending.<sup>13</sup> The institution should 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>14</sup> Under Title IX, the range of interim measures available to a student, employee, or third party complainant may vary based on their legal relationship to the institution. The institution should also inform the complainant of their Title IX rights and the right to report a crime to campus or local law enforcement.<sup>15</sup>

## **B. Clery Act (as amended by VAWA)**

The Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act<sup>16</sup> is a federal statute enacted in 1990 that requires all institutions of higher education that receive federal financial assistance, either directly or indirectly, to keep and publish information about crime on or near their campus.<sup>17</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>18</sup>

Clery requires that schools report enumerated offenses and disclose statistics for Clery crimes reported to the local police and those personnel who are Campus Security Authorities.<sup>19</sup>

The Clery Act also requires timely warning notification to the campus community of an enumerated set of Clery Act crimes reported to Campus Security Authorities or local police that the school considers a serious or continuing threat to students and employees.<sup>20</sup> Finally, the Clery Act mandates that schools develop policies, procedures and programs regarding sexual assault, dating violence, domestic violence, and stalking.<sup>21</sup> These procedures must include a clear statement that

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<sup>10</sup>Title IX Q & A at 15-16.

<sup>11</sup>Title IX Q & A at 16.

<sup>12</sup>1997 Guidance.

<sup>13</sup>Title IX Q & A at 32-33.

<sup>14</sup>Title IX Q & A at 32-33.

<sup>15</sup>*Id.*

<sup>16</sup>20 U.S.C. § 1092(f).

<sup>17</sup>*See generally* 20 U.S.C. § 1092 (f); 34 C.F.R. § 668.46.

<sup>18</sup>U.S. Department of Education, *The Handbook for Campus Safety and Reporting* (2016 Edition), <http://www2.ed.gov/admins/lead/safety/handbook.pdf>.

<sup>19</sup>20 U.S.C. § 1092(f)(1)(F); 34 C.F.R. § 668.46(c).

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

<sup>21</sup>20 U.S.C. § 1092 (f)(8); 34 C.F.R. § 668.46(b)(11).

the proceedings will entail a prompt, fair, and impartial investigation and resolution.<sup>22</sup> Notably, the procedural requirements for disciplinary procedures set forth in Clery, as amended by VAWA, are not limited by Clery geography. As set forth in *The Handbook for Campus Safety and Reporting* (2016 Edition), “You must follow your [policy] statement regardless of where the alleged case of dating violence, domestic violence, sexual assault or stalking occurred (i.e., on or off your institution’s Clery Act geography).”<sup>23</sup>

Clery requires that schools report offenses and disclose statistics for crimes reported to the local police and Campus Security Authorities.<sup>24</sup> Reportable crimes include those that occurred on-campus, in or on non-campus buildings or property, or on public property within or immediately adjacent to and accessible from the school’s campus.<sup>25</sup> Furthermore, it is not necessary for the crime to have been investigated, nor must a finding of guilt or responsibility be made, to constitute a reportable crime—as long as there is a reasonable basis for believing the information is not rumor or hearsay, the crime should be reported.<sup>26</sup>

Campus Security Authorities include four groups of individuals and organizations: (1) individuals who work within a campus police or security department; (2) individuals who have responsibility for campus security but are not a part of a campus police or security department; (3) individuals who are named in an institution’s policy as persons to whom students and employees should report; and (4) individuals who have significant responsibility for student and campus activities.<sup>27</sup> Campus Security Authorities are required to report, to the individual or office designated by the institution to collect crime report information, often a police department, any Clery Act crime allegations that the Campus Security Authorities believe were made in good faith.<sup>28</sup>

In addition, Clery 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, Clery 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>29</sup>
- procedures individuals should follow if a sex offense, domestic violence, dating violence, sexual assault or stalking occurs;<sup>30</sup>

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<sup>22</sup>34 C.F.R. § 668.46 (k)(2)(i).

<sup>23</sup> Note that this implies an extension of CSA reporting responsibilities (to properly evaluate and apply the elements of the disciplinary procedures required by VAWA with respect to sexual assault, dating violence, domestic violence and stalking) but this does not constitute a shift in the definition of Clery geography or expand conduct that the University must report externally in its Annual Security Report. This tension is not clearly reconciled in the *Handbook*, which is subregulatory guidance.

<sup>24</sup>20 U.S.C. § 1092(f)(1)(F); 34 C.F.R. § 668.46(c).

<sup>25</sup>20 U.S.C. § 1092(f)(1)(F), 20 U.S.C. § 1092(f)(12); 34 C.F.R. § 668.46(c), 34 C.F.R. § 668.46(c)(4).

<sup>26</sup>*The Handbook for Campus Safety and Reporting*, *supra*, at 4-1 to 4-2.

<sup>27</sup>34 C.F.R. § 668.46(a) (defining “Campus security authority”); *The Handbook for Campus Safety and Reporting*, *supra*, at 4-2 to 4-3.

<sup>28</sup>34 C.F.R. § 668.46(b)(2)(iii); *The Handbook for Campus Safety and Reporting*, *supra*, at 4-1 to 4-13.

<sup>29</sup>34 C.F.R. § 668.46 (k)(1)(iii) and (iv);

<sup>30</sup>34 C.F.R. § 668.46 (b)(11)(ii).



- information regarding the importance of preserving evidence;<sup>31</sup>
- identification of the administrator to whom alleged offenses should be reported;<sup>32</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>33</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>34</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 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.

#### **IV. Policies at Issue**

This section outlines the applicable policies at the University of Colorado. *The Laws of the Regents*, Regent Policy, and Administrative Policy Statements apply system-wide to all University of Colorado employees, while campus policies and unit/departmental policies may be more limited in their application.

The following University policies and contract provisions are at issue:

##### **A. Laws of the Regents**

The Colorado General Assembly explicitly recognizes the Board of Regents’ authority to “enact laws for the government of the University.” C.R.S. §23-20-112. The Colorado courts have confirmed this authority and recognized that the Board of Regents “can validly impose a wide variety of regulations.” *Sigma Chi Fraternity v. Regents of the University of Colorado*, 258 F.Supp. 515 (Colo. 1966). The *Laws of the Regents* are the highest source of authority in the University of Colorado system.

##### **1. Laws of the Regents - Article 1**

Under Article 1, Part D, of the Laws of the Regents, “In pursuing the mission of the University of Colorado, all members of the university community are responsible for understanding and upholding the highest standards of legal and ethical conduct. The Board of Regents’ policies describe principles of ethical behavior that articulate a basic ethical framework for the decisions, actions and

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<sup>31</sup>34 C.F.R. § 668.46 (b)(11)(ii)(A).

<sup>32</sup>34 C.F.R. § 668.46 (b)(11)(ii)(B).

<sup>33</sup>34 C.F.R. § 668.46 (b)(11)(ii)(C)(1)(2) and (3).

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

behavior of all University of Colorado employees. These “Principles of Ethical Behavior” [contained in Regent Policy 1-C] define the underlying expectations for the conduct and activities of university employees.”

## **2. Laws of the Regents – Article 3**

Under Article 3, Part E, of the Laws of the Regents, “Employees must uphold ethical standards appropriate to their position within the university as defined in state law and regent policies. These include but are not limited to standards applicable to conflicts of interest and conflicts of commitment.”

## **3. Laws of the Regents – Article 11**

Under Article 11, Part D, of the Laws of the Regents, “University employees shall adhere to Board of Regents laws and policies and state and federal laws and regulations related to: sexual harassment, political activities, academic freedom, nepotism, conflict of interest, conflict of commitment, nondiscrimination, and diversity.”

### **B. Regent Policy 1(C) – Principles of Ethical Conduct**

Regent policies implement the *Laws of the Regents*. They are statements of high-level policy that are often implemented through other policy documents. In 2013, the Board of Regents revised Regent Policy 1(C) - its Principles of Ethical Conduct. The operative provisions of this document state:

In pursuing the mission of the University of Colorado, all members of the university community are responsible for understanding and upholding the highest standards of legal and ethical conduct. The Board of Regents’ policies describe principles of ethical behavior that articulate a basic ethical framework for the decisions, actions and behavior of all University of Colorado employees. These “Principles of Ethical Behavior” define the underlying expectations for the conduct and activities of university employees. They include:

#### **Responsible Conduct**

University of Colorado employees are expected to conduct themselves ethically, and in compliance with all applicable laws, regulations, and university policies. University employees are expected to practice and model ethical and responsible behavior in all aspects of their work. Expected conduct includes . . . acting in good faith; being personally accountable for individual actions; conscientiously fulfilling obligations towards others; and communicating ethical standards of conduct through instruction and example.

#### **Reporting Suspected Misconduct**

The University of Colorado is committed to meeting federal and state legal requirements and fostering a culture of compliance. University employees are expected to report known and suspected violations of university policies, as well as violations of applicable laws and regulations to appropriate offices. The university

provides several options for reporting violations. Employees are encouraged to first report any known or suspected violations to their direct supervisor. . . All university employees who act in good faith in reporting known or suspected violations of law or university policy are protected from retaliation.

### **C. Sexual Misconduct Policy and Procedures (APS 5014)**

The Office of the President may promulgate Administrative Policy Statements (APS), which are system-wide rules that implement the *Laws of the Regents* and Regent Policies. In July 2015, the University of Colorado issued a system-wide APS on sexual misconduct, which implemented recommendations from our 2014 external audit and newly enacted VAWA requirements.<sup>35</sup> The APS has several relevant provisions.

#### **1. Introduction**

Section I (Introduction) of the APS provides:

Sexual misconduct . . . is a form of sex discrimination. The University of Colorado (“University”) is committed to providing an environment where all individuals can achieve their academic and professional aspirations free from sex discrimination.

\* \* \*

To foster a climate that encourages prevention and reporting of sexual misconduct, the University will provide prevention efforts, educate the community, respond to all reports promptly, provide interim protection measures to address safety and recognize the inherent dignity of all individuals involved.

#### **2. Prohibited Conduct**

Section II.A (Policy Statement) of the APS uses the term *sexual misconduct* to include “intimate partner abuse (including domestic or dating violence.)” Section III.E defines intimate partner abuse as “any act of violence or threatened act of violence against a person with whom the individual is or has been involved in a sexual or dating relationship. . . This definition includes intimate partner violence, dating violence, and domestic violence.”

#### **3. Jurisdiction**

Section II.A sets forth the APS’ jurisdiction. The prohibition of sexual misconduct “applies to conduct that occurs on campus. It also applies to off-campus conduct, including on-line or electronic conduct, if the conduct (1) occurred in the context of an employment or education program or activity of the University or (2) has continuing adverse effects on campus.”

#### **4. Reporting Responsibilities**

Section II.C sets forth the reporting requirements and expectations for University employees:

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<sup>35</sup>In the fall of 2013, we were engaged to conduct an external audit of the University’s policies, procedures and practices under Title IX. On January 23, 2014, we provided a report of our external audit to the University. *See* <http://www.colorado.edu/today/2014/01/24/title-ix-review-report-finds-cu-boulder-meeting-legal-requirements>.

Any faculty or staff member who is considered a responsible employee . . . who witnesses or receives information regarding any possible sexual misconduct prohibited herein is required to promptly report to the Title IX Coordinator or designee all known details about the alleged sexual misconduct, including:

- (1) Name of the alleged victim;
  - (2) Name of alleged perpetrator;
  - (3) Name of any alleged witness; and
- (4) Any other relevant facts, including the date, time and specific location of the alleged incident.

All individuals, even if not considered a responsible employee, are highly encouraged to promptly report such information to a responsible employee or directly to the Title IX Coordinator or designee.

A **responsible employee** is defined in Section III.H as “any employee who: (1) has the authority to hire, promote, discipline, evaluate, grade, formally advise or direct faculty, staff or students; (2) has the authority to take action to redress sexual misconduct; and/or (3) has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX Coordinator . . .”

#### **D. CU Boulder Discrimination and Harassment Policy and Procedures**

In July 2016, the CU-Boulder campus revised its Discrimination and Harassment Policy and Procedures (DH Policy). A campus policy may supplement, but may not contradict, an APS.

##### **1. Introduction**

The DH Policy provides:

This policy and the University of Colorado Boulder complaint process and procedures are intended to comply with the related requirements of the following federal laws, their implementing regulations, and related federal agency guidance: . . .

- Titles IV, VI, and VII of the Civil Rights Act of 1964;
- Title IX of the Education Amendments of 1972; . . .
- Jeanne Clery Disclosure of Campus Security Policy and Crime Statistics Act of 1991; . . .
- Violence Against Women Act of 1994; and
- Violence Against Women Reauthorization Act of 2013

##### **2. Prohibited Conduct**

Section II of the DH Policy provides “CU-Boulder prohibits *discrimination, harassment* and/or related *retaliation* based on *protected class* in admission and access to, and treatment and employment in, its educational programs and activities.”

Section III.B defines “discrimination” as “occur[ing] when an individual suffers an adverse consequence on the basis of a protected class. Examples include failure to be hired or promoted or denial of admission to an academic program on the basis of their protected class.”

Section III.C defines “harassment” as “unwelcome verbal or physical conduct related to one’s protected class that unreasonably interferes with an individual’s work or academic performance or creates an intimidating or hostile work or educational environment.”

The DH Policy is narrower than APS 5014 in that it does not include intimate partner violence within its definition of discrimination or harassment.

### **3. Jurisdiction**

CU Boulder’s prohibition of discrimination applies to “all students, faculty, staff, contractors, patients, volunteers, affiliated entities and other third parties.”

The statement of jurisdiction mirrors APS 5014 and applies to conduct “that occurs on campus. It also applies to off-campus conduct, including on-line and electronic conduct, if the conduct (1) occurred in the context of an employment or education program or activity of the University or (2) has continuing adverse effects on campus.”

### **4. Reporting Responsibilities**

Section II. C provides:

Any faculty or staff member who is considered a *responsible employee* . . . who witnesses or receives information regarding any possible *discrimination, harassment or related retaliation* based upon protected class is required to promptly report to the Office of Institutional Equity and Compliance (OIEC) all known details about the alleged *discrimination, harassment, or retaliation* including:

- (1) Name of the alleged victim;
- (2) Name of alleged perpetrator;
- (3) Name of any alleged witnesses; and
- (4) Any other relevant facts, including the date, time and specific location of the alleged incident.

All individuals, even if not considered a *responsible employee*, are highly encouraged to promptly report such information to a *responsible employee* or directly to the OIEC.

## 5. Primary and Ongoing Prevention and Awareness Programs

Section II. H provides that “CU-Boulder shall create, provide and publish comprehensive, intentional and integrated programming, initiatives, strategies and campaigns intended to end *discrimination and harassment*[.] . . . The programs must include both primary prevention and awareness programs offered to incoming students and new employees and ongoing prevention and awareness campaigns directed at current students, faculty and staff.”

### E. OIEC Process and Procedures 2016-2017

The OIEC published its most recent version of its Process and Procedures (P&P) in July 2016. The OIEC Process and Procedures are unit policies and have not been adopted as campus policies.

CU Boulder distinguishes between campus-wide policies and unit policies. Campus-wide policies are “governance documents” adopted by CU-Boulder and applicable across the Boulder campus. A campus-wide policy must be approved and enacted by the Chancellor.

In contrast, units have the authority to adopt their own policies to govern their operations, so long as they are consistent with higher sources of authority. A unit policy may supplement, but cannot contradict, an APS or campus policy.

Pursuant to a July 1, 2015 memo by President Bruce Benson, the P&P apply to students and employees within the System Office.

#### 1. Jurisdiction

As set forth in Section C of the P&P:

The Process and Procedures govern all students, faculty, staff, contractors, patients, volunteers, affiliated entities and other third parties regarding:

- a. Conduct that occurs on or as it relates to University property or at official functions and University-sponsored programs conducted away from the campus. University property is defined as land, buildings and facilities in possession of or owned, used or controlled by the University or funded by University budgets; **or**
- b. Conduct that occurs off University property if it: (1) has a potential continuing effect on campus, including, but not limited to, adversely affecting the health, safety or security of any member of the University community or the mission of the University; or (2) involves any records or documents of the University.

The P&P’s jurisdictional statement is broader than APS 5014 or the DH Policy. APS 5014 applies to off-campus conduct that has “continuing adverse effects on campus,” while the P&P applies if there is a “potential continuing effect on campus.” The P&P defines those potential continuing effects as including conduct that is “adversely affecting” either “the health, safety or security of any member of the university community” or “the mission of the University.”

Section C.2 of the P&P explains that “OIEC’s jurisdiction does not depend on whether criminal charges are filed.” Further, the P&P address circumstances that do not fall within their jurisdiction as follows: “For employees, any other matters outside the scope of the Process and Procedures shall be handled by the appointing/disciplinary authority.”

## **2. Prohibited Conduct**

The P&P define prohibited conduct as including “engaging in sexual misconduct.” Consistent with APS 5014, the definition of sexual misconduct includes “intimate partner abuse (including domestic or dating violence),” which “means any act of violence or threatened act of violence against a person with whom the individual is or has been involved in a sexual or dating relationship. . . This definition includes intimate partner violence, dating violence, and domestic violence.”

The P&P define prohibited conduct as also including “failing to report,” which occurs when “any responsible employee who witnesses, or receives a written or oral report of a complaint alleging, discrimination, harassment, sexual misconduct or related retaliation as covered by the Process and Procedures but fails to promptly report it to the OIEC.”

## **3. Reporting Responsibilities**

The P&P contain expanded information about an employee’s reporting requirements. They address the context when an employee learns of potential sexual misconduct, but the complainant does not wish to report. Section F of the P&P provides that, “If an individual discloses an incident to a responsible employee who by definition is a mandatory reporter but the individual wishes to maintain privacy and requests that no investigation be conducted, that no disciplinary action be taken, or that the allegation not be reported to law enforcement, the responsible employee remains required to report all relevant information to the Executive Director of the OIEC or designee who will explain that the University prohibits retaliation and that the University will not only take steps to prevent retaliation but will also take strong responsive action if it occurs.”

The P&P reporting requirement should be read in conjunction with its jurisdictional statement, which states at Section C.4 that, “The University has an obligation and jurisdiction to conduct at least a preliminary inquiry to determine whether the alleged conduct occurred in the context of, or has continuing effects on, a University program, activity or employment. . . .” This concept is reiterated in Section H of the P&P, which provides an overview of the resolution process.

### **F. Campus Security Authority Reporting Responsibilities**

As outlined above, in addition to Title IX reporting responsibilities, under the Clery Act, University employees designated as Campus Security Authorities are required to report Clery-designated crimes, including sexual assault, domestic or dating violence, and stalking, to the University of Colorado Boulder Police Department (CUPD). The report by the CSA to the individual designated within the University, here CUPD, enables the University to carry out three key functions: 1) evaluate the report to determine if it must be reported externally under Clery (e.g., added to the daily crime log or included in the annual security report based on Clery geography and definitions of

Clery crimes); 2) determine whether a timely warning should be issued; and 3) provide the complainant with written resources and rights as required by the VAWA amendments to Clery.<sup>36</sup>

## **G. Specific Contract Provisions**

Both Athletic Director Rick George and Head Football Coach Mike MacIntyre have term contracts. We will discuss each contract separately to provide an understanding of each party's roles and responsibilities related to the applicable policies in this matter. We discuss these for the purpose of identifying George's and MacIntyre's contractual obligations to the University, rather than to determine whether any conduct violated these contractual provisions, a task that was beyond our purview.

We discuss only the most relevant contract terms, although we note that other contract provisions may apply. Chancellor DiStefano does not have an employment contract.

### **1. George's Contract**

George entered a term contract in July 2016. This contract expires in June 2021.

#### **a) Duties**

George agreed to accept the position of "Athletic Director." The contract requires that he "shall report to and be under the immediate supervision of the Chancellor of the University of Colorado Boulder or his designee." George "shall confer regularly with the Chancellor or his designee concerning administrative and technical decisions."

George's contract requires him to use his "best efforts" in the development, administration, operation, maintenance and control of all aspects of the University of Colorado Athletic Department. Evaluating "best efforts" includes "consideration of such factors as work ethic; integrity; positive attitude; high moral standards; loyalty to the University . . . ; support for the Chancellor; . . . administration, operation, maintenance, and control of all aspects of the Athletic Department in a manner consistent with the policies, rules, and regulations of the NCAA, the Conference, the Board of Regents of the University of Colorado ("Board") and the University . . ."

Beyond the paragraph defining "best efforts," George's contract obligates him to the following specific duties:

- Provide outstanding leadership and management to the Athletics Department.
- Work closely and effectively with the Chancellor, Senior Vice Chancellor, faculty, and staff of UCB to ensure that the mission and operations of the Athletics Department are carried out in a manner consistent with the mission, laws, policies and procedures of the University, the NCAA, and the Conference.
- Implement effective controls to ensure that all of the Athletics Department's business, human resource and financial transactions are carried out pursuant to

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<sup>36</sup> See footnote 23 above for additional discussion.



applicable federal, Colorado, and University laws, rules, regulations, policies and procedures.

- Make all decisions in accordance with the authority provided to him under University policies regarding the employment, salary, assignments and supervision of all personnel within athletics.
- Conduct himself at all times in accordance with the highest standards of integrity, courteousness and professional competence; and in accordance with the Constitution and Bylaws of the NCAA and the Conference.

#### **b) Suspension or Termination for Cause**

The University of Colorado has the right to suspend George without pay or terminate his employment contract “for cause.” The grounds for suspension or termination for cause include:

- Violation of any Board law, Board policy, or UCB campus policy and/or being found responsible by the UCB Office of Discrimination and Harassment for violating one or more of the following policies: Discrimination and Harassment, Sexual Harassment and/or Amorous Relationships.
- Failing to immediately report to the Chancellor and law enforcement (if the misconduct involves potentially criminal conduct) serious student athlete or Athletics Department staff misconduct George knew or should have known about.
- Failure to cooperate with Conference, NCAA, and/or University staff in connection with investigation of possible violation of NCAA or Conference legislation or University policies/Board Laws.

#### **2. MacIntyre’s Contract**

Coach MacIntyre entered a term contract in January 2014. This contract expires in December 2018. At the time these allegations came to light, the campus was in the process of determining the details of a contract extension with MacIntyre.

#### **a) Duties**

MacIntyre agreed to accept the position of “Football Coach.” The contract requires that he “shall report to and be under the immediate supervision of the Director of the Intercollegiate Athletics Department (“Athletic Director”) or his designee.” Coach MacIntyre “shall confer regularly with the Athletic Director or his designee concerning administrative and technical decisions.”

MacIntyre’s contract requires him to use his “best efforts” in the development, administration, operation, maintenance and control of all aspects of the University of Colorado football program. Evaluating “best efforts” includes “consideration of such factors as work ethic; integrity; positive attitude; high moral standards; loyalty to the University . . . ; support for the Athletic Director and the Chancellor; . . . administration, operation, maintenance, and control of all aspects of the Football Program in a manner consistent with the policies, rules, and regulations of the NCAA, the Conference, the Board of Regents of the University of Colorado (‘Board’) and the University. . .”

In the contract, MacIntyre acknowledges that he is a campus security authority and agrees to comply with all reporting obligations imposed upon campus security authorities by the Clery Act and applicable University policies.

Beyond the paragraph defining “best efforts,” MacIntyre’s contract obligates him to the following specific duties:

- Compliance with the Athletic Department policies regarding responsibilities of coaches.
- Supervising, planning, administering, and coordinating the activities of the Football Program with integrity and in a manner that is consistent with the rules, Regent Laws, policies, and academic goals of the University.
- Conducting himself and operating the Football Program in a manner that is in compliance with and does not result in material or repeated violations of applicable governing policies, constitutions, laws, rules, and regulations of the University, the Board, the Conference, and the NCAA.
- Maintaining responsibility for the supervision, evaluation, and conduct of the assistant coaches and football staff, including making diligent efforts to assure their compliance with applicable University policies and regulations . . .
- Abiding by all applicable Board of Regents’ laws and policies and University of Colorado Boulder policies as may be in effect from time to time. Modifications, changes, additions, or deletions to such laws or policies shall automatically apply to this Agreement without the necessity of a written modification.

**b) Suspension or Termination for Cause**

The University of Colorado has the right to suspend MacIntyre without pay or terminate his employment contract “for cause.” The grounds for suspension or termination include:

- Immoral, dishonest or other conduct that, in the reasonable judgment of the Athletic Director consultation with the Chancellor of the University of Colorado Boulder, falls below the minimum standards of professional integrity or that is inconsistent with the professional standards expected of a head coach of a collegiate sports team and that is prejudicial to the best interests of the University or that violates the University’s mission.
- Violation of any Regent law, Regent policy, or UCB policy or being found responsible by the University Office of Discrimination or Harassment for violating one or more of the following policies: Discrimination and Harassment, Sexual Harassment, and/or Amorous Relationships.
- Failing to immediately report to the Athletic Director and law enforcement (if the misconduct involves potentially criminal conduct) serious student-athlete or football staff misconduct MacIntyre knew or should have known about.

- Failure to cooperate with Conference, NCAA, or University staff in connection with investigation of possible Football Program violation of NCAA or Conference legislation or University policies/Regent Laws.

## V. Investigative Chronology

As we undertook our review, University Counsel gathered available information from University records. Through our review, we augmented those records to include available email correspondence, telephone records (from landlines, University-issued cell phones, and personal cell phones), documents provided by the Complainant (including her personal cell phone records, text and iMessages, and her correspondence with *Sports Illustrated* ), documents provided by the parties, available law enforcement and court records, training and OIEC records and communications, records from Brian Bagley, Esq. (counsel for the Complainant) and other related materials. We also reviewed a significant volume of documents, including the email accounts of the parties. The University fully cooperated in our review, and no request for access to documents, information or personnel was denied.

Key documents are referenced herein and attached as exhibits:

<b>Exhibit</b>	<b>Description</b>
Exhibit 1	December 7, 2016 Email from the Complainant to MacIntyre
Exhibit 2	December 8, 2016 Facebook Message from the Complainant to Trisha MacIntyre
Exhibit 3	December 12, 2016 iMessage from the Complainant to MacIntyre
Exhibit 4	December 15, 2016 iMessage from the Complainant to MacIntyre
Exhibit 5	December 19, 2016 Broomfield Police Department Witness Statement
Exhibit 6	December 20, 2016 Motion for Civil Protection Order
Exhibit 7	December 22, 2016 Text Message from Detective Hammell to the Complainant
Exhibit 8	December 21, 2016 Waiver of Service
Exhibit 9	Boulder County Court Docket
Exhibit 10	December 29, 2016 Court Order regarding Unopposed Motion for Continuance
Exhibit 11	December 30, 2016 Executed Waiver of Service
Exhibit 12	January 25, 2017 Permanent Protection Order
Exhibit 13	January 30 Affidavit and Application for Arrest Warrant

Exhibit 14	Excerpt from January 2013 Online Training Script
Exhibit 15	MacIntyre Statement Submitted on May 15, 2017
Exhibit 16	MacIntyre Statement: Protocol, Submitted on May 15, 2017
Exhibit 17	MacIntyre Statement: Evidence of Athletic Department Protocol, Submitted on May 15, 2017
Exhibit 18	MacIntyre Statement: Coaches' Meeting Agenda, September 28, 2015, Submitted on May 15, 2017

In addition to gathering relevant documents, we conducted more than 28 interviews with more than 16 individuals, including the Complainant, members of senior leadership, members of the Athletic Department, and representatives from the Office of Institutional Equity and Compliance, Sports Information, University Communications, and the Office of University Counsel. We interviewed each of the parties multiple times to ensure that each had a full and fair opportunity to provide information, to be heard, and to respond to the information we gathered. We began our interviews on February 18, 2017, and completed our last interview on May 6, 2017.

We also sought to interview Detective Dale Hammell of the Broomfield Police Department and Jon Banashek, Esq., counsel for Tumpkin. Detective Hammell was limited in his ability to speak with us because of the ongoing criminal investigation. Although we sought to limit our inquiry with Banashek to his communications with University officials, he declined to speak with us. We also spoke with Lisa Wayne, Esq., counsel for Mike MacIntyre, and Peter Ginsberg, Esq., another counsel for the Complainant. Relevant content from the witness interviews has been incorporated into the Factual and Investigative Chronology below.

Our interviews sought to gather relevant information about the nature and context of the Complainant's report to the University and the subsequent communications and interactions between the parties through an open and neutral inquiry. At the beginning of every interview, we explained our role as outside investigators engaged by CU Boulder to conduct a prompt, equitable, impartial, and thorough inquiry. We explained that our review was attorney-client privileged, that the privilege belonged to the University to maintain or waive, and that we would share the information we gathered with the University. We explained to each witness that participation in the review was voluntary and we provided the witness the opportunity to ask questions or raise concerns. We requested that the parties and the witnesses respect the privacy of the parties and the integrity of the process by not discussing the content of the interview with other individuals. We explained to every witness that they were free to contact us with any additional information, and in many instances, conducted follow up interviews to ensure that the parties had a full and fair opportunity to provide information, to be heard, and to respond to information we gathered through document review and the interview process. We acknowledge the willingness of all witnesses to participate fully in this review.

## **VI. Factual Chronology**

This section provides a synthesis of the information gathered from documents and witness interviews. The events at issue, documentary evidence, and records of electronic communications

are presented chronologically. The observations of the parties and witnesses, while included in the context of the timeline, reflect information gathered in interviews between February 18, 2017 and May 6, 2017.

On May 10, 2017, this report was submitted to the University, without findings or conclusions, to allow the parties the opportunity to review the factual chronology. DiStefano, George and MacIntyre were invited to offer any additional information or clarifications and/or to identify any additional witnesses or documents before the conclusion of the fact-gathering. Each party submitted a written comment and those comments were incorporated into this final report.

## **A. Background and Context**

In January 2015, Head Football Coach Mike MacIntyre hired Joe Tumpkin as an assistant football coach to coach the safeties and secondary defensive players.

The Complainant lives and works as an educator and counselor in Michigan.<sup>37</sup> According to the Complainant, she and Tumpkin began to date in December 2013. According to the Complainant, when Tumpkin moved to Colorado in early 2015, he asked the Complainant to move to Colorado to marry him. The Complainant agreed to do so. Upon moving to Colorado, Tumpkin initially resided in the Omni Hotel, accommodations that the Athletics Department provided, until he could find housing. He subsequently moved to an apartment in Broomfield, Colorado and paid rent from his own funds. Over the course of the next six months, the Complainant traveled to Colorado to visit Tumpkin approximately every 10 days. She also came for an extended visit in the summer of 2015 in anticipation of moving to Colorado to be with Tumpkin. The Complainant alleged that between February 2015 and July 2015, Tumpkin physically abused her on an ongoing and regular basis at the following locations: Tumpkin's apartment in Broomfield;<sup>38</sup> the Renaissance Hotel in Broomfield; the Omni Hotel in Broomfield; the Broadmoor Hotel in Colorado Springs; Chicago, Illinois; Detroit, Michigan; Miami, Florida; Tampa, Florida during a recruiting visit; and the Complainant's home in Michigan. During this time, the Complainant accompanied Tumpkin to a limited number of team events, where she met MacIntyre, George, their spouses, and other football program staff.

The Complainant said that she and Tumpkin had an argument in July 2015, and as a result, she did not move to Colorado as planned. The Complainant said she did not see Tumpkin between July 2015 and January 2016, but that they maintained communication, and in January 2016, she met him in San Antonio, Texas for a coaches' conference. She described a renewed and continuing course of abuse from January 2016 to May 2016, including an incident in March 2016 when a neighbor contacted law enforcement based on noise coming from Tumpkin's apartment. The Complainant said that she last saw Tumpkin in Tampa, Florida in May 2016 before they again took a hiatus in their relationship. Although they did not see one another between May and November 2016, she described continuing communication with Tumpkin during that timeframe. The Complainant said she agreed to attend the CU-Boulder home game against Washington State during the weekend of November 18 to 20, 2016.

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<sup>37</sup>In February 2017, the Complainant contacted the Board of Regents to ask to participate in this review. We met with the Complainant in Detroit, Michigan on Sunday, February 18, 2017. The Complainant was accompanied by her sister. She subsequently provided additional correspondence and documents, granted access to her attorney's file and records, and allowed us to meet with her attorney, Peter Ginsberg. She has been responsive to our requests for documentation or additional information.

<sup>38</sup>The Complainant's name is also on the lease at the apartment complex.

The Complainant flew to Colorado on November 18, 2016 to join Tumpkin for the CU Boulder football game. The Complainant stayed with Tumpkin in the Broomfield apartment. The Complainant said that Tumpkin attended a coaches' meeting, then stopped to have drinks at a bar before returning to the apartment. The Complainant said that Tumpkin physically assaulted her late on the night of November 18, and again on the morning of November 20. The Complainant left Colorado and flew home to Michigan later on November 20, 2016. We understand that this is the last time the Complainant was in Tumpkin's physical presence.

The Complainant said that after this incident, she reached the realization that Tumpkin needed help and that she could no longer tolerate the abuse. She disclosed the abuse to her family and friends for the first time. She said that her mother suggested that she call MacIntyre to see if he could help. The Complainant decided to contact MacIntyre, and as detailed below, made outreach through email and Facebook in early December 2016. The Complainant said that this was the first time she communicated with the University about Tumpkin's conduct.

At the time of the Complainant's contact with MacIntyre, in December 2016, the University was in the process of renegotiating MacIntyre's contract extension. MacIntyre, George and Chancellor Phil DiStefano each described the negotiation process as intense, and at various instances, upsetting to each. In addition, we note that the end of the academic semester is a busy time generally, that the University's defensive coordinator resigned suddenly in December, and that MacIntyre and the team were actively preparing for the Bowl Game.

## **B. December 6 to 10, 2016: The Complainant's Disclosure to the University**

### **1. December 6, 2016: Friend Request to Trisha MacIntyre**

The Complainant sent a friend request via Facebook to Trisha MacIntyre, Mike MacIntyre's wife. Mrs. MacIntyre accepted the Complainant's Facebook friend request on Tuesday, December 6, 2016.<sup>39</sup>

### **2. December 7, 2016: Email to MacIntyre**

On Wednesday, December 7, 2016, the Complainant emailed MacIntyre at his CU email address with the subject line "Joe Tumpkin situation."<sup>40</sup> The email read: "Coach, I have a very confidential concern that I would like to discuss with you at your earliest convenience, if possible." The Complainant signed the email by name and identified herself as "Joe's friend from Michigan;" she also included her phone number. .

MacIntyre said that he did not read or otherwise see this email until Saturday, February 18, 2017 when University counsel asked MacIntyre to collect any emails in his possession related to the Complainant's allegations in preparation for his first meeting with Cozen O'Connor.<sup>41</sup>

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<sup>39</sup>MacIntyre provided a screenshot of his wife's Facebook account documenting the Complainant's friend request.

<sup>40</sup> Exhibit 1.

<sup>41</sup>Along with this email, MacIntyre brought Facebook records, his personal cell phone records, and copies of relevant email correspondence. We subsequently interviewed Cheryl Voth, MacIntyre's assistant, who has access to and manages MacIntyre's email. Voth confirmed that although she saw the Complainant's email within a week of December 7, she did not show the email to MacIntyre at that time because she knew, through Tumpkin, that the Complainant and MacIntyre had already spoken.

### **3. December 8, 2016: Facebook Message to Trisha MacIntyre**

On Thursday, December 8, 2016, at 1:51 p.m. EST<sup>42</sup>, the Complainant messaged Trisha MacIntyre through Facebook:

Hi Trisha! I am sorry that I missed seeing you when I was in for the Washington State game. I would have loved to have caught up. I have an important issue regarding Joe that is sensitive and confidential. I need to talk to Coach or Rick George as soon as possible. I would prefer to address this with Coach Macintyre [sic] if possible. I sent him an email yesterday morning, but I have no idea if he got it or it goes to spam. Could you please ask him to call me at his earliest convenience, please? I apologize for using you as the messenger, but I am trying to involve as few people as possible and avoid calling the secretaries. Thank you so much, [the Complainant].”<sup>43</sup>

The Complainant included her cell phone number in the Facebook message.<sup>44</sup> At the time, the MacIntyres were in Atlanta, Georgia for an award ceremony.

### **4. December 9, 2016: MacIntyre’s Telephone Call to the Complainant**

On Friday, December 9, 2016, at 5:59 a.m. EST, while in the Atlanta airport, Mrs. MacIntyre opened and read the Complainant’s Facebook message.<sup>45</sup> She immediately shared the message with MacIntyre. Two minutes later, at 6:01 a.m. EST, MacIntyre called the Complainant from his personal cell phone at the number she provided in the Facebook message. The Complainant and MacIntyre talked for 34 minutes.<sup>46</sup>

We spoke with both the Complainant and MacIntyre about the substance of the telephone call. While their recollection of some portions of the conversation differ, they largely concur in many respects. Their recollections of the telephone call are recounted here in narrative form. In sum, MacIntyre acknowledged that the Complainant told him of a course of conduct of physical abuse by Tumpkin. While the Complainant recalled providing a detailed account, MacIntyre denied knowing the extent of the abuse, however, saying that the Complainant told him that Tumpkin was smart enough not to leave bruises and that the Complainant did not tell him that Tumpkin choked her, bit her, or threatened to kill her or himself. MacIntyre recalled being distraught at the call and extremely concerned for the Complainant’s safety. The Complainant described MacIntyre as supportive and receptive to her concerns.

#### **a) The Complainant’s Recollection**

The Complainant recalled that she told MacIntyre she was scared to death and had never been so afraid to make a phone call. She said that she was terrified to talk to him and that deciding to call

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<sup>42</sup>Unless otherwise noted, all times are Mountain Standard Time.

<sup>43</sup> Exhibit 2.

<sup>44</sup>MacIntyre provided a screenshot of the Complainant’s Facebook message to his wife; the Complainant also provided a screenshot of the same message. Exhibit 2.

<sup>45</sup>The Complainant provided a screenshot of the same Facebook message showing the read receipt time at 5:59 a.m. EST.

<sup>46</sup>The dates, times and lengths of the telephone calls recorded in this report are supported by underlying telephone records and cell phone data.

him was the hardest decision she had ever made. The Complainant said she cried through parts of the call. The Complainant said she told MacIntyre that she was not trying to hurt him or the program, but that he needed to know that Tumpkin had been abusing her for two years. The Complainant said she told MacIntyre that the night before the Washington State game in November 2016, Tumpkin came home drunk around midnight, assaulted her, and dragged her across the floor by her hair. She said she also told MacIntyre about the location of other episodes of abuse, including at a retreat for the football staff and their partners at the Broadmoor and on recruiting trips with other coaches. The Complainant said she told MacIntyre that Tumpkin choked her, threw her against walls, bit her face, and left bruises. The Complainant said she told MacIntyre that Tumpkin was scary, violent, and dangerous, and she believed he was going to kill himself or someone else.

The Complainant said she told MacIntyre that Tumpkin liked to go out, drink, and pick up other women. She said that Tumpkin already had another woman alone with him in his apartment and that she was worried for the woman's safety. The Complainant recalled that she told MacIntyre she and Tumpkin had gone to counseling in Denver. She said that Tumpkin needed intensive help but refused to get it. The Complainant told MacIntyre that she did not want Tumpkin to go to jail, that she did not want to have to go to court, but she was trying to protect herself and her son, as well as MacIntyre and the football program.

The Complainant recalled that MacIntyre was kind and told her she was courageous to make the call. She said he told her he did not know what to say, that he was numb, that he had never had this situation come up before, and he needed to talk to people to find out what to do legally. The Complainant said she told MacIntyre she did not want him to go to the police and did not want Tumpkin to go to jail. She told MacIntyre she intentionally had not given him any evidence because she "did not want to put him in an Art Briles situation."<sup>47</sup> The Complainant said she told MacIntyre he could hang up on her and say she was a crazy, bitter ex-girlfriend with no evidence. She said that she did not want any negative publicity for the team—all she wanted was for Tumpkin to get help.

The Complainant recalled that MacIntyre told her he "believed every word" she told him. She said he told her he was getting on a plane, that he needed some time to think about it, and would let her know what he was going to do. She said MacIntyre asked her many times if she was safe and if she felt safe. The Complainant told MacIntyre she felt safe as long as Tumpkin didn't lose his job because, if he did, she "was afraid he would kill me and then himself." The Complainant told MacIntyre football was all Tumpkin had, that he had no family, and if he lost football he would kill her. The Complainant said she told MacIntyre that she had called a friend who is an athletic director (who also knew MacIntyre), and that friend told her to "walk away because I believe this guy will kill you." She said MacIntyre told her to take care of herself and do what she needed to do to stay safe. She apologized again to MacIntyre again for calling him during such a happy time.

#### **b) MacIntyre's Recollection**

MacIntyre's recollection of the content of the call was similar in many respects. He recalled "there were three categories [the Complainant] kept going back and forth between. First she told me of the abuse – '[Tumpkin] pulled my hair, threw me to the ground, never put a bruise on me.' Second, she starts talking about him running around with other women. Third, 'I don't want him to get in trouble, want you to get him help.'" MacIntyre said the Complainant told him she was in Colorado

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<sup>47</sup>Art Briles is the former head football coach at Baylor University. He was dismissed from Baylor in June 2016.



for the Washington State game and that Tumpkin came home late. MacIntyre recalled that the Complainant told him Tumpkin would grab her by her hair and throw her around, and she told him several times that Tumpkin “was smart” and would never leave bruises or marks.

When provided with the opportunity to hear the Complainant’s recollection of the call, MacIntyre said the Complainant did not use the words choke, bite, or kill. MacIntyre said the Complainant did not tell him that Tumpkin was going to kill himself or someone else. He said he would have remembered those words.

MacIntyre recalled the Complainant said Tumpkin was “running around with other women,” and they fought about his infidelity. When he heard this, MacIntyre said he told the Complainant “I feel like he needs to get help.” MacIntyre did not recall the Complainant saying there was another woman alone with Tumpkin in his house.<sup>48</sup>

MacIntyre recalled the Complainant talking about her concern for her son and her desire to not involve her son. MacIntyre said she told him, “I would like for you to get [Tumpkin] help. I don’t want him to get in trouble.”

MacIntyre recalled that he told the Complainant “this is something I have to report” and he had to “turn it in.” He said he was numb listening to her, trying to wrap his mind around it and thinking, “I can’t believe this is happening because I had not seen anything that would make me feel like [Tumpkin] would do this.” MacIntyre recalled the Complainant told him that she did not want him to turn it in and that she would “deny it, deny any reports.” MacIntyre understood the Complainant wanted Tumpkin to get help and she “in no way shape or form wanted me to let anybody else know” because she didn’t want Tumpkin to get in trouble. MacIntyre said “but no way could I be put in the box of not reporting it.”

MacIntyre could not recall if he told the Complainant he believed every word she said, but that he was trying to reassure her. He said he did not want to get off the phone with her until he knew she was safe, and asked her a couple of times if she was safe. MacIntyre recalled the Complainant confirmed she was safe, that she was in Michigan, and that she said she would be safe as long as Tumpkin did not lose his job. MacIntyre did not recall the Complainant describing any threats or saying Tumpkin could be suicidal. MacIntyre did not recall the Complainant discussing Tumpkin’s family, although he acknowledged to us that he was aware that Tumpkin’s mother had passed away. MacIntyre said he continued to ask her if she was safe, and the Complainant said “yes, as long as Tumpkin doesn’t lose his job.”

## **5. December 9 and 10, 2016: MacIntyre’s Outreach to Rick George**

After his call with the Complainant, MacIntyre flew home to Colorado. MacIntyre first attempted to contact George at 5:43 p.m. on the evening of Friday, December 9, 2016. George did not answer, and MacIntyre did not leave a voicemail. In the intervening hours between his call with the Complainant (6:01 a.m. EST) and his attempted call to George (5:43 p.m. MST), approximately 13 hours, MacIntyre made or received approximately 20 telephone calls, including four with his agent, one with the CU Director of Recruiting, and one with David Plati, the University’s Sports

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<sup>48</sup>Although not received or read by MacIntyre, a later text message from the Complainant confirms that she held this impression and attempted to communicate it to MacIntyre.

Information Director. MacIntyre also exchanged multiple text messages with the mother of a recruit.

MacIntyre said he kept calling George until he reached him. The phone logs show that MacIntyre called George at 7:30 a.m., and again at 8:56 a.m. on the morning of Saturday, December 10. George answered the second call, and they talked for seven minutes.

MacIntyre recalled that he told George “about all three phases [or categories]” – the abuse that occurred over a period of time, Tumpkin running around with other women, and the Complainant’s statement that she wanted Tumpkin to get help. MacIntyre said he did not remember “exactly” what he told George, but that he told him “about the abuse and the situation.” MacIntyre said he told George it was abuse over a period of time, the Complainant wanted Tumpkin to get help, the Complainant did not want it to be reported, and she would deny it if anyone asked her. He said he shared with George as much as he could remember. MacIntyre said that George “definitely knew it happened over a period of time” and that he told George it was “more than just that one time occurrence.”

George explained that he was in Texas with his family for a wedding on Saturday, December 10. He said that he spent most of the day seeking a local dentist for a dental emergency. George said that MacIntyre told him the Complainant made an allegation that Tumpkin “beat her and there was an incident at his apartment in Broomfield.” He said that MacIntyre told him the Complainant did not want to do anything, but just wanted to get Tumpkin help. George said he heard the abuse as “one incident, because [MacIntyre] specifically mentioned Broomfield.” George said MacIntyre asked “what do I do?” and George responded “I will get with [Chancellor Phil DiStefano] and will see what we do. I will be back in town tomorrow morning.”

George recalled MacIntyre saying something about the Washington State game, but said that MacIntyre never told him about additional details, including any mention of abuse at a hotel, that the abuse involved biting, that Tumpkin said he would kill himself or the Complainant, that Tumpkin was violent to other women, that there was another woman at Tumpkin’s house, the reference to Art Briles, or that the Complainant had tried to get Tumpkin help.<sup>49</sup> George said that he did not recall MacIntyre telling him that the abuse occurred over a period of time. George said he did not hear “kill, bite me, or any of that” until January 6, 2017 when he viewed the allegations in the Temporary Protection Order. George confirmed that MacIntyre told him the Complainant did not want the police involved and that she would deny everything if that happened. George could not remember if MacIntyre told him in this initial call or in a subsequent call that the Complainant reached MacIntyre through a Facebook message to his wife.

## **6. December 10, 2016: The Complainant’s Second Call with MacIntyre**

Shortly after his call with George, at 8:50 a.m. on December 10, Macintyre received a telephone call from the Complainant. They spoke for three minutes.

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<sup>49</sup>When first interviewed by University counsel on January 17, 2017, George referenced awareness of a prior 911 call involving Tumpkin. Counsel’s summary of George’s remarks is as follows: “He was notified by MacIntyre over the weekend of December 9th. He could not recall the exact date. He said MacIntyre relayed that the Complainant mentioned one incident in Broomfield where someone had called the police and she told the police nothing happened or that maybe a picture had fallen off a wall or something like that [he could not recall specific details] and that it occurred after the Washington State game.” We note that the information in the memo is facially inconsistent; in one instance, George said he was not aware of a 911 call, but in another instance, he was aware that someone had called the police.

The Complainant explained that she called MacIntyre because she realized there was publicly available evidence on record in Broomfield – a 911 call a neighbor placed in March 2016 when Tumpkin “was beating [her] up.” She said that she wanted to tell MacIntyre that there was “evidence” of the abuse out there because she did not want him to be blindsided if that information became publicly available. The Complainant explained that, during her initial call with MacIntyre, she told MacIntyre she would not give him any evidence because she did not want to put him in an “Art Briles” situation, and he could just say she was a “crazy ex-girlfriend.” The Complainant said she told MacIntyre about the 911 call and about the details of the incident. She said that she told MacIntyre that the police showed up at the Broomfield apartment because the neighbor heard Tumpkin assaulting her and called the police. The Complainant explained she provided an innocent explanation for the noise and the police left. The Complainant said MacIntyre thanked her for letting him know about the 911 call.

The Complainant recalled that MacIntyre told her he had called George, who was out of town until the following day [December 11], and told him “some of what was going on but this is not the type of thing you talk about over the phone.” He said that they were planning to meet when George returned and decide what to do. The Complainant said she also told MacIntyre that Tumpkin was seeing someone new and that she had messaged that woman. The Complainant said she received a message from Tumpkin acknowledging that she had texted the woman. The Complainant said she told MacIntyre she was worried for the new girlfriend.

MacIntyre said the call on December 10 lasted for only 3 minutes, which the phone records confirmed. He said the call was limited in content and scope to his informing the Complainant that he had reported the matter to George. MacIntyre said that he did not tell the Complainant that it was not the type of thing you talk about over the phone. He also said that the Complainant did not tell him about Tumpkin having a new girlfriend or that the Complainant had messaged the new girlfriend. MacIntyre recalled that the Complainant told him about the 911 call. However, he recalled that this definitely occurred during their conversation the previous day, December 9. MacIntyre said she told him the neighbors in Broomfield called the police, but when the police came to the apartment she denied any abuse to the police and told them a picture had fallen. MacIntyre said that he told the Complainant he “reported it,” that he had “turned it over,” and she said she understood. MacIntyre recalled the Complainant said she was considering getting a restraining order, but that she still felt safe at the time.<sup>50</sup>

## **7. December 10, 2016: MacIntyre’s Calls**

Within minutes after his call with the Complainant, MacIntyre called George twice, at 8:56 a.m. and again at 9:13 a.m. George did not answer either call. At 9:31 a.m., MacIntyre called Lisa Wayne, a private criminal defense attorney who MacIntyre had previously invited to speak to the football team. Wayne also represented student-athletes in University Title IX proceedings and, in 2016, was adverse to the University in representing a student-athlete. During those proceedings, Wayne communicated to the University that she believed the Title IX investigation was flawed and was considering seeking an injunction against the University. The call with Wayne lasted 2 minutes. At

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<sup>50</sup>The Complainant did not remember saying anything to MacIntyre in this call about a restraining order. After her call with MacIntyre, the Complainant reached out to the Broomfield Police Department to inquire about the 911 call. An officer from the department called her twice during the day and encouraged her to come in. The Complainant recalled that the officer said he listened to the 911 tape and gave her the case number. The Complainant also said that on Friday, December 9, 2016, she sought and received medical assistance in connection with Tumpkin’s abuse.

9:35 a.m., MacIntyre called George again and spoke to him for 2 minutes. At 12:05 p.m., MacIntyre again called Wayne, and they spoke for 22 minutes.

George returned MacIntyre's calls at 1:50 p.m. that afternoon. They talked for six minutes. MacIntyre said he told George he had talked to the Complainant again and told her he had "reported" the abuse. George recalled that MacIntyre said he told the Complainant "[George] knows." He said MacIntyre told him that the Complainant was going to get an attorney.

At 2:09 p.m., MacIntyre tried to reach Wayne. MacIntyre and Wayne spoke at 5:54 p.m. for 10 minutes. MacIntyre did not disclose to us that he had sought and received legal advice from Wayne, although Wayne served as MacIntyre's advisor during his second, third and fourth interviews with us. Based on our review of telephone records and information provided by other witnesses, during our final interview with MacIntyre, we questioned MacIntyre about his relationship with Wayne and the context of any advice Wayne may have provided. MacIntyre told us that there was no intent to hide Wayne's involvement. To the contrary, he believed he had been transparent throughout the process, that he volunteered all of his phone records for both work and personal phones, and that his calls to Wayne were on those records.

MacIntyre agreed to waive any attorney-client privilege and provide details about the legal advice he sought and received from Wayne. MacIntyre explained that after he notified George, "I wanted to make sure that I did all the right things – the only person I know that I know well who knows these issues is Lisa [Wayne], so I called her to make sure I had done the right thing." MacIntyre said, "When it is this magnitude, I am going to make sure I cover every base; it impacts reputation when it hits." MacIntyre later explained, "I was talking about the impact that this could have on everyone involved." We asked MacIntyre whether he considered consulting University Counsel for advice. He explained, "I have never had to go above Rick [George]. Things have stretched out in other cases – I did not know that it had not gotten someplace." MacIntyre said that he thought that it was happening the way it was supposed to happen. When we inquired whether he could have made further inquiry, MacIntyre said, "When I went back and asked if Joe [Tumpkin] could be the play caller, I asked what is going on. Rick [George] said he had talked to the Chancellor and the Chancellor was seeking counsel." MacIntyre explained, "It has always come through – it always has worked out the way it was supposed to." MacIntyre said, "I've never gone to counsel – I'm not trying to play dumb coach – I always went to Rick [George]."

MacIntyre said that a few hours after his 8:50 a.m. call with the Complainant, he blocked the Complainant's calls on his personal cell phone. In our first interview, MacIntyre told us that he blocked the calls because, "I did not want my actions to influence this in any way." He explained that once he had reported it, it was out of his hands. MacIntyre further explained that he understood the role of head coach to be a position of influence, and he did not want any actions on his part to "put undue influence on anything." In a subsequent interview with another witness, we learned that Wayne had advised MacIntyre to block the calls. MacIntyre subsequently explained, "When this situation came up, I did not know [the Complainant] that well. I was concerned about [her] 100%, even when she called back, I asked her if she was ok." At the same time, MacIntyre said that he thought "whoa, if she texts me 15 or 30 times – I am going to look like the liaison, like the mediator – I asked [Wayne for advice], because no matter what I say, I am going to look like I am guilty."

According to MacIntyre, Wayne advised him to block the Complainant's number, and noted that the Complainant knew how to contact other people at the University and knew that [George] had been

told. MacIntyre said “I thought she could get me on Facebook if she needed to.” Wayne explained to us that she told MacIntyre “this was not about anybody else now – it was about him and I told him he had to protect himself.” When asked if Wayne or MacIntyre considered giving the Complainant’s contact information to anyone else at the University to establish a point of contact, Wayne interjected and said she would not have recommended that to MacIntyre. At the time, MacIntyre did not respond to the question, nor did he agree or disagree with Wayne’s statement at the time of the interview. MacIntyre later said, “I ABSOLUTELY would have given the Complainant’s number to anyone in the University that asked for it.”

After December 10, 2016, despite multiple attempts to reach MacIntyre by text message and cell phone, the Complainant did not speak again with anyone in the Athletics Department.

MacIntyre did not report the alleged abuse to any other University employee. He explained to us that his practice under former Athletic Director Mike Bohn, Associate Athletic Director Ceal Barry [who served as an interim director before George was hired], and George was “to get whatever information” he had to them “as quickly as possible.”<sup>51</sup> MacIntyre said, “The best thing I can do is to pass it to my superiors.” He explained that it was not his role to investigate, and that he never wanted to be in the position that it was his call [as to the outcome]. MacIntyre said that in the past, information he had reported to Bohn, Barry, or George had always gotten to the right place, and he knew that was what would happen here. When we explored the foundation for this assumption, MacIntyre said, “It was not an assumption,” that he knew the information would get to the right place because “in the past, when I turned it over, it was all handled by whatever group it went to, and they handled it from there.” He said that he had a system with George and he trusted that system. MacIntyre later explained, “This was not an assumption by me . . . It has been the University policy since I have been employed as I have stated throughout this whole process.” MacIntyre said that for four years, all he has done is “turn it in” to Bohn, Barry, or George and that nobody had ever told him he was doing anything wrong.<sup>52</sup>

MacIntyre explained that he had no Title IX or Clery training beyond his January 2013 online module on discrimination and harassment. He also said that he was not familiar with the University’s Title IX policies and that no one had walked him through the policies except in the context of this review. MacIntyre later explained that he was generally familiar with University’s Title IX policies but did not know – and had not been trained on – the intricacies of the policies. He said, “Of course, I am familiar with Title IX and it has been important to me to educate my team by

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<sup>51</sup>Barry confirmed that she had long served in a liaison role between the Athletic Department and OIEC (including the Office of Discrimination and Harassment prior to the creation of OIEC). Barry said that in the fall of 2014, shortly after Simons was hired, she met with Simons and George to discuss reporting within the Athletic Department and recommended that she continue to serve in this capacity. Barry said that Simons disagreed with “chain of command” reporting within the Athletic Department and was “absolutely certain” that all responsible employees were required to make a direct report to OIEC. Barry felt strongly that she and George should “know everything,” but said that Simons did not want to differentiate the Athletic Department from any other department on campus. Barry said that Simons “clearly came down on the side that responsible employees had to report to OIEC directly.” Barry said that later in the fall of 2014, Simons met with MacIntyre and other head coaches to discuss the policy and the reporting obligations. As described below, however, internal documents from coaches meetings continued to reiterate that coaches should report sexual misconduct internally within the Athletics Department to the Athletic Director.

<sup>52</sup>MacIntyre later submitted two documents that contain references that the Athletic Department’s protocol for reporting was that reports were to be made internally. MacIntyre explained, “Please make sure to clearly communicate the evidence that I have submitted proving that there is a protocol and that I followed it. This was not my assumption or a system between George and I. All of the Head Coaches in the Athletic Department have been trained to report just as I did in this situation.”

having Valerie [Simons] speak to them as well as have others such as Lisa Wayne to speak to the team.”

MacIntyre said that he was heartbroken for everybody involved in this matter, but that “I know without a doubt I did what I thought was right – the way I have been trained in all of my four years, and nobody has ever told me any different.” He reiterated, “I am not perfect, but I know I did the right thing.”

After speaking with MacIntyre on December 10, George, who was still in Texas, did not immediately notify anyone at the University about the allegations.

### **C. December 11, 2016 to January 5, 2017: The University’s Response**

#### **1. December 11, 2016: Notice to Tumpkin and the Chancellor**

On Sunday, December 11, 2016, MacIntyre and George met in person to discuss the Complainant’s allegations in more detail. Neither MacIntyre nor George had a specific recollection of the details of their in-person conversation.

At 3:15 p.m., MacIntyre called Wayne in George’s presence. They talked for 16 minutes. George recalled that MacIntyre put Wayne on speaker phone, and Wayne counseled MacIntyre on what he should and should not do or say. George said MacIntyre wanted him to hear Wayne’s perspective. He said Wayne told MacIntyre not to talk to the Complainant because he would “become a witness.” George said neither he nor MacIntyre considered calling University Counsel for direction.

At 5:14 p.m., nearly 33 hours after he first learned of the allegations, George called DiStefano, who was in New York, and advised him of the report of abuse against Tumpkin.<sup>53</sup> George recalled that he told DiStefano “what I knew” and asked what his responsibilities were. George said he “never had a staff member with a partner off campus” and did not know what to do.<sup>54</sup>

George explained that he was familiar with Valerie Simons, but that he did not have a lot of direct involvement with Simons outside of the Chancellor’s Executive Committee.<sup>55</sup> He said that it was

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<sup>53</sup>George said that he did not recall if he called DiStefano on Saturday, December 10 or Sunday, December 11 when he returned to Boulder. DiStefano thought that George called him on either Saturday, December 10 or Sunday, December 11 while DiStefano was in New York. There is no record of a telephone call between George and DiStefano on December 10, but as noted above, there are two calls on December 11, at 5:14 p.m. and 7:20 p.m.

<sup>54</sup>Llen Pomeroy of OIEC provided us with an overview of reported sexual misconduct involving student-athletes or Athletic Department employees. Several of those matters involved harassment allegedly committed by an Athletic Department employee and reflected that the Athletics Department reported harassment and other forms of interpersonal violence to OIEC, but we found no allegation that was directly analogous to the facts here.

<sup>55</sup>George and Simons previously had direct interaction with respect to the resolution of allegations against a student-athlete, which was the same matter in which Wayne represented the student-athlete. In one e-mail communication, George wrote “Just for the record and I know you all know, I disagree will [sic] all aspects of this case.” Similarly, Simons recalled a conversation with George shortly after the sanction in the student-athlete case was announced. Simons said that George said he was “upset about the finding and the sanction” and “no longer had any faith in [the OIEC] process.” Simons recalled that George said he had read the report, reached his own conclusion, and did not agree with the OIEC conclusion but would abide by it. Simons said that George’s voice was raised during the conversation and that he was upset. We asked George directly about this issue, and whether it impacted his decision not to call OIEC. George said that this had no impact on his decision not to notify Simons directly about the Complainant’s disclosure. He said that, although he was upset about the prior case, he was a professional. George later reiterated that he did not raise his voice, that he did not reach his own conclusion, and that his comment was that he did not have

difficult for him to decipher which issues went to Simon's office and which went to student conduct. George said when there are issues involving student-athletes, they report those issues to Simons or Christina Gonzalez, Associate Vice Chancellor and Dean of Students and former Title IX Coordinator for students, but that the report is typically through Barry or Lance Carl, Associate Athletic Director.<sup>56</sup> George said that he thought his last training was an online training in 2013, that he had not read or reviewed the University's sexual misconduct policies, and that he did not realize intimate partner abuse was covered under Title IX.

During the course of our interview, we showed George the SM Policy, the DH Policy and the P&P. He said that was the first time he had ever seen the policies. He also said that there is no written protocol within the Athletics Department for reporting, but that his general understanding is that "it all has to be reported."<sup>57</sup>

George said that he believed he was a campus security authority under the Clery Act, which he interpreted as having to report anything that related to violence or sex. George said that he did not consider calling University counsel independently. He said that counsel was not that accessible to him and that he typically sought DiStefano's advice. He reiterated that when he has questions, he goes to DiStefano for advice. He explained that "Phil [DiStefano] is my guy – he has been here for 42 years."<sup>58</sup> George said that the only reason he was at CU was because of DiStefano and that he always tries to keep DiStefano, who he described as his "boss," informed. George explained, "Until February 14, when Valerie [Simons] sat down with me and Phil [DiStefano] and Mike [MacIntyre] together, nobody had ever said to me that you need to report this – that you are a mandatory reporter, everybody was talking about jurisdiction." He reiterated that he had taken the information to DiStefano because "that is what I was supposed to do." George said, "The word mandatory reporter was never mentioned by anybody until February 14 when Valerie [Simons] raised it."

DiStefano said George told him MacIntyre had received a phone call from Tumpkin's ex-girlfriend who lived in Michigan. He said George told him the Complainant told MacIntyre that Tumpkin physically abused her in the Broomfield apartment after the Washington State game. DiStefano said George told him MacIntyre asked the Complainant if she was safe, and the Complainant said she was in Michigan. DiStefano also recalled George told him the Complainant did not want to call the police but wanted Tumpkin to get help. DiStefano said George asked what to do, and DiStefano replied "we don't have very much evidence right now." DiStefano said George asked him whether they needed to report this, and DiStefano said "I don't think so but let me get back to campus." DiStefano said he was thinking about jurisdiction, but because the Complainant was not an affiliate of the University and lived in Michigan, he did not think jurisdiction existed, but wanted to check the policy. DiStefano said he told George they would need to get more information about the allegation before the University could do anything from the standpoint of putting Tumpkin on leave.

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confidence in Simons' office, not the OIEC process. George explained that he respected the decision, but did not agree with it, and he was upset at the timing of the sanction (an immediate imposition instead of allowing the student-athlete to complete the semester when there was no information that he was a threat to the campus and his professors were willing to work with him to complete the semester remotely).

<sup>56</sup>Barry said that when Carl assumed the role of sports supervisor for football, George asked Barry to defer to Carl and let Carl handle the Title IX issues. She said that George was very clear that football was Carl's jurisdiction.

<sup>57</sup>We reviewed training records that confirmed that George attended an in-person Clery training on September 28, 2016. Per George, he attended about 30 minutes of that session.

<sup>58</sup>George later clarified, "I would not say Phil is my guy. I have a ton of respect for Phil." We do not draw any inference, positive or negative from the informal use of the term "my guy."

DiStefano also recalled that at some point, perhaps in a separate conversation, George told him he and MacIntyre were going to notify Tumpkin about the allegation

On Sunday afternoon, December 11, George and MacIntyre met with Tumpkin to inform him of the allegation. MacIntyre recalled that George did most of the talking in the meeting with Tumpkin. He said George advised Tumpkin “what the situation was” and that they did not want to hear anything about it so he and George “would not be in the position of being witnesses or exercising influence.” MacIntyre said they asked Tumpkin if he needed help and told him to get an attorney. MacIntyre explained that “the Complainant told me he needs to get help – that was her thought; my whole thing was to get a lawyer.” MacIntyre later clarified that he and George did not direct Tumpkin to get a lawyer but told Tumpkin that he had a right to get a lawyer and that he wanted Tumpkin to get help. MacIntyre said Tumpkin did not say anything other than to ask MacIntyre how the Complainant got in touch with MacIntyre. MacIntyre told Tumpkin it was through his wife’s Facebook.

George remembered the meeting with Tumpkin as “a two minute meeting.” He said he told Tumpkin “there has been an allegation; I am not here to investigate it.” George said he told Tumpkin four things – “don’t call this woman again; you may need to get legal counsel; do you have anything to say; and do you need help.” George said Tumpkin replied “no” and that “was the extent of the meeting.”

After the meeting with Tumpkin, George called DiStefano at 7:20 p.m. to update him on the meeting. At the time, DiStefano was in New York and planned to return to campus on Tuesday, December 13, 2016. DiStefano recalled the call happening as “later in the week.” He said George told him he and MacIntyre advised Tumpkin to get help. DiStefano said he later learned that Tumpkin consulted with the Athletics Department psychologist.<sup>59</sup>

## **2. December 12, 2016: Continued Outreach by the Complainant**

At 9:33 a.m. EST on Monday, December 12, the Complainant sent an iMessage to MacIntyre. Because MacIntyre blocked the Complainant’s calls, he did not receive this message:<sup>60</sup>

Here are some texts over the last couple of days about the abuse. He hasn’t gotten help. Immediately after what he did to me, he has another woman alone in his place and I am really worried for her because she isn’t safe until he gets help. He has done nothing to get well. He told me has talked to the team psychologist and 2 women from his mother’s church over the phone about getting help. I worry about him, her, you and the boys if he doesn’t get help. I have stopped all communication now because nothing is changing and I can’t get well trying to help and reason with a man I love who abused me. You are in my prayers. Coach, you and Trisha welcomed me as family and I am sorry for bringing all this into such an amazing time for you both.<sup>61</sup>

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<sup>59</sup>We do not have independent verification whether Tumpkin actually sought counseling.

<sup>60</sup>This iMessage was viewed and screen-captured from the Complainant’s phone. There is no delivery receipt at the bottom of the message. A review of MacIntyre’s phone suggested this and other iMessages and voice mails were not received. MacIntyre later reiterated, “I blocked [the Complainant’s] phone and did not receive any text messages or calls from her after December 10. This should be CLEAR as evidenced by my phone records and all of the evidence collected. . . . The message was NOT received.”

<sup>61</sup> Exhibit 3.



The Complainant's iMessage to MacIntyre included screenshots of messages between her and Tumpkin discussing the abuse.

Shortly thereafter, at 10:16 a.m. EST, the Complainant called MacIntyre. Because MacIntyre blocked the Complainant's number, the call did not register in the call log. The Complainant's voice message, however, was recorded on MacIntyre's voicemail. While no notification of the incoming call would have occurred, the voicemail message could be accessed by viewing the Blocked Calls folder on the voicemail home screen on MacIntyre's cell phone:<sup>62</sup>

Hi Coach MacIntyre. This is [the Complainant]. It's about 8:15 here. I just wanted to keep you abreast, cause I don't, I just want you to have the information. I am trying not to, as you know, like cast a negative light over anything. I'm going to be taking FMLA until Christmas. And I did start counseling and I have been diagnosed with post-traumatic stress disorder from the abuse. And I have had numerous conversations with him over the last two weeks, week and a half, and he apologizes, whatever, and says he will get help, and he has yet to get any help and that's with me saying that you know that I'm going to file charges. He acknowledges that it happened, he acknowledges he did it, he takes full responsibility, that he's going to get help, that he's going to talk to the team psychologist at the [unintelligible] Championship, I don't know. But he hasn't done anything, anything to get help. So he's, there's now someone else, a female who stays there and she is, she is not safe. He can't go from what you did to me at the Washington State game and then straight into someone else coming in and never have addressed any of the violence that you do on women. So I am letting you know that I may when I am in Nashville I may press charges. I called the Broomfield Police Department. He told me that the description from the neighbor that night was violent. Alright I'm out of time. Thank you.

At some point that same day, the Complainant iMessaged Tumpkin and told him she was being asked by the police to come to Broomfield. Tumpkin did not respond to the message.

### **3. December 14, 2016: DiStefano Determines No Report to OIEC is Required**

DiStefano said that after he traveled home from New York on December 13, 2016, and returned to campus on Wednesday, December 14, 2016, he reviewed University policy and concluded that there was no University Title IX jurisdiction because, as he understood the allegations, the incident occurred off campus in Tumpkin's apartment in Broomfield, the Complainant was not a University affiliate and was living out of state, and there was no threat to campus. He said that he reviewed OIEC's 2016-2017 Process & Procedures.<sup>63</sup> DiStefano said he looked at the jurisdiction section and made his assessment based on what George had shared with him. DiStefano said that George told

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<sup>62</sup>Forensic Pursuit, an external IT firm, was retained to examine the three voicemails from the Complainant on MacIntyre's phone. Forensic Pursuit confirmed that three voicemails from the Complainant's cell number were listed under "Blocked." Each voice mail message was marked with a blue circle symbol that usually indicates the voicemail is not retrieved or heard. Forensic Pursuit noted, however, that "when listening to blocked voice mails, which can be done by touching the voicemail record, the symbol does not go away to reflect the item has been viewed or listened to." Forensic Pursuit also noted that the iPhone does not log access times for voicemail files. .

<sup>63</sup>See Section C.1 of the Process and Procedures 2016-2017.

him only of one incident in Broomfield. DiStefano later clarified, “The main reason for failure to report was that another incident occurred on the Omni Hotel when the Athletics Department was paying for Tumpkin’s room until he could find a place to live. I had no knowledge of the incident that occurred at the Omni Hotel.”

DiStefano said that “To me, not being in the legal area, it was domestic violence between a university employee and a non-employee, off campus.” He said that Tumpkin’s interactions were confined to the Athletics Department and was coaching and he did not consider Tumpkin a threat. DiStefano said, “In hindsight now, the “mission” [piece of the Process & Procedures jurisdiction statement] that I talk a lot about, the climate of the university that shows respect for everyone on the campus” should have triggered the decision to report, but “at the time, I didn’t really think to that point, as I have been thinking about it now.”<sup>64</sup> He said at the time, the mission piece of the jurisdiction did not really connect with him. DiStefano said he also looked at the reporting outcomes and the different areas of the responsible employee definitions, but that he did not interpret the policy to require reporting.

DiStefano communicated to George that there was no need to report the Complainant’s allegations. He said he later talked to Simons about his decision not to report the incident to OIEC, and Simons told him it was a difficult or tricky question about jurisdiction. Simons confirmed to us that the circumstances of this report [of dating violence by an employee against a non-employee in an off-campus location] posed an issue of first impression under the policy.

DiStefano elaborated that he had built the OIEC and hired Simons. He also said that Simons was his direct report and that he has worked closely with Simons to develop the Sexual Misconduct Policy, provide additional education for the campus, and support OIEC. He explained to us during this review, “I kick myself every day. I should have just picked up the phone and called Valerie [Simons]. Hindsight is 20/20. I should have done that.” DiStefano said, “That’s on me, I take that responsibility.”

George recalled that DiStefano called and said “we are not obligated to report to Valerie [Simon’s] office because it was an off-campus incident.” George explained that he reported it to DiStefano, who felt there was nothing to do. George said, “I think we handled this right. In hindsight, we did not handle everything perfectly, and that bothers me because I am a perfectionist.” He said, “Obviously we need to make big improvements, and we will make them, because that is who I am.” In our last interview with George, he reiterated, “I was not going to sit here and say that we did everything right because we didn’t.” He said that he wished he “would have gone to OIEC or asked about the T[emporary] P[rotection] O[rder].” He said “Had we just called OIEC back then, we wouldn’t be sitting here now; I get that now, I didn’t get that then.”

#### **4. December 12-13, 2016: Tumpkin Retains Counsel**

According to MacIntyre, on December 12 or 13, 2016, Tumpkin approached MacIntyre and asked him for the number of the lawyer “that had been around some.” MacIntyre gave Tumpkin the contact information for Jon Banashek, a CU booster whose firm sponsors the annual kickoff luncheon, and attorney who had represented several CU football players in legal matters.<sup>65</sup>

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<sup>64</sup>See Section C.1.b of the Process and Procedures 2016-2017

<sup>65</sup>On January 18, 2017, in response to questions by *Sports Illustrated*, MacIntyre was asked by University counsel how Tumpkin came to be represented by Banashek. MacIntyre told University counsel he “did not know.” When later asked

Phone records from the Complainant reveal, at 5:10 p.m. EST on December 13, 2016, Banashek called the Complainant on her cell phone.<sup>66</sup> The Complainant said that she recognized the Colorado area code and was expecting to hear from social services, the police, or George. The Complainant said Banashek identified himself as Tumpkin’s lawyer and said “I understand you called Coach MacIntyre and that you are looking for a restraining order.” The Complainant said Banashek told her he could make that happen. He said he could assure her Tumpkin would never call or text her again. She said that she told Banashek that now Tumpkin knew she had called MacIntyre, she did not expect to hear from Tumpkin again. The Complainant said that Banashek told her that Tumpkin was called in to meet with MacIntyre and George, which was “news” to her.

The Complainant said that Banashek asked her what she wanted, and she responded that she told Banashek about the history of abuse, and said, “I want him not to have beaten me for 2 years. I want him not to hurt women. I want him to get help.” She said that she told Banashek she had been diagnosed with PTSD. She said Banashek offered for Tumpkin to pay for her mental health expenses. The Complainant said that she did not want Tumpkin’s money. She said that Banashek asked if she wanted an apology [from Tumpkin], and she replied that she already had hundreds of apologies over the years. The Complainant said she told Banashek that Tumpkin was dangerous – to other women and as a drunk driver – and she wanted him to get help and stop hurting women. Banashek told her he could get Tumpkin in counseling, and she responded that she had tried that and had called MacIntyre to help, but that now the only person talking to her was a criminal defense attorney who was being paid a lot of money to get Tumpkin out of trouble for beating her for two years. She said Banashek then asked her if she was considering going to the police and, if she decided to contact the police, whether she would let him know in advance. The Complainant said that she told Banashek she would not tell him, but she would call MacIntyre to give him a “heads up” because she trusted him. According to the Complainant, Banashek replied that MacIntyre was not going to take her calls anymore because he did not want to be called as a witness.<sup>67</sup>

## **5. December 13-15, 2016: The Complainant’s Response to Banashek’s Outreach**

At 6:19 p.m. EST on December 13, 2016, one minute after the call from Banashek ended, the Complainant called MacIntyre. The call again went directly to voicemail, and according to MacIntyre, was not received by him:

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about the inconsistency, MacIntyre said, “That’s wrong.” He reiterated, as he told us, that Tumpkin walked into his office, said he might need to get counsel, and asked for the number of “that guy” who represented athletes. MacIntyre said he did not know why counsel’s memo reflected something different. He said that he spoke with counsel on his cell phone from a parking lot. He also said that he gave Tumpkin the telephone number, but that he did not know from there how Tumpkin got in touch with Banashek, and that he did not know the terms of their engagement.

<sup>66</sup>We do not know how Banashek obtained the Complainant’s telephone number, but a reasonable inference is that Tumpkin provided the number. Both MacIntyre and George said they did not provide the number to Banashek, and George has indicated that he never had the Complainant’s cell phone number. The call between Complainant and Banashek lasted 68 minutes.

<sup>67</sup>We do not know how Banashek learned that MacIntyre was not going to take the Complainant’s telephone calls. MacIntyre denied speaking with Banashek, and Wayne said that she did not speak with Banashek until after the *Sports Illustrated* article when she called to admonish Banashek that he did not represent MacIntyre and should not speak on his behalf. Further, the first documented call we are aware of between George and Banashek occurred on December 16; however, we note that in the December 15 telephone call between Banashek and the Complainant, she described that Banashek had spoken with George. While we obtained University landline records, the manner in which the data is stored precluded us from determining the existence of relevant landline calls.

Hi Coach Mac. I understand that I guess you probably aren't gonna speak with me and I understand. I just wanted to let you know that I just got a call from a defense attorney representing Joe Tumpkin. I just I don't think I was anticipating that, I don't know, I don't know what's going on, I don't know, like, you know, and he's like I understand you called Coach MacIntyre, and you know, I just, I don't know, I just, I don't know, I was just was trying to keep you abreast of what I was doing and trying to protect the team and all of that and I'm, I'm just really confused. So alright like I said I'm probably not allowed to contact you, I don't know. I don't even know who this man is, but he just told me about how I would be hurting you and the team and, so anyway I guess Joe has lawyered up and I don't know. Ok. I don't really know what to do. Like I just talked to you. I don't, I don't know what I'm supposed to do. I'll consult with my family. I just wanted to let you know I got a call from an attorney saying that I understand you called Coach MacIntyre and saying I'm representing Joe Tumpkin. Ok. Take care.

The Complainant also contacted Tumpkin by iMessage to share the case number for the March 2016, 911 call "in case you need it for your attorney." Tumpkin responded and asked the Complainant if she was going to the police. The Complainant did not reply.

On December 15, 2016, the Complainant contacted a Boulder attorney, Brian Bagley, Esq., to assist her in obtaining a protection order and reporting Tumpkin's conduct to law enforcement. The Complainant sent MacIntyre an iMessage at 1:13 p.m. EST (again, not received by MacIntyre): "I am going to file a report with the police in Colorado about what was done to me. I do not wish to give Joe or his criminal defense attorney a heads up, but I will forever respect you and Trisha so I wanted you to know ahead of time."<sup>68</sup>

Later that evening at 5:56 p.m., the Complainant called MacIntyre for the final time. Again, the call went directly to voicemail, and according to MacIntyre, was not received by him:

Hi Coach. It's [the Complainant] and this will be my last contact. I would appreciate very much if you did not let Joe or his attorney know. I am calling you only out of respect for you and I felt too guilty not to call you and let you know but it's very important that Joe and his attorney do not know. I have a flight Sunday night to come to Denver and I am I have an attorney and I am going to be going to file a TPO and then to the police department and so that's happening Monday and I wanted to let you know that there, that after that I don't know what happens and I don't have a lot of control over what the DA does and all of that, and so I just wanted to let you know so that you were not blindsided and felt as if I had done something that I hadn't informed you about so this is really just out of, honestly, out of respect and I am hoping that you can, that you will keep my confidence and because it doesn't [garbled] help me at all if his defense attorney is aware and Joe is aware and so anyway that is Monday [December 19] that that will be happening, ok? I, like I said, I know I'm putting you in a bad position and I'm trying to call to put you in a better position. So I won't contact you again. I wish you and Trisha the best and I just have nothing but respect for both of you and your program. So ok. Goodbye.

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<sup>68</sup>Screenshot from the Complainant's phone. Exhibit 4.

## 6. December 15-16, 2016: Banashek's Continued Outreach

On December 15, 2016, at 7:14 p.m. EST, Banashek called the Complainant again.<sup>69</sup> The Complainant recalled that Banashek told her that Tumpkin was starting counseling the next day and said "I thought you would want to know that he is getting help for his problem." The Complainant said Banashek asked her "what I was planning on doing," and when she responded she did not know, Banashek replied "Well, you have a lot of people on pins and needles." The Complainant asked Banashek to whom he was referring, and Banashek said "Joe [Tumpkin], Mac[Intyre], Rick George."<sup>70</sup> The Complainant responded by asking Banashek "So, Mac[Intyre] says he 100% believes me. You tell me that you have [Tumpkin] in counseling starting tomorrow for his problem. No one is questioning that the guy choked me for two years, but everyone is on pins and needles because they want to know if I am going to the police and not that they know they have an abusive man on staff?" The Complainant said Banashek told her that was not the case and that he wanted to work things out with her without involving the police. When Banashek told her it was Tumpkin's career at issue, the Complainant responded "It's my career, too. Do you know how much work I have missed because I can't focus and I can't sleep due to the years of this?" Banashek said he understood, then told the Complainant he talked to George that night,<sup>71</sup> and added, "I told you I hadn't talked to Mac[Intyre]."

The Complainant said Banashek went on to say that he could "spend 100% of my time and resources on getting [Tumpkin] healthy and helping you or I can spend 100% of my time and resources keeping [Tumpkin] out of jail and saving his job. I would rather spend my time and resources helping you two heal." Banashek then asked the Complainant again what she was planning to do. The Complainant again said she did not know, but told Banashek:

I was really upset; I love [Tumpkin], and I have tried to help him. I begged him to get help for weeks. When he wouldn't, I called [MacIntyre] and I told him that I didn't want to hurt [Tumpkin] or [MacIntyre] or the other coaches or the boys. I just wanted [Tumpkin] to not hurt women or other people. He needed intensive therapy to address the level and frequency of violence he has had towards me. Instead of hearing from [Tumpkin] or [MacIntyre] or [George], I only have heard from a defense attorney. I said I tried to help everyone and everyone lawyered up and stopped talking to me. The only two people I trust in this are [MacIntyre] and [George].

The Complainant said Banashek responded by asking if he should have George call her. The Complainant said she responded by saying, "No. He has had my number since December 9. If anyone had wanted to help me, they would have called by now." The Complainant said she was "the only one in this without a lawyer and there was no one protecting her best interests, only their own." The Complainant said Banashek reiterated that he wanted to help the Complainant.

On December 16, 2016, at 9:02 a.m., Banashek called George. George said that he did not remember a lot about that early call, but that he and Banashek talked periodically throughout the

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<sup>69</sup>This call lasted 76 minutes.

<sup>70</sup>George confirmed, "I never said to Banashek that I was on pins and needles. I do not recall talking to Banashek on the night of the 15<sup>th</sup>. My cell phone logs do not show that I spoke with Banashek on that evening."

<sup>71</sup>As noted in footnote 33, we do not have documentation of a cell phone call between Banashek and George on December 15, 2016 and we were unable to identify if there were any calls to or from the University landline.

process to see if there was a police report or police investigation going on. George said that Banashek wanted to know Tumpkin's employment status, and that George probably asked Banashek where this was going. George explained, "We were trying to make decisions on what we are doing" with Tumpkin and wanted to know if Tumpkin was going to be criminally charged. George said Banashek probably asked about Tumpkin's status and whether Tumpkin was going to be considered for the defensive coordinator position.<sup>72</sup> George was sure he would have asked Banashek, "Is there a police report? Are there charges?" Banashek said there weren't. George said that Banashek "did not give me a lot of the facts on the case – it was more informational."

Later that day, December 16, the Complainant called Banashek at 1:12 p.m. EST and again at 1:13 p.m. EST, first on his office line and then his cell phone. Banashek answered his cell phone, and the Complainant said she told Banashek she retained a lawyer.

## **7. December 16, 2016: The Defensive Coordinator Position**

In light of Jim Leavitt's sudden departure from CU Boulder, and the allegations against Tumpkin, MacIntyre sought advice from George as to what role Tumpkin could play at the pending bowl game. MacIntyre said that George had talked to DiStefano and he knew they were trying to determine what they were going to do. MacIntyre said that he asked George, "Is [Tumpkin] going to be at the bowl game?" MacIntyre said that if Tumpkin was going to be there, he was "never going to treat him any different[ly] than other employees." MacIntyre said that he was considering having Tumpkin call plays at the bowl game, and that he "essentially [got] permission" from George to do so. MacIntyre explained that he initially put any decision about the defensive coordinator position on hold until after the bowl game. He said that Tumpkin would have been "a thought to be a candidate before all this, but once all of this came to light [referencing the Complainant's December disclosure], true or no, I had to move my mind based on logistics and timing." He said that because he did not have enough information, he had a responsibility to the team to move on [from considering Tumpkin as a potential defensive coordinator] as a business decision. He said that he was not going to consider Tumpkin for the defensive coordinator position, and that he never asked George if Tumpkin could be considered for that position. MacIntyre said, "It would have also been me using my position to push the resolution if I were to consider him for the defensive coordinator position."<sup>73</sup> MacIntyre also consulted with Wayne on December 16, 2016. He called Wayne at 1:50 p.m. and 5:41 p.m. Wayne returned his call at 5:46 p.m. and they spoke for 12 minutes. MacIntyre said that had he been aware of the temporary protection order before the bowl game, he would never have allowed Tumpkin to be the play caller given the media world he lived in. Wayne agreed that she would have been very clear in her advice that Tumpkin would not have called the plays.

George said that Tumpkin would have been a candidate to replace Leavitt before the Complainant's allegations. George said that he did not recall MacIntyre asking him whether Tumpkin "is going to be at the bowl game," but that they did discuss what to do with Tumpkin. George said that he told MacIntyre, "In light of what is going on, we cannot make him defensive coordinator until we know what is going on." George said that he did not want to elevate Tumpkin, even to interim defensive

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<sup>72</sup>On December 14, 2016, Jim Leavitt, the football team's defensive coordinator, announced he was leaving CU Boulder for a position with University of Oregon.

<sup>73</sup>We understood MacIntyre to mean that he did not want to take any action that would influence the outcome of the Complainant's allegation against Tumpkin, and that seeking to promote Tumpkin could impact how the allegation was resolved.

coordinator, because they knew about the allegation, but did not know enough about the allegation. At the same time, George said, “We had a responsibility to our employee.” George explained, “All we had is an allegation from a lady that we don’t know very well who had one or two phone calls with [MacIntyre] – that was it – I wish we knew then all the information.” George explained, “We were very clear that we were not promoting him, but that he was going to help call the plays.” George said he discussed the circumstances with DiStefano, but that it was George’s decision to allow Tumpkin to call plays. George explained, “It was a difficult decision and I made it – to allow him to be a coach at all.”<sup>74</sup>

DiStefano confirmed that he and George talked about Leavitt leaving and what to do with Tumpkin. He said that he and George agreed that they had to wait until they got some more information. DiStefano said that George told him that George had not been sleeping well because MacIntyre was thinking about promoting Tumpkin to defensive coordinator. DiStefano said, “[George] and I agreed that it wasn’t a good time because we still did not have enough information.” He said that he planned to talk to University Counsel Patrick O’Rourke at the bowl game because “[O’Rourke] always has good advice.”

On December 16, 2016, the Denver Post published a story with the headline *Safeties Coach Joe Tumpkin to Call Defense for Colorado Buffaloes in Alamo Bowl*. The article noted “Joe Tumpkin, CU’s safeties coach, will assume defensive coordinator responsibilities during the Dec. 29 game against Oklahoma State.”<sup>75</sup> MacIntyre was quoted in the article saying “It’s seamless because the staff worked so closely together,” MacIntyre said. “They met together, watched (film) together. They talked and game-planned together and that type of thing.”<sup>76</sup>

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<sup>74</sup>MacIntyre later explained, “Rick [George] and Phil [DiStefano] had already approved the decision to make Joe the play caller . . . I was not aware of [the] confusion [between George and DiStefano] until I read the May 10 report.” MacIntyre reiterated that he was “waiting for resolution on [Tumpkin’s] employment at this time and was not considering him to be the Defensive Coordinator after the allegations.” MacIntyre explained that it was his understanding at the time that “Phil [DiStefano] was seeking counsel as to what to do with Joe [Tumpkin] as an employee.” MacIntyre further explained, “We had finalized the play calling decision on December 16 . . . Phil [DiStefano] and Rick [George] were involved in the play caller decision. Rick [George] and I never considered making Joe [Tumpkin] the DC after the allegations. We were waiting for instruction on how to handle Joe [Tumpkin] as an employee given the allegations. I never even thought about giving Joe [Tumpkin] a new contract.”

<sup>75</sup>According to Plati, there was no press release or formal statement by the Athletic Department. He said that he found out at the Alamo Bowl media day on December 16 when MacIntyre announced that Tumpkin was going to call the plays. Plati said that when he asked MacIntyre whether Tumpkin was going to be a candidate for the defensive coordinator position, MacIntyre was noncommittal. Carl confirmed his knowledge of the report and said that “We never considered [Tumpkin] for the defensive coordinator position because of the allegation that was out there.” He said that it was not “fireable” to do that, but they “were not going to promote him with that.”

<sup>76</sup>See also the following quotes from media accounts: “MacIntyre said his search for a new defensive coordinator won’t begin in earnest until after the Alamo Bowl. Tumpkin, who will be coaching in his fifth bowl game, could be an in-house candidate should CU aim to keep continuity with the staff it has, particularly given his experience.” <http://www.denverpost.com/2016/12/16/joe-tumpkin-to-call-defense-colorado-buffaloes-in-alamo-bowl/>; “MacIntyre said safeties coach Joe Tumpkin will call the defense in the bowl game and will also take over coaching linebackers for the next two weeks.” <http://www.cubuffs.com/news/2016/12/16/football-buffs-defense-doesn-t-plan-on-skipping-a-beat-for-alamo-bowl.aspx>; “Tumpkin will likely be a candidate for the coordinator’s job once MacIntyre turns his attention to the task of hiring another coach. But Tumpkin said the Alamo Bowl is in no way an “audition.” <http://www.cubuffs.com/news/2016/12/16/football-buffs-defense-doesn-t-plan-on-skipping-a-beat-for-alamo-bowl.aspx>; “The only thing I’m worried about is this bowl game and getting our kids ready to play, send our seniors off the right way and get ready for the next season,” Tumpkin said. “That’s my focus.” <http://www.cubuffs.com/news/2016/12/16/football-buffs-defense-doesn-t-plan-on-skipping-a-beat-for-alamo-bowl.aspx>.

## **8. Week of December 16, 2016: DiStefano Speaks with Benson**

DiStefano said that later in the same week as his conversation with George about the allegations against Tumpkin, DiStefano had a conversation with CU President Bruce Benson.<sup>77</sup> DiStefano said that he told Benson that “something is going on in athletics.” He told Benson, “I don’t believe at this point we have to report anything.” He said he told Benson that “[George] called me, it involved Tumpkin, and we were waiting for more information.” DiStefano said that Benson called him back later that day to discuss Leavitt, and DiStefano told Benson “we had this issue [with Tumpkin], and it deals with the incident in Broomfield, and the victim lives in Michigan, and I will keep you posted as we have more information.”

Benson said that he and DiStefano talk regularly, and that he knew DiStefano had told him about the incident. He said he did not remember the details of the conversation, but remembered that DiStefano told him “Tumpkin’s girlfriend called [MacIntyre].” Benson said, “other than that, I don’t know what he said.” Benson said he could not recall what DiStefano told him or parse what he learned from DiStefano from what he has read in the media since then. Benson said that DiStefano, whom he has known since 1985, would raise significant issues with him, and that Benson’s role was ensuring “the appropriate people are in charge.” Benson said that he “normally would have asked, ‘Are we taking care of it? Is it in the right hands?’” Benson said “I can’t tell you much more than that – I got too many things going on.” Benson said that “Anytime you have sexual violence, it is a concerning issue to me,” but that “if it is being handled, I move on, I don’t micromanage.” He said, “I must have felt good about it – I would have assumed it got covered.” Benson elaborated, “I guess I assumed Phil [DiStefano] was handling it – or Valerie [Simons].” He said that, “I just had confidence that Phil [DiStefano] would be involved and Valerie [Simons] would be involved and they would handle it.” Benson said he would be surprised if it did not get to DiStefano, Simons, or Chief of Staff Catherine Shea. He said that he operates the University based on trust and collaboration, and that he had been working to break down silos across the University.

### **D. December 18 to 22, 2016: Temporary Protection Order and Report to Broomfield Police Department**

#### **1. December 18-19, 2016: The Complainant Meets with Broomfield Police Department**

On December 18, 2016, the Complainant flew to Colorado to meet with the Broomfield Police Department and begin the process of filing for a temporary protection order.

On December 19, 2016, the Complainant met with her attorney, Brian Bagley, and then met with Detective Dale Hammell at the Broomfield police station for seven hours. As part of the report to law enforcement, the complainant completed a Witness Statement.<sup>78</sup>

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<sup>77</sup>DiStefano thought he spoke with Benson on December 15 or 16, as well as the day of commencement, which was December 17, 2016.

<sup>78</sup> Exhibit 5.



## **2. December 20, 2016: The Complainant Files for a TPO**

On December 20, 2016, at 10:01 a.m., the Complainant filed a Motion for Temporary Protection Order (TPO) in the Boulder County Court.<sup>79</sup> The Motion included a Complaint, which detailed alleged abuse by Tumpkin from February 15, 2015 through November 20, 2016. The Complaint provided detailed information about locations of occurrence and details. Also attached to the filing was a copy of the Complainant's Broomfield PD Witness Statement. Judge Stavely granted the ex parte Motion, ordering the TPO against Tumpkin. The Court set a January 3, 2017 hearing date and scheduled a December 22, 2016 telephonic conference between the parties.

## **3. December 21, 2016: Banashek Waives Service for the TPO**

On December 21, 2016, Detective Hammell of the Broomfield PD received a call from Banashek. Banashek told Hammell he would consider letting him meet with Tumpkin, but not until Banashek returned to the office after the holidays. Banashek also told Hammell he was not aware of the protection order yet.<sup>80</sup>

At 4:51 p.m. on December 21, Banashek emailed Bagley acknowledging a phone conference scheduled for the next morning. Banashek wrote "I understand you helped [the Complainant] obtain a TPO yesterday. ... I am authorized to accept service for Mr. Tumpkin if you'd like to send me a waiver of service."<sup>81</sup> Approximately half an hour later, at 5:23 p.m., Bagley emailed Banashek, attaching a waiver of service.<sup>82</sup> At 6:02 p.m., Banashek replied "I will sign [the waiver of service] tonight and my assistant will send it back to you tomorrow. I notice that the TPO motion references an attached witness statement that was submitted to the Broomfield PD on 12/19/16 - but that document wasn't available on [the court docketing system]. Can you please forward that to me?"<sup>83</sup> Banashek also noted that he had a conflict on January 3, 2017, the date of the hearing, and asked to discuss a continuance.<sup>84</sup>

On December 21, 2016, Banashek signed the waiver of service on behalf of Tumpkin, effectively acknowledging the existence of the TPO (and agreeing to abide by its terms), the affidavit, the January 3, 2017 hearing, and the ongoing criminal investigation (based on the reference to the Broomfield PD Witness Statement).<sup>85</sup>

At 6:19 p.m., approximately 17 minutes after Banashek told Bagley he would sign the Waiver of Service, Banashek called George, but George did not answer. George called Banashek back at 6:48 p.m, but did not reach him. At 7:47 p.m., George called Banashek again and they spoke for 10 minutes.

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<sup>79</sup> Exhibit 6. Under Colorado law, a TPO is issued on an ex parte basis and remains in effect until a Permanent Protection Order (PPO) hearing is scheduled with the court. The TPO and notice of the date of the PPO hearing must be served on the accused to ensure compliance with the TPO on an interim basis, as well as subsequent appearance at the hearing.

<sup>80</sup> Although Detective Hammell declined to speak with us, the Complainant provided a copy of an iMessage from Hammell confirming this information. Exhibit 7.

<sup>81</sup> December 21, 2016 email between Banashek and Bagley.

<sup>82</sup> December 21, 2016 email between Banashek and Bagley.

<sup>83</sup> December 21, 2016 email between Banashek and Bagley.

<sup>84</sup> December 21, 2016 email between Banashek and Bagley.

<sup>85</sup> Exhibit 8.

According to George, he was at a women's basketball game during the December 21<sup>st</sup> call with Banashek. He said that it was "possible, highly possible, that [Banashek] talked about a restraining order."<sup>86</sup> George said that he did not remember talking about a temporary restraining order, but that he did recall Banashek talking about some kind of order that would take a couple of weeks.<sup>87</sup> George said that Banashek at no time told him that the TPO had been filed. He reiterated that he was aware of "some kind of an order that would go to the judge," but that he did not know much about the order.

#### **4. December 22, 2016: Waiver of Service Docketed**

On December 22, 2016, Detective Hammell sent an iMessage to the Complainant to advise her of his call with Banashek the previous evening.<sup>88</sup>

At 9:36 a.m. on December 22, 2016, Banashek emailed Bagley a copy of the executed waiver of service, dated December 21, 2016. The Waiver of Service was docketed by the court that same day.<sup>89</sup> Later that evening, at 7:40 p.m., Banashek emailed Bagley, "Thanks for your time today. .... I have a couple other ideas to discuss with you when you have a few minutes to talk."<sup>90</sup>

At 7:45 p.m., Banashek texted George. At 7:46 p.m., George called Banashek, and the call lasted six minutes. According to George, he was at a men's basketball game when Banashek texted him. George said that he would have had no reason to call Banashek on either night had Banashek not texted or called him first. George could not distinguish the content of the December 21 call from the December 22 call. He said he did not remember the specific content of those calls, but that Banashek was giving him updates as he knew them. George said, "I don't feel so good about that today." He said that Banashek did not tell him the protective order had been filed. George said that he knew he would get the opportunity to see the orders, but that he did not really understand the court process. George said that he did not recall Banashek saying anything about waiving a hearing, just that they were having positive discussions and that was going to take some time.

He said, "I knew a protection order was in process," and acknowledged that he did not share that information with MacIntyre or with anyone else. George said that in his 34 years, he has never had a domestic/dating violence issue. George said he did not go back and speak with O'Rourke or anybody else to check in on what the TPO meant. George said, "I have thought about this a lot, and I don't know if it is how I accepted things or heard things, but I didn't think there was a big legal thing coming behind this. I never thought there was something like this, maybe that was naiveté. I don't know if I relaxed or not." He acknowledged that had information been shared with OIEC, or had the TPO been explored, it would have been a different outcome. George said, "I wish I would have gone to OIEC or asked about the TPO – you have regrets and thoughts about what you could have done . . . – if we had just called OIEC back then, we wouldn't be sitting here now. I get that now, I didn't get that then."

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<sup>86</sup>George later clarified, "I do not recall saying 'highly possible.' I did say 'possible' but I do not recall that he ever told me about the TPO."

<sup>87</sup>This is presumably the PPO that was initially set for a hearing on January 3, 2017. As noted above, the ex parte TPO granted on December 20, 2016 was temporary and would have required a PPO hearing or agreement by Tumpkin before becoming final.

<sup>88</sup> Exhibit 7.

<sup>89</sup> Exhibit 8.

<sup>90</sup>December 21, 2016 email between Banashek and Bagley.

## **E. December 24, 2016 to January 5, 2017: The Alamo Bowl**

On December 24, 2016, the football team traveled to the Alamo Bowl in San Antonio, Texas. The game was scheduled for December 29, 2016.

### **1. December 27, 2016: DiStefano Approaches O'Rourke**

On December 27, 2016, DiStefano approached O'Rourke on the plane on the way to the bowl game. DiStefano said he told O'Rourke that he and George needed to speak with him. DiStefano recalled that he told O'Rourke that they needed to discuss the possibility of promoting one of the assistant coaches.

O'Rourke corroborated this account. He said that on Tuesday, December 27, 2016, around noon, DiStefano told him he and George might need to talk to O'Rourke about a call MacIntyre received about one of his assistant coaches. O'Rourke said that, in the 48 hours before the bowl game, everyone had different commitments, but he, George, and DiStefano were all scheduled to be at an event at the Alamo on December 28.

### **2. December 28, 2016: DiStefano and O'Rourke Talk**

The following day, while at a social event at the Alamo, DiStefano and O'Rourke spoke as DiStefano was on his way into the event to give a speech to the guests. The conversation lasted approximately five minutes or less. George was not present. DiStefano said he told O'Rourke about the Complainant's call to MacIntyre. He described the conduct to O'Rourke as one incident of dating/domestic violence in Broomfield around the time of the Washington State game. DiStefano recalled that he probably shared that the Complainant did not want police involvement. DiStefano said he also told O'Rourke "we are waiting to hear some more information about a restraining order." DiStefano said that is all he could have told O'Rourke because that is all he knew at the time. DiStefano said that O'Rourke advised that Tumpkin should not be promoted until the University had more information. He said that O'Rourke said "let's not do anything [to promote Tumpkin or advance the contract] now," and DiStefano agreed. DiStefano also remembered discussing and agreeing that any future contract would have to give the University ability to terminate Tumpkin's employment for cause.

O'Rourke said that DiStefano told him that they were considering promoting Tumpkin to defensive coordinator because Leavitt had just been recruited to the University of Oregon. O'Rourke said DiStefano told him that MacIntyre received a phone call from Tumpkin's girlfriend, who lived in Michigan, who said Tumpkin had physically abused her. O'Rourke said that DiStefano was imprecise and that was the extent of the detail provided. O'Rourke said that he assumed MacIntyre had just received the phone call. O'Rourke said, based on the information provided, he had no sense of when or where the abuse occurred. He said that he went "straight into thinking about the contract." O'Rourke asked DiStefano if there was an ongoing criminal investigation or anything else going on, and DiStefano said not that he was aware of. O'Rourke said he understood the context to be that they were considering promoting Tumpkin to defensive coordinator and that MacIntyre had just received the call. O'Rourke said he told DiStefano it would not be appropriate to offer Tumpkin the position without further information, but that if there was no police involvement and they still wanted to hire Tumpkin, "in the absence of external restraints [such as criminal charges or a restraining order] we could create restrictions in the employment relationship," including the ability to terminate Tumpkin if he had any contact with the Complainant. O'Rourke

said that DiStefano responded that the approach made sense to him, he would talk to George, and DiStefano would let O'Rourke know if they wanted to move forward, if at all.

O'Rourke said the entire conversation lasted "a couple of minutes." He described the setting as an outside courtyard where he and DiStefano had ducked into a corner to speak. He said it was not a private location and that food and drinks were being served in the courtyard. O'Rourke said it was not his decision who gets a contract, but that he would not have wanted to bring a contract forward [to the Board of Regents] for a coach who had an issue that was unresolved, or if he thought the contract posed some type of risk. O'Rourke said that he expected that if the campus was ultimately going to get to the point where it offered Tumpkin a contract, there would be further conversation. O'Rourke acknowledged that "It didn't blip across my mind whatsoever about the potential risk posed by a current employee." He said, "I feel bad about that, but I did not ask [DiStefano] for details." He added, "It did not sound to me like he knew them – what happened, where, when." O'Rourke said, "The question about reporting or the Title IX response didn't even pop into my head at the time." O'Rourke said that he felt like he had let DiStefano down because DiStefano brought him information, which he viewed through the narrow lens of how the question was framed to him (a specific question about promoting an employee). O'Rourke said that he answered the specific question that DiStefano posed to him and did not think through the information "in all of those dimensions." O'Rourke said that his own errors in this were twofold: "One, I should have gone back and said to Rick [George], 'What are you doing?' Two, from a reporting standpoint, it didn't even blip across my radar; I was thinking from the lens of what I got asked."

Sometime after O'Rourke and DiStefano talked, while still at the bowl game, DiStefano circled back to George. George said he had been asking DiStefano how to "bring this to resolution" because "we didn't know where this was going and we had to move on to hiring a staff," but that DiStefano responded by saying he and O'Rourke had discussed drafting a contract for Tumpkin that included provisions that would allow the University to terminate Tumpkin if necessary later. George said that was "not what I was expecting to hear," and thought that DiStefano had not understood what George had been asking. George said he was asking how to resolve the issue around Tumpkin because they "didn't have any information, didn't know where this was going, and we were going out to recruit in ten days and needed to know what to do." Instead, George said DiStefano seemed to think George was asking him to find a way to hire Tumpkin for the defensive coordinator position. DiStefano said he recalled George asking about Tumpkin's future employment, which he understood at that time to mean Tumpkin's potential role as the defensive coordinator.

#### **F. December 29, 2016 to January 5, 2017: Continued Court Action on the TPO**

On December 29, 2016, the Boulder County Court granted the parties' request to continue the January 3, 2017 show cause hearing.<sup>91</sup>

On December 30, 2016, Tumpkin's counsel again waived service of the TPO.<sup>92</sup> Because the January 3, 2017 hearing date had been continued, the Court signed an order for a second TPO, effectively extending the protection order until the new hearing date. As he did the first time, Tumpkin waived service of the TPO through his counsel, agreed to abide by its terms, and

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<sup>91</sup> Exhibit 10.

<sup>92</sup> Exhibit 11.

acknowledged a January 31, 2017 hearing date. The court docketed the Waiver of Service on December 30.<sup>93</sup>

MacIntyre and Tumpkin remained in contact over the holiday break. Between December 31, 2016 and January 4, 2017, MacIntyre called Tumpkin three times.<sup>94</sup> MacIntyre explained that Tumpkin was still working and he spoke with Tumpkin about recruiting. Both MacIntyre and George said that Tumpkin never provided any information about a temporary protection order, although they both “hoped” that he would have provided whatever information he possessed.

On January 5, 2017, Banashek emailed Bagley asking if the Complainant would consider an alternative that “might salvage” Tumpkin’s career. Banashek suggested that the Complainant agree to keep the restraining order temporary for one year and then revisit the matter or, alternatively, that she notify the police that she no longer wanted to proceed with the criminal case.<sup>95</sup>

## **G. January 6, 2017: TPO Filing Becomes Public and Tumpkin Placed on Leave**

### **1. Inquiry by The Boulder Daily Camera**

On the afternoon of January 6, 2017, Mitchell Byars, a reporter at *The Boulder Daily Camera*, obtained a copy of the TPO from the court records. Byars contacted CU Boulder for a statement. At the time, George was working with Carl and others on the terms of MacIntyre’s contract extension.<sup>96</sup>

David Plati, the University’s Sports Information Director, was in Tampa, Florida for a championship game. Jason Clay, the Associate Sports Information Director, was present in the office and took Byars’ call.

Clay said that Byars called to get a comment from MacIntyre or George about the TPO. Clay recalled that Byars called around 1 p.m. or 2 p.m. and asked “if the department knew about the Tumpkin situation.” Clay thought Byars was asking whether Tumpkin was going to be named defensive coordinator. He said that Byars “was very vague” and he “had to probe to find out what was going on.” Byars then told Clay about the court order.

Clay called Plati on his cell phone and asked Plati if he knew about the restraining order. Plati said he did not know anything about the issue. Plati told Clay to talk to George and Carl because Plati thought MacIntyre may have been out of town. Plati also notified Ryan Huff, Spokesperson and Issues Coordinator for University Communications.

Clay said that George and Carl were both in the Boulder campus offices, and that he went to see Carl first. Clay recalled he told Carl a reporter from *The Daily Camera* called about a restraining order filed against Tumpkin and wanted a quote. Clay said Carl responded “let’s go in and grab

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<sup>93</sup> Exhibit 9.

<sup>94</sup> MacIntyre called Tumpkin on December 31, 2016 at 6:45 p.m. (2 minutes); January 1, 2017 at 8:25 p.m. (5 minutes); and January 4, 2017 at 3:05 p.m. (1 minute).

<sup>95</sup> January 5, 2017 email between Banashek and Bagley.

<sup>96</sup> MacIntyre also said that he was in his office working on his contract. Similarly, Henson-Strehle was working on MacIntyre’s contract that afternoon. Henson-Strehle said that George called her to alert her about Byars’ outreach. Henson-Strehle later explained that George called because Tumpkin had been scheduled to go on a recruiting trip and George needed advice in light of Byars’ information.

[George].” Clay said George asked “what specifically Byars was asking, what the exact question was.” Clay explained that George said he did not know the restraining order had been filed, but that he was “aware of something previously.” Clay said he did not ask what George had known previously, and Clay did not know if Carl knew anything before January 6. Clay explained he did not feel it was his “place” to ask George or Carl “what was going on.” Clay recalled that the three of them, George, Carl and Clay, called Huff to advise him of the information about the restraining order and the request for comment. Clay said that Huff obtained a copy of the restraining order. Clay said that George called also DiStefano while Carl and Clay were in George’s office.<sup>97</sup>

George said that he had been meeting with Carl when Clay came in. George said that he immediately picked up the phone and called Banashek and said, “Why didn’t you tell us about the restraining order?” George said that Banashek responded “I did tell you.”<sup>98</sup> George recalled that MacIntyre and Carl were in the room when he called Banashek. Carl confirmed that he was present when George called Banashek and that he heard George say, “Why didn’t you tell me about this? Why didn’t you let me know about this?” Carl said the he could not hear Banashek’s response, but that George said, “That’s not right. I don’t recall you telling me that.” Clay also recalled that George called Banashek, but Clay did not remember hearing George say to Banashek, “Why didn’t you tell me?” Clay noted that he was not in the office for the entire conversation between George and Banashek because he left the office at some point to call Plati.

Clay said he told Plati what George and Carl had shared with him. Clay did not recall telling Plati that George and maybe Carl knew “of a prior situation, whatever it was.” Plati recalled that Clay told him that “January 6 was the first time George and Carl learned of the restraining order.” When asked if Plati understood it to be the first time they *learned of* the restraining order or the first time they *saw* the restraining order, Plati responded that he understood it as both – the first time Carl or George *learned of or saw* the restraining order. Plati said he did not talk to MacIntyre, George, or Carl on January 6, but relied upon the information he learned from Clay.

At 3:14 p.m., Huff emailed DiStefano, copying O’Rourke; Elvira Strehle-Henson, Managing Associate University Counsel; Francis Draper, Vice Chancellor for Strategic Relations; and Catherine Shea, the Chancellor’s Chief of Staff and Ethics and Compliance Director, with the subject line “Alert: Restraining order against asst. football coach Joe Tumpkin.”<sup>99</sup> Huff advised that *The Daily Camera* was planning to publish an article that afternoon “on a restraining order against assistant football coach Joe Tumpkin.” Huff wrote, “The Athletic Department is just learning of these allegations and is considering a holding statement along the lines of “We’re collecting information on this report, but don’t have a comment at this time.”<sup>100</sup> DiStefano forwarded Huff’s email to George.<sup>101</sup>

Approximately 15 minutes later, Huff, replying to the same string as his 3:14 p.m. message attached a .jpeg image of one page of the TPO that included the Complainant’s statement of abuse. Huff wrote that he received the picture from *The Daily Camera* reporter, who was in the court house. He summarized the document as follows, “The reporting party alleges various incidents of choking,

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<sup>97</sup>The call logs reflect George called DiStefano at 2:28 p.m. and the call lasted for three minutes.

<sup>98</sup>No call to Banashek is reflected in George’s cell phone call logs. The call may have been made from his office land line.

<sup>99</sup>January 6, 2017 email from Huff to DiStefano et al.

<sup>100</sup>January 6, 2017 email from Huff to DiStefano, copied to Strehle-Henson, O’Rourke, Draper and Shea.

<sup>101</sup>January 6, 2017 email from DiStefano to George, forwarding an email from Huff.

throwing her against a wall and biting her face.” He said that *The Daily Camera* planned to publish an article in the next fifteen minutes (probably around 3:40pm) and that he was working with Athletics on a holding statement.<sup>102</sup> DiStefano again forwarded this email to George.<sup>103</sup>

At 3:37 p.m., Huff emailed Clay, George, Carl and Plati advising them of the impending news article and attached the .jpeg image of the page from the TPO.<sup>104</sup> At 3:39 p.m., Strehle-Henson emailed DiStefano, Draper, Huff and George, copying Shea and O’Rourke, attaching a copy of the complaint, order, waiver of service, and exhibits.<sup>105</sup> Strehle-Henson noted that a hearing date had been scheduled for January 31, 2017 and outlined the court actions to date:

1. 12/20/2016 - Temporary Protection Order Granted;
2. 12/20/2016 - Complaint - TPO Domestic Abuse;
3. 12/30/2016 - Temporary Civil Protection Order and Exhibit A;
4. 12/30/2016 - Joseph Tumpkin’s Waiver of Service and acknowledgement to appear at the January 31, 2017 show cause hearing.<sup>106</sup>

At 3:45 p.m., Plati forwarded to George the 3:37 p.m. email from Huff, altering the subject of the email to read “Statement Draft.” Plati told George, “Think best if it is attributed to you,” and included a draft statement: “We were not aware of a restraining order until this afternoon, and as of yet have not seen it. But once we do, I will get together with Coach (Mike) MacIntyre and we will take whatever action is appropriate and necessary.”<sup>107</sup> George responded, asking Plati to send the statement to Huff.<sup>108</sup>

At 4:01 p.m., Huff emailed O’Rourke the statement that had been sent to *The Daily Camera* “that [Draper], [Plati] and I crafted with [George’s] approval:”

We are still gathering details about the very serious allegations in this filing. Once I’ve reviewed it, I will get together with Coach MacIntyre and we will take whatever action is appropriate and necessary. I expect all our student-athletes and employees to conduct themselves appropriately on and off the field.<sup>109</sup>

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<sup>102</sup>January 6, 2017 email string from Huff, continuing his correspondence with DiStefano, Strehle-Henson, O’Rourke, Draper and Shea.

<sup>103</sup>January 6, 2017 email from DiStefano to George, forwarding an email string from Huff.

<sup>104</sup>January 6, 2017 email from Huff to Clay, George, Carl and Plati.

<sup>105</sup>January 6, 2017 email from Strehle-Henson to DiStefano, Draper, Huff and George copied to Shea and O’Rourke.

<sup>106</sup>When first notified about the TPO on January 6, 2017, Strehle-Henson asked a litigation paralegal in the Office of University Counsel to obtain the docket and available documents. The litigation paralegal provided the documents to Strehle-Henson via email. The paralegal’s email included the same documents Strehle-Henson attached to her 3:39 p.m. message. The paralegal’s email also included a screenshot of the docket that revealed the December 20, 2016 waiver of service. While Strehle-Henson referenced the granting of the TPO, neither the screenshot of the docket nor a reference to the December 20, 2016 waiver of service and acceptance of the TPO by counsel on behalf of Tumpkin were included or referenced in Strehle-Henson’s email to the group. .

<sup>107</sup>January 6, 2017 email from Plati to George, forwarding a string from Huff.

<sup>108</sup>January 6, 2017 email from George responding to Plati.

<sup>109</sup>January 6, 2017 email from Huff to O’Rourke.

Our document review did not reveal additional documents further elucidating the discussion or reasons for the evolution of the statement ultimately provided to *The Daily Camera*.

Around the same time, O'Rourke emailed the Regents, Benson, DiStefano, and George, under the subject line "Legal Alert: CU Boulder Coach." O'Rourke advised the Board of the TPO filed against Tumpkin, that he was not aware of any criminal charges asserted against Tumpkin, and that George, DiStefano, and campus counsel were conferring as to the appropriate course of action.<sup>110</sup> O'Rourke then forwarded the same group a copy of George's statement to *The Daily Camera*.<sup>111</sup>

Around 4:30 p.m., *The Daily Camera* posted a story with the headline "Joe Tumpkin, CU Buffs assistant coach, named in domestic violence complaint."<sup>112</sup>

## 2. Administrative Leave for Tumpkin

On the afternoon of January 6, 2017, George and MacIntyre placed Tumpkin on administrative leave. MacIntyre recalled that he was in the office working with his agent on contract negotiations when George called about the *Daily Camera* inquiry. MacIntyre said he went to George's office and saw the protection order for the first time. MacIntyre said when he read the information in the documents, there was more information there than the Complainant had shared with him in their December 9 and 10 telephone calls. MacIntyre said, "I still couldn't see [Tumpkin] doing it" and that he had never seen Tumpkin "blow up."

MacIntyre noted that, because of the documentation, he "knew we were going to have to make a decision to suspend or dismiss or whatever." When asked what the difference was between hearing allegations from the Complainant and reading the court documents, MacIntyre said that the Complainant told him she would deny the allegations if anyone found out but "I guess she got to the point where she didn't care who knew." He said, "This was now straight allegations" and it added reliability that "she felt like she had to go that far with it" by filing the protection order. MacIntyre also said that when the Complainant told him Tumpkin was "running around with other women – to me, she said that is why they were fighting, my thought process [was] there might be something more here." MacIntyre said he did not have the final authority to suspend, but that he and George decided that they needed to act based on the new information. MacIntyre said, "It had gone on and we had not had any direction or resolution," but "now we had a little bit more."

George explained that when he read the information in the protection order, he said to MacIntyre, "Based on this, this is a lot more than we knew, and we need to suspend Tumpkin." George said, "I was not happy, and I knew what we had to do at that point." George said that they called Banashek's office and asked Tumpkin to come over. George worked Strehle-Henson and Human Resources to put together a notice of administrative leave and had it prepared when Tumpkin arrived.<sup>113</sup> George also explained that he called DiStefano to tell him what he planned to do, and

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<sup>110</sup>January 6, 2017 email from O'Rourke to Regents.

<sup>111</sup>January 6, 2017 email from O'Rourke to Regents.

<sup>112</sup>[http://www.dailycamera.com/cu-college-sports/ci\\_30708576/joe-tumpkin-cu-buffs-assistant-coach-named-domestic](http://www.dailycamera.com/cu-college-sports/ci_30708576/joe-tumpkin-cu-buffs-assistant-coach-named-domestic).

<sup>113</sup>Strehle-Henson said that when she read the information in the TPO, she advised DiStefano that Tumpkin should be removed from the workplace and not be permitted to conduct recruiting trips while the allegations were reviewed. She said that she and George reached the same conclusion independently, and DiStefano agreed with the decision.

DiStefano also told us that it was clear to him that they needed to put Tumpkin on leave until they found out what was going to happen at court. He said that the allegations in the restraining order were very different from what George told him the Complainant had told MacIntyre. Strehle-Henson said that in her conversations with George and DiStefano that



DiStefano agreed.<sup>114</sup> On the afternoon of January 6, 2017, George met with Tumpkin, and issued him a formal letter placing him on administrative leave:

As a member of the Athletics Department, you are to uphold a level of professionalism and personal integrity on and off the field. In light of a recent temporary restraining order filed against you, I am relieving you of your duties and placing you on paid administrative leave effective January 6, 2016....

The letter further provided, “I encourage you to take advantage of counseling services provided by the University.”<sup>115</sup>

Later that evening, George spoke separately by phone with DiStefano twice and with MacIntyre. MacIntyre also spoke to his agent.<sup>116</sup>

## **H. OIEC Investigation into Tumpkin**

### **1. January 6, 2017**

Strehle-Henson said that she and Shea spoke on Friday afternoon, January 6, 2017 about the draft of the alert to the Board of Regents. In that conversation, Strehle-Henson and Shea discussed making sure that Simons and OIEC were included in the correspondence. In the bustle of the afternoon, neither Strehle-Henson nor Shea notified Simons. Strehle-Henson explained, “There was some miscommunication between me and Catherine [Shea]. Valerie [Simons] found out from the media, not from anybody else.”<sup>117</sup>

### **2. January 7, 2017**

On Saturday, January 7, 2017, Simons emailed O’Rourke and Strehle-Henson asking why she had not been informed of the report and asking for a telephone conference as soon as possible. Simons said that her first notice was from the media and she was requesting legal advice about how to proceed in light of the information in the *Daily Camera*.<sup>118</sup> Strehle-Henson forwarded the pleadings and court records to Simons.

Simons said that she was surprised that her office was not notified. She said that Barry typically has forwarded reports to OIEC. She said that it would have been unusual to receive a direct report from MacIntyre, but that she expected that George, DiStefano, or O’Rourke would have notified OIEC, even if just to ask what to do in response to the information.

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neither of them told her they had been aware of the allegations since December. Strehle-Henson said she first learned about their prior involvement after the University received outreach from *Sports Illustrated* a week or so later.

<sup>114</sup>Telephone records show that DiStefano called George at 4:03 p.m. (2 minutes) and again at 4:12 p.m. (3 minutes).

<sup>115</sup>January 6, 2017 Administrative Leave Notice.

<sup>116</sup>George called DiStefano at 5:27 p.m. (2 minutes) and 5:57 p.m. (4 minutes). MacIntyre called George at 6:00 p.m. (1 minute) and George returned the call at 6:01 p.m. (5 minutes). MacIntyre’s agent called him at 6:10 p.m. (3 minutes). MacIntyre called George at 6:16 p.m. (1 minute).

<sup>117</sup>Strehle-Henson later explained, “In our telephone conference on January 8, Valerie [Simons] had told me and Pat [O’Rourke] that she found out about the matter from the paper. However, on Friday evening, Ryan Huff included her in an e-mail – along with the rest of the Cabinet members – about the order and the Byars article.” At 7:08 p.m. on Friday, January 6, 2017, Huff sent an email notifying the Cabinet, which included Simons, about the TPO and putting Tumpkin on paid administrative leave.

<sup>118</sup>January 7, 2017 email from Simons to O’Rourke and Strehle-Henson.

### 3. January 8, 2017

On Sunday, January 8, 2017, at 11 a.m., Simons; O'Rourke; Llen Pomeroy, Director of Investigations and Deputy Title IX Coordinator; Megan Clark, Associate Director of Investigations; Regina Tirella, Director of Remedial and Protective Measures and Deputy Title IX Coordinator; and Strehle-Henson met via teleconference to discuss the allegations in *The Daily Camera* article. It was determined during that call that Simons would follow up with George to determine whether there was any link to campus. It was also determined that Strehle Henson would report the incident to the Behavioral Intervention Team (BIT) for evaluation and that, if there was no jurisdiction in OIEC, the matter would be handled by the legal department. OIEC also committed to contacting the Office of Victim Assistance (OVA) to provide support and advocacy to the Complainant. Simons said that during that call, O'Rourke did not share that he had spoken with DiStefano about Tumpkin in late December.

That evening, Strehle-Henson emailed DiStefano, copying Shea. She wrote, "I just spoke with Valerie [Simons] regarding the Tumpkin case and whether her office has jurisdiction. Valerie [Simons] agrees that this is an unusual matter, but will be conducting a preliminary inquiry to determine whether this would fall under her office's jurisdiction, i.e., if there are other allegations that the coach's alleged behavior has a nexus to campus."<sup>119</sup> DiStefano responded about 45 minutes later: "I appreciate the follow up from Valerie's office. From my conversation with athletics, I do not believe there are any allegations relating to campus personnel but let's make sure."<sup>120</sup>

Simons said that OIEC's first priority was the Tumpkin matter and that they did not independently investigate the issue of failure to report because not all of the information was known to OIEC at that time.

### 4. January 9, 2017

OIEC initiated a preliminary inquiry into whether it had jurisdiction to pursue an investigation into Tumpkin's conduct. At 9:00 a.m. on January 9, 2017, Clark contacted BIT; BIT made arrangements for the Faculty and Staff Assistance Program (FSAP) to contact Tumpkin. At 9:19 a.m., Pomeroy contacted OVA.

At 10:23 a.m., George called Simons. Simons returned the call a minute later and they talked for three minutes. At 10:45 a.m., Pomeroy called George "to get more information to determine the nature of the allegations." According to Pomeroy's notes in the OIEC file:

George said that Coach MacIntyre first learned of the allegations in December 2016 when [the Complainant] called to report abusive behavior by Tumpkin and wanted the university to assist in getting him "help." George said that he followed up with Tumpkin's attorney at that time but no one in athletics was aware of any formal documentation or a police report regarding the allegations. George said he did not learn of formal documentation until Friday, January 6, 2016 [sic].

I asked George about the reference to the Omni Hotel in [the Complainant's] statement that accompanies her request for a civil protection order. George said that the football program

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<sup>119</sup>January 8, 2017 email from Strehle-Henson to DiStefano and copied to Shea.

<sup>120</sup>January 8, 2017 email from DiStefano responding to Strehle-Henson.

does not stay at the Omni Hotel; rather they stay at the Renaissance Hotel before games and the reference to his “home” on November 18 (CU v. Washington State game) would not be associated with the University. George said that the February 27, 2015 reference to the Renaissance Hotel also does not relate to the University as football does not play during that time and there is no record of any university function/event where Tumpkin would have been staying at the Renaissance.

As to the reference to the March 2015 allegations at the Omni Hotel, George confirmed that Tumpkin was staying at the Omni during that time and his stay was payed [sic] for by CU as he was a new hire without a place to live yet. George reiterated that he was previously unaware of the allegations of abuse at the Omni Hotel.

George said he is not aware of any on-campus allegations against Tumpkin nor is he aware of any student athlete or staff involvement in the allegations by [the Complainant].<sup>121</sup>

Also on January 9, 2017, Huff emailed Clay and Plati asking, “Any word on whether Rick [George]/Mike [MacIntyre] will make any decision on Tumpkin’s status in the near future?” Huff explained that he was asking so he could keep the Chancellor and President informed ahead of any announcement. Plati responded that George “wants to hold off...we want to get [notice of MacIntyre’s contract extension] out this afternoon so we can maximize some pub tonight during the national title game.”<sup>122</sup>

In a parallel contemporaneous email chain, Huff asked Strehle-Henson and others to review and approve a draft of DiStefano’s statement for the press release regarding MacIntyre’s contract extension. Later that day, CU issued a press release “MacIntyre Signs Contract Extension Through 2021.”<sup>123</sup>

## **I. January 10, 2017: Broomfield PD Announces Criminal Investigation**

On January 10, 2017, around 11:30 a.m., the *Daily Camera* posted a story with the headline “Broomfield police investigate domestic violence allegations against CU Buffs assistant Joe Tumpkin.”<sup>124</sup> George explained to us that January 10 was the first time he had any awareness of a criminal investigation.

Huff drafted a proposed statement for George that read “I am very disturbed by the allegations, which don’t reflect the high conduct standards I have for our student-athletes and staff. Joe Tumpkin has been suspended indefinitely from his coaching duties, pending outcome of the court process.”<sup>125</sup> George edited the draft statement to clarify that the suspension was with pay and changed the beginning of the first sentence to read “I am very concerned by the allegations.”<sup>126</sup>

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<sup>121</sup>OIEC Case Details for Tumpkin, Joseph, Case ID 51393.

<sup>122</sup>January 9, 2017 email from Plati.

<sup>123</sup>On January 10, 2017, DiStefano emailed O’Rourke and George copied to Shea with a draft message he wanted to send to the Regents and President Benson. DiStefano observed, “The recruiting season is at a fever pitch and we needed to get an agreement-in-principle in place with Coach MacIntyre because of the competitive pressures. In addition, Coach MacIntyre is in the process of hiring a new defensive coordinator that needs to be meeting with recruits later this week.”

<sup>124</sup>[http://www.dailycamera.com/cu-news/ci\\_30715585/joe-tumpkin-colorado-football-domestic-violence-allegation](http://www.dailycamera.com/cu-news/ci_30715585/joe-tumpkin-colorado-football-domestic-violence-allegation).

<sup>125</sup>January 10, 2017 email from Huff to George.

<sup>126</sup>January 10, 2017 email from George to Huff.

## **J. Inquiry from Sports Illustrated**

### **1. January 12, 2017: Inquiry from McKnight**

On January 12, 2017, at 2:41 p.m., Mike McKnight, a reporter for *Sports Illustrated*, contacted Plati by email.<sup>127</sup> McKnight wrote, “I’m working on a piece about the domestic violence allegations against Joe Tumpkin and I have a question for Mike McIntyre - When did you first learn of these allegations?” Plati responded, “He is out recruiting but we all first heard of them at the same time, which was last Friday afternoon. When I say we, that is coach, the A.D., myself, the Chancellor, etc.” McKnight replied, asking Plati if he checked his response with George and DiStefano. Plati confirmed: “Don’t need to—we all found out when a local reporter emailed us for a comment when the Broomfield police released the report she filed. I got the same email the A.D. and the chancellor’s spokesperson did; coach was either traveling or about to head to the airport so depending on who called who first, we all found out within minutes of each other (I was already in Tampa). Rick gathered more information, spoke with Mac and the decision was made rather quickly to suspend him indefinitely.” McKnight then answered “Appreciate the clarification. Maybe a quick call would help here. Can I ring you on your office line?” At 5:47 p.m. EST, Plati emailed back and gave McKnight his cell number. Plati and McKnight spoke later that evening.

During the exchange with McKnight, Plati texted MacIntyre twice, and then again later in the evening. Plati, MacIntyre, and George all exchanged calls that evening.<sup>128</sup> Plati called MacIntyre at 7:30 p.m. (9 minutes); MacIntyre called Plati at 7:46 p.m. (9 minutes); MacIntyre called George at 7:49 p.m. (3 minutes); George called MacIntyre at 7:59 p.m. (10 minutes); MacIntyre called Plati at 8:20 p.m. (5 minutes); and, George called Plati at 8:30 p.m. (6 minutes).

Plati explained to us that he relied on what he learned from Clay on January 6, 2017 (in response to the inquiry from the *Daily Camera*) when he responded to McKnight. Plati said that, when McKnight asked the same question for a third time, he thought, “Now I need to start digging in.” Plati said he called George, and George told him that “he knew about the allegations in mid-December.” He said that George told him, “MacIntyre received a call from Tumpkin’s girlfriend in early December with an allegation ‘that he had been beating her.’” Plati did not recall George providing more details.

### **2. January 13, 2017: Statement in Response to Sports Illustrated Inquiry**

On the morning of January 13, 2017, at 6:45 a.m., MacIntyre and George spoke for 17 minutes. George also talked to Banashek at 7:30 a.m. for 8 minutes and to DiStefano at 9:12 a.m. for 2 minutes.

At 10:08 a.m., Plati emailed McKnight. He wrote,

Your questioning made me doubt if I knew everything, so I reached out to my athletic director last night (he’s in Vietnam on a NIKE trip). There’s more than I knew—we all found out about the police report and subsequent restraining order on Jan. 6, but he and Mac knew of some allegations prior – he had to bring campus legal in on a comment considering the subject matter and they promised me a comment later today. Sorry about the confusion, I

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<sup>127</sup>January 12, 2017 email exchange between Plati and McKnight.

<sup>128</sup>At the time, George was traveling in Vietnam and China.

just wasn't in the loop, which is common on matters such as these before there is documentation that becomes public. I'll get it to you as soon as they get it to me.<sup>129</sup>

In addition to this response to McKnight, Huff, Plati, and others worked together on January 13, via email, to draft an additional statement to McKnight. The draft statement went through multiple revisions.<sup>130</sup> At 6:52 p.m. on January 13, 2017, Plati emailed McKnight the following statement:

Okay, I am now better versed in what went on before word reached me . . . just couldn't wake up my AD in Vietnam until a little while ago (he's on a NIKE junket) . . .

In mid-December, Joe Tumpkin's ex-girlfriend notified Coach MacIntyre of an allegation of physical assault. MacIntyre immediately informed Athletic Director Rick George, who engaged Chancellor Phil DiStefano. They (the Chancellor and Rick) determined that no action could be taken at that time because there was no restraining order, criminal charges, civil action or other documentation of the allegation.

Tumpkin signed and acknowledged receipt for the temporary restraining order on Dec. 30 (according to court records) but no Athletic Department officials or university administrators saw a copy of it until the afternoon of Jan. 6, shortly after a local reporter from the Boulder Camera informed the Athletic Department of the filing and was seeking comment. The university then immediately retrieved the court order (again, on Jan. 6), and less than two hours after seeing that documentation, Tumpkin was placed on administrative leave pending an investigation into the matter.

We obviously are taking these allegations very seriously. Tumpkin will remain suspended pending the outcome of the Jan. 31 show cause hearing and investigation, at which time the Athletic Department will make a further decision on his status.

Hopefully this clears everything up.<sup>131</sup>

### **3. January 17-19, 2017: Further Inquiry by *Sports Illustrated***

On January 17, 2017, at 9:39 a.m., McKnight emailed Plati. He wrote, "Our email and phone communications last week regarding the Tumpkin matter has [sic] left room for many questions. These, below, are among them. Our request is that you, Mike MacIntyre and Rick George respond to these questions, either in writing or via telephone, by the end of business tomorrow." The email included seventeen questions, beginning with "Why were MacIntyre and George dishonest with you on Fri 1/6/17 with regard to their prior knowledge of the domestic violence allegation? (Your prior

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<sup>129</sup>January 13, 2017 email from Plati to McKnight.

<sup>130</sup>January 13, 2017 emails between and among Huff, Plati, DiStefano, Draper, Shea, Strehle-Henson and George. On January 13, 2017, MacIntyre called Plati five times; they connected on three of the calls and talked for a total of 22 minutes. MacIntyre also consulted with Wayne about his statement. January 13, 2017 email exchange between MacIntyre and Wayne. According to the email, Wayne provided advice to MacIntyre about the contents of a statement that would be attributed to George. Wayne wrote, "My position is less is best. Succinct and general. I would not approve the first draft. It leaves too much open to speculation about what you and Rick may or may not have known here." In addition to the email exchanges, there were multiple telephone calls between MacIntyre and George (11 minutes and 2 minutes); George and Plati (11 minutes, 5 minutes, 2 minutes, and 2 minutes); and Huff and George (24 minutes).

<sup>131</sup>January 13, 2017 email from Plati to McKnight.

statements to me were that each said to you, independent of one another on 1/6/17, ‘This is the first I’ve heard of this.’”<sup>132</sup>

At 10:16 a.m., Plati responded to McKnight:

I’ll need to direct almost all of these to our legal people, that’s the norm involving any criminal investigation. They’ll take it from there with either Rick and/or Mac (Rick is in Vietnam through Saturday; Mac is recruiting so pinpointing them likely will take some time). As for the first question, *that was purely my fault—I was working the championship week down in Tampa and not being in town, simply made the mistake between thinking we all found out for the first time as opposed to Rick telling me this was the first time they saw the restraining order. I just assumed that was what happened and didn’t think twice about it at the time. They really never need to loop me in until it gets to that point and certainly were not dishonest with me; did not mean to convey that at all as that was not the case.*<sup>133</sup>

Plati then forwarded the email from McKnight to Huff, copying George. He wrote, “Well, see below [referencing the email from McKnight lower in the string]. I already answered one since that was directed to me; told him I’d have to forward to legal counsel from here.” Plati copied part of his response to McKnight (the italicized language in the paragraph above) into the text of the email from McKnight below Question 1.<sup>134</sup>

At 3:23 p.m., George called Plati; they talked for seven minutes. George then called DiStefano twice, at 3:31 p.m. and 3:39 p.m., and connected with him the second time for nine minutes.

At 3:55 p.m., McKnight replied to Plati,

Thanks for this response, David.

It’s uncomfortable to point this out ... but I asked you more than once, including via phone, whether it was expressly communicated to you that 1/6/17 was the first time MacIntyre or George had heard anything about this. You responded in the affirmative, including via phone, when -- according to my notes -- you replied:

**Yes. I don’t even know if Joe knew it was coming ...**

And:

**When I saw the email [from the local paper] I said, I haven’t heard of this. I called Rick. Rick hadn’t heard of it either. Mac hadn’t heard of it either.**

You added something along the lines of: **Sometimes how you find things out is from the media...**

Knowing our factcheckers, I asked again: “‘MM and RG both told you, ‘This is news to us?’”

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<sup>132</sup>January 17, 2017 email from McKnight to Plati.

<sup>133</sup>January 17, 2017 email from Plati to McKnight.

<sup>134</sup>January 17, 2017 email from Plati to Huff, copied to George, forwarding an email string with McKnight.

Your response: **Yes**.

As for needing to run the questions past Legal, I'm wondering why that's the case now, as compared to your prompt response to my questions last week --which also pertained to a criminal investigation."<sup>135</sup> (*emphasis in original*).

Plati responded to McKnight's second email a few minutes later, explaining, "I know but I never checked because I thought I was right and didn't need to. But you kept asking so then I asked your original question. I lumped allegations into the restraining order. I was simply mistaken and goofed that part of it, so that was on me. Remember I said I was 99.999 percent sure? I was just wrong because I assumed wrong and it was true that on Jan. 6 is when we all saw the TRO for the first time."<sup>136</sup>

At some point during the day, the Chancellor's Office requested that University Counsel provide advice and counsel regarding responses to McKnight's questions. Strehle-Henson and Michelle Krech, Associate University Counsel, talked to George by phone on the evening of January 17 at 5:26 p.m. The call lasted 41 minutes. Almost immediately after his call with counsel ended, at 6:15 p.m., George called MacIntyre; the call lasted for 6 minutes. At 6:23 p.m., George then called Strehle-Henson on her cell phone; the call lasted for one minute. At 9:45 p.m., MacIntyre called George; they talked for 10 minutes.

At 8:24 a.m. on the morning of January 18, 2017, Strehle-Henson and Krech talked to MacIntyre by phone for about half an hour.<sup>137</sup>

George called MacIntyre at 3:17 p.m.; they spoke for 17 minutes. MacIntyre also called George at 8:51 p.m., and they spoke for three minutes.

On January 19, 2017, seemingly in continuation of the correspondence and discussion the day before about how to respond to McKnight's questions, George emailed Strehle-Henson on a new string with a proposed response to McKnight:

My thoughts on our response. I have other comments but this was a start. "We made our decision based on information that we have [sic] at the time. We had an allegation with no evidence or documentation that was communicated to us in December. The allegation we had was about one incident which there was no police report for in Broomfield. The Broomfield police announced on January 10th that they were beginning an investigation. However, once we had documentation on January 6th we made a firm and quick decision. We will make further decisions on this matter as we obtain more information."<sup>138</sup>

Around midday, Krech sent DiStefano and Shea a memo titled Athletics' Responses to Sports Illustrated Questions summarizing George and MacIntyre's responses to the questions posed by McKnight.

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<sup>135</sup>January 17, 2017 email from McKnight to Plati.

<sup>136</sup>January 17, 2017 email from Plati to McKnight.

<sup>137</sup>The call appears to have been dropped and been initiated again at 8:39 a.m. The first call lasted 13 minutes. The second call lasted 17 minutes.

<sup>138</sup>January 19, 2017 email from George to Strehle-Henson.

Strehle-Henson emailed DiStefano, Shea, Draper, Simons, Kelly Fox, Senior Vice Chancellor and Chief Financial Officer, copying Krech, a proposed response to McKnight's questions. Strehle-Henson also attached George's January 18, 2017 email to Henson with his thoughts and comments.<sup>139</sup> The proposed response, which Huff ultimately sent to McKnight around 4 p.m. later in the day, read:<sup>140</sup>

Hi Mike. I am responding on behalf of the university and the Athletic Department to your questions sent Jan. 17 to Dave Plati. The Office of Institutional Equity and Compliance is in the process of reviewing this matter. In order to preserve the integrity of their process and respect the rights of the parties involved, I cannot go into detail on every question. But I hope the following points provide additional information you are seeking.

- Jan. 6 was the first time that George or MacIntyre learned that a judge had issued a Temporary Protection Order (it became effective on Dec. 30, according to the court records).
- Tumpkin was not promoted to interim defensive coordinator. His role, salary, and job title never changed. He simply helped to call plays during the Alamo Bowl.
- The university is not paying for Tumpkin's defense counsel.
- Any supervisor at CU Boulder who becomes aware of discrimination, harassment, sexual misconduct or related retaliation is a mandatory reporter under our policies. You can find those here: <http://www.colorado.edu/institutionalequity/policies>.

About an hour after Huff emailed McKnight the University's response, McKnight sent the University a request pursuant to Colorado's open records act seeking phone records and emails for Tumpkin, MacIntyre, and George, and information related to payments to Banashek or his firm.

## **K. OIEC Inquiry and Actions re: Tumpkin's Employment Status**

### **1. January 9 to January 30, 2017: OIEC Preliminary Inquiry**

Between January 9 and 30, 2017, OIEC continued its investigation, ultimately closing the investigation on January 30, 2017 after Tumpkin resigned from the University. During OIEC's investigation, Pomeroy and OIEC investigators Caitlin O'Donnell and David Pacheco spoke with the Complainant. They provided the Complainant with a copy of the Sexual Misconduct Policy and made arrangements to meet her in person when she returned to Colorado to attend a January 31 court hearing, but that hearing was later cancelled. OVA also spoke with the Complainant to provide support and advocacy. OIEC attempted to obtain a copy of the Broomfield PD report; the request was denied as the case was still open. OIEC also obtained a copy of the full TPO record. On January 27, 2017, Pacheco and O'Donnell informed the Complainant that Tumpkin had resigned and that the OIEC investigation would be concluded. On January 30, 2017, the case was closed with the following note: "Athletics requested and received the resignation of Tumpkin. Given that

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<sup>139</sup>January 19, 2017 email from Strehle-Henson to DiStefano, Fox, Shea, Draper and Simons, copied to Krech.

<sup>140</sup>January 19, 2017 email from Huff to McKnight.



Tumpkin resigned and is no longer an employee of CU Boulder, the OIEC has no basis to proceed with further action. Tumpkin also signed a settlement and release of claim with the university.”

## **2. Continued Contact between George and Banashek**

At the same time OIEC was conducting its preliminary inquiry, George continued to communicate with Banashek. On January 20, 2017, at 3:47 p.m., George called Banashek from China; the call lasted 19 minutes. On January 23, 2017, George called Banashek at 6:12 p.m. for four minutes, at 6:18 p.m. for one minute (after a missed call from Banashek) and at 6:50 p.m. for two minutes (after a missed call from Banashek). On January 24, 2017, at 8:16 p.m., George called Banashek; Banashek returned the call at 8:44 p.m, and the call lasted 13 minutes. The calls were made to and from to George’s personal cell phone. On January 25, 2017, George called Banashek twice, at 5:10 p.m. and 6:13 p.m, and each call lasted four minutes. On January 26, 2017, George called Banashek at 3:20 p.m. for eight minutes and at 7:22 p.m. for four minutes. On February 1, 2017, at 1:56 p.m., Banashek called George, and the call lasted five minutes. George explained that these conversations were related to the resignation discussions. He said that the last call, on February 1, likely had to do with retrieving Tumpkin’s university-issued cell phone.

Strehle-Henson also said that she was communicating with Banashek about the terms of the resignation. She said that she was unaware of the extent of George’s contact with Banashek.

## **3. Tumpkin’s Resignation**

On January 25, 2017, the Permanent Protection Order was finalized.<sup>141</sup> The following day, on January 26, 2017, Tumpkin submitted a letter of resignation. The letter read: “I hereby resign from my position as Assistant Football Coach at the University of Colorado so that I can focus on personal issues as well as to avoid distractions to the CU Football program as preparations begin for the upcoming season.”

DiStefano explained that after seeing the restraining order, “Within probably two weeks, Rick and I talked throughout that the best thing was to get [Tumpkin] to resign and terminate him.” DiStefano said that they discussed the length of the severance. He said that he told George that in the past up to six months’ severance had been given to employees who resigned, but George thought that was too much and settled on two months. DiStefano said that two months’ severance was approved by George, O’Rourke, and the Board of Regents.<sup>142</sup> Tumpkin also received his additional salary for coaching at the bowl game.

On January 27, 2017, the Settlement Agreement and Release were finalized. Section 9 of the Agreement provides that requests for employment verification will be directed to CU Boulder HR “which will provide a neutral reference.” Section 16 provides that CU will notify Banashek of any records requests for records relating to Tumpkin.

In an email string among Huff, Draper, George, Plati, Strehle-Henson and Shea, Huff advised the group that Simons had notified the Complainant of Tumpkin’s resignation. Huff identified three tasks to be completed before the press release could be issued: DiStefano’s signature on the

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<sup>141</sup> Exhibit 12.

<sup>142</sup>While Chancellor DiStefano informed O’Rourke, Benson, and the Board of Regents of the severance terms, none of them formally approved the severance agreement.

Agreement; DiStefano's approval of the press release; and "[Strehle-Henson's] go-ahead that she has spoken to Tumpkin's attorney." About 30 minutes later, Huff advised that the three tasks had been completed. George responded to the email asking, "Has Joes [sic] attorney been notified?" Huff responded that [Strehle-Henson] had notified Banashek and Draper added that Banashek "has agreed to it" in apparent reference to the press release.

The University released a statement captioned 'CU athletics director announces resignation of assistant football coach Joe Tumpkin.' The press release quoted George as saying "Joe is currently defending himself against allegations made in court records that do not represent our values. Furthermore, we need to move forward to ensure we do not have gaps in our coaching staff as we build the team and sign new contracts."

#### **4. January 31, 2017: DA Announces Charges**

On January 31, 2017, the Broomfield District Attorney announced that Tumpkin was being charged with five counts of second-degree felony assault and three counts of third-degree misdemeanor assault.<sup>143</sup>

#### **L. February 2017: *Sports Illustrated* Article and University Statements**

On February 3, 2017, Sports Illustrated published an article titled Seeking justice for alleged abuse, victim of Colorado assistant confronts big-time college football.<sup>144</sup>

Following the release of the article, the University subsequently released statements from DiStefano, George and MacIntyre. The University did not reach out to the Complainant directly.

#### **1. February 3, 2017 Statement of Philip P. DiStefano**

*Today, Sports Illustrated published an article on domestic violence allegations against former assistant football coach Joe Tumpkin. First, Coach Mike MacIntyre, Athletic Director Rick George and I want to apologize to the victim in this case, as well as to her son. She should have received an immediate response from the university pertaining to the actions we might take as well as expressing concern for her safety and any support she needed to deal with repercussions of the trauma she suffered.*

*My staff provided the reporter a full timeline of what occurred, but Sports Illustrated chose not to publish key elements of it. So let me be clear on what happened.*

*In mid-December, Joe Tumpkin's ex-girlfriend notified Coach MacIntyre of an allegation of physical assault. MacIntyre immediately informed George. I learned of these allegations shortly thereafter. At that time, we believed that it was premature to take personnel action because there was no restraining order, criminal charges, civil action or other documentation of the allegation. Tumpkin signed and acknowledged receipt for the temporary restraining order on*

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<sup>143</sup> Exhibit 13.

<sup>144</sup><https://www.si.com/college-football/2017/02/03/colorado-football-joe-tumpkin-assault-case>.

*Dec. 30, according to court records. But no athletic department officials nor university administrators saw a copy of it until the afternoon of Jan. 6, shortly after a Boulder Daily Camera reporter informed the athletic department of the filing and was seeking comment.*

*Less than two hours after seeing court documentation, George indefinitely suspended Tumpkin from his coaching duties. He was later asked to resign and did so on Jan. 27. Broomfield police filed criminal charges against Tumpkin on Jan. 31. Sports Illustrated asked us if university funds are being used for Tumpkin's defense counsel. They are not. I should also note that Sports Illustrated incorrectly reported that Tumpkin received a promotion to interim defensive coordinator ahead of the Alamo Bowl. Tumpkin was not promoted nor did he receive any adjustment in salary or title.*

*I have consulted with OIEC on the reporting obligations in this case, where it involved a complainant who was not a student, faculty or staff member and where the alleged abuse did not occur on campus. This was certainly a confusing case as to our reporting requirements under our policy. We have a strong policy on domestic violence and sexual misconduct that covers the campus.*

*However, we regret that as soon as each of us knew of the allegations of domestic violence, written evidence or not, we did not report them to our office of Institutional Equity and Compliance. I am now making it clear to all CU Boulder mandatory reporters that even when they become aware of possible domestic abuse that does not involve a person affiliated with the campus, I want them to err on the side of reporting it to OIEC. In hindsight, we should have done so here.*

*We have made a concerted effort in recent years to strengthen our enforcement of Title IX and the Violence Against Women Act and our obligations under those statutes. We have also strengthened services to support victims of sexual misconduct and other abuse and emphasized the importance of reporting. Clearly we need to do more to train our community to report issues of domestic and dating violence at the same level that they would report issues of sexual assault.*

*It is important for our community to know that I take our shortfalls in this instance seriously and we need to do better to represent our values.*

## **2. February 9, 2017 Statement of Mike McIntyre**

*I write this to the CU community not only as a coach who has built his career on always trying to do the right thing both on and off the field but as a person who tries to be compassionate.*

*I understand the concerns of those who worry about the safety of women—as I do—and those concerned that success on the football field means we will abandon our ethics and morals. That is not who I am as a man, a coach, a teacher and as a member of the CU community.*

*I did not come to CU to run a program or to achieve success at any cost. Nor has the CU leadership ever encouraged such behavior. I can assure the campus community,*

*all CU fans and all of our student-athletes and their families that I personally (and our team and coaching staff collectively) will continue to build the rise of CU football on a bedrock set of values; decency, honor, excellence, respect for women and for all people being chief among them.*

*Upon hearing the allegations by Joe Tumpkin's girlfriend, my initial reaction and foremost concern was for her safety. I reiterated that to her several times and confirmed that she was in fact, safe.*

*In the same conversation, I was clear in communicating to her my obligation as a university employee to notify my superior, which is exactly what I did. I can say I did everything necessary to ensure this individual's statements were relayed immediately.*

*I would like to clarify the following reported statements:*

*There were two separate conversations. The first was her report to me of the abuse. In the second conversation, I communicated to her that I reported it.*

*Tumpkin was made the play caller for the bowl game because, at the time of the decision, there was no police report or legal complaint. This decision was approved by my superiors.*

*I want to be clear I unequivocally endorse the chancellor's plans for improving CU's policies and practices in dealing with matters of domestic violence and pledge that I and the entire football coaching staff will work to carry out our obligations under university policy.*

*Thank you.*

### **3. February 9, 2017 Statement of Rick George**

*First and foremost, I want to acknowledge that I could have handled this situation better. I feel particularly bad that I did not personally reach out to the woman involved. I realize it would have been helpful for her to hear from me directly, letting her know the steps we would take and just checking in with her to offer personal help and support.*

*I also should have engaged our Office of Equity and Compliance right away. As the Chancellor stated last Friday, we will err on the side of caution by reporting when in doubt moving forward and should have done so here.*

*Additionally, I take responsibility for not being aware that a temporary restraining order had been filed prior to the day we received a copy, Jan. 6. Immediately after reviewing the report, we called Joe in and suspended him the same day. I understand this may appear to some that we were trying to hide the allegation. We were not. We hesitated to put Joe immediately on leave after we first learned of the allegation without any police investigation being brought to us or filings in a court. This does*

*not change the situation, but gives you an idea of our conundrum. In the future, we will do better involving our experts around the campus immediately.*

*People need to know that I am committed to doing things the right way here. I am as thrilled by our football success as anyone, but I don't ever want to compromise our values. I want us to be a model program in all ways and at all times. I am fully supportive of the changes the Chancellor is implementing and I am committed to upholding CU Boulder's values in all our words and in actions.*

#### **4. Additional Discussion about the Statements**

MacIntyre said that the University tried to make him issue a statement written for him, but he refused to “go for it.” He explained, “I know what happened – they don't know what happened, and it better be right.” MacIntyre said that he wanted his statement to be completely accurate. MacIntyre said he worked with George and Plati, then called Wayne and put her on speaker phone. He said Wayne was advising him while he was drafting his statement. Wayne confirmed that “we disagreed with what they were wanting to say.” MacIntyre again reiterated that he wanted his statement to be right. Wayne said that she said at the time, “I want to be clear, I am not giving you legal advice, I am giving Mike advice and want his statement to be accurate.” Wayne said that her role was to help MacIntyre, and that she “was focused on Mike and helping him.” She also said, “I was clear all along in being in sync with the school's policies and he was talking to school people, not just me.”

George and Huff confirmed that MacIntyre took issue with the University's proposed statement. George said that he, MacIntyre and Plati were in the conference room, and George got frustrated with MacIntyre. He said MacIntyre put Wayne on the phone, and that MacIntyre “wasn't going to do anything other than say I [MacIntyre] did everything right, I followed what I am supposed to do and I'm not saying anything more.” George said that Wayne tried to address him, but that he said he did not need her counsel and would rely on University Counsel. George said that he left and went to Draper's office. Huff confirmed that MacIntyre was frustrated and refused to use the University's draft statement. He said that MacIntyre was adamant that “I did the right thing – I told my supervisor.”

When the public apologies were released, the Complainant expressed her disappointment that the University chose to apologize through public statements and just expected that she would see them, rather than offering a personal outreach and apology. She said that after her last conversation with OIEC at the end of January, no one from the University contacted her again. When this review was announced, the Complainant contacted a member of the Board of Regents and asked to participate in the review.

### **VII. Overview of Relevant Training and Education**

#### **A. 2014 External Audit**

In the fall of 2013, we were engaged to conduct an external audit of the University's policies, procedures, and practices under Title IX. On January 23, 2014, we provided a report of our external audit (then with the law firm Pepper Hamilton LLP) to the University, which was released publicly by the University. DiStefano agreed to implement our recommendations, which led to the creation of the OIEC and the hiring of Simons in the summer/fall of 2014, which pre-dated the subsequent

implementation of APS 5014 in July 2015. As part of the audit, we made both broad and specific training recommendations. Of relevance here, we recommended that the University consider providing specialized training on sexual harassment, sexual assault, intimate partner violence, and stalking to targeted populations, including athletes. We also recommended that the University continue its efforts to provide training and education to all individuals on campus who may be a “first responder,” the first point of contact (e.g. faculty, coaches, resident advisors, and peer advisors), or a “responsible employee” under Title IX. Of note, we recommended that the training include “practical information as to: how to identify and report sexual harassment and violence; how to respond to a report by addressing immediate safety, health, and well-being concerns; how to access support and emergency assistance; and how to connect the reporting party to the designated trained professionals who oversee the Title IX centralized process.” Further, we recommended that the University provide training for all “responsible employees” to share any report received with the Title IX Team. Finally, we recommended that the University consider providing refresher training at least every three years, rather than five years.<sup>145</sup>

## **B. 2013 Training Records and Materials**

In addition, we reviewed the training records for the parties, which indicate that they each completed the University’s online training on discrimination and harassment in 2013, before the new APS, campus policy, and the adoption of the new OIEC procedures, and within the then-required five-year time frame for recurring training:

- MacIntyre January 20, 2013
- George July 29, 2013
- Distefano August 7, 2013

The 2013 online training included the following statement:

Sexual assault is the most egregious form of sexual harassment. Because such behavior is so severe, one allegation, if proven true, would violate the Sexual Harassment Policy. Other examples of unwelcome, criminal behaviors that are prohibited by this policy include domestic violence, dating violence, and stalking. If you become aware of an allegation of sexual assault, rape, domestic violence, dating violence, or stalking on the Boulder campus, you should immediately report it to the police, as well as the ODH [Office of Discrimination and Harassment] or the OSC [Office of Student Conduct] so that the matter can be criminally investigated and so that the Boulder campus can promptly investigate and take appropriate steps to protect the potential victim and our community.<sup>146</sup>

This statement predated the passage of VAWA and the subsequent implementation of APS 5014, both of which explicitly address intimate partner violence. We also note that, while this statement includes references to domestic violence, dating violence, and stalking, it describes the reporting obligation as triggered when the conduct occurs “on the Boulder campus.” As described above, APS

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<sup>145</sup>In the fall of 2016, OIEC announced that training for employees would be required on an annual basis moving forward.

<sup>146</sup>Wroe provided the script for the online Discrimination and Harassment Policy training as of June 21, 2013. The training also included definitions for dating violence and domestic violence. Exhibit 14.

5014 and the associated campus policies have a broader jurisdiction, as they apply to off-campus conduct that has a continuing adverse effect upon the university.

### **C. Intersections with OIEC**

During this review, we spoke with Simons, Teresa Wroe, Education & Prevention Program Director and Deputy Title IX Coordinator, and Ceal Barry, who served as a liaison in the Athletic Department, to understand the level of training that had been offered or provided in the Athletic Department since the implementation of APS 5014 in July 2015.

We note that Simons and Wroe have worked with Barry and the Athletic Department to provide training and education through formal and informal in person meetings, including participating in coaches' breakfasts. Wroe provided us with a comprehensive list of touchpoints between OIEC and the Athletic Department (based upon a review of Simons' calendar). The list included more than 45 intersections between OIEC and the Athletic Department between July 2015 and December 2016, including Clery Committee meetings, the Chancellor's Annual Compliance Address to Athletics, the Chancellor's Executive Committee meetings, the District Attorney's/CU Athletics Task Force, Gender Equity Committee meetings, trainings, and informal meetings. While the majority of these touchpoints do not involve education or training regarding Title IX or reporting responsibilities, they demonstrate the existence of regular interactions between OIEC and the Athletic Department and reinforce the conclusion that Simons and other OIEC staff would have been readily accessible to the Athletic Department.

The University also provided the following University-wide communications regarding campus responsibilities and initiatives under Title IX and Clery:

- January 24, 2014: <http://www.colorado.edu/today/2014/01/24/leading-way-vawa-rulemaking-and-implementation>
- January 24, 2014: <http://www.colorado.edu/today/2014/01/24/title-ix-review-report-finds-cu-boulder-meeting-legal-requirements>
- February 17, 2014: <http://www.colorado.edu/today/2014/02/17/chancellor-distefano-launches-national-search-new-title-ix-programs-director>
- May 1, 2014: <http://www.colorado.edu/today/2014/05/01/chancellors-corner-how-cu-boulder-will-address-sexual-assault-and-title-ix-issues>
- September 12, 2014: <http://www.colorado.edu/today/2014/09/12/meet-valerie-simons-director-institutional-equity-and-compliance-title-ix-coordinator>
- May 1, 2015: <http://www.colorado.edu/today/2015/05/01/campus-working-toward-progress-sexual-assault>
- September 17, 2015: <http://www.colorado.edu/today/2015/09/17/valerie-simons-ocr-representatives-seeing-our-title-ix-progress-first-hand>
- February 9, 2016: <http://www.colorado.edu/studentsuccess/sexual-misconduct-survey>

- July 12, 2016: <http://www.colorado.edu/chancellor/2016/07/13/chancellor>
- September 26, 2016: <http://www.colorado.edu/chancellor/consortium-title-ix-and-equity-higher-education>

We note that the University has continued to take extensive efforts to update and expand training campus-wide. Simons and Wroe both affirmed that the messaging from OIEC included an overview of reporting responsibilities, and OIEC maintained and periodically distributed written resource materials that reinforced the reporting obligation.

#### **D. Current Training**

We have also reviewed the online training that is currently offered by the University of Colorado Boulder. It contains several relevant provisions, beginning with the statement that “the Sexual Misconduct Policy (formerly the Sexual Harassment Policy) was revised and became effective July 1, 2015.” In addition to sexual harassment, the online training now has specific provisions regarding sexual assault, sexual exploitation, intimate partner violence, and stalking, as well as resources for victims. The training defines “dating violence” as a prohibited and unwelcome criminal behavior.

The online training discusses the reporting requirement for responsible employees:

Responsible employees are required to report any written or oral complaint of sexual misconduct, discrimination, and harassments based on a protected class, or related retaliation that occurs within CU employment, educational programs, and/or activities to the appropriate office. This obligation exists whether or not the person making the complaint actually works for or is supervised by that employee. A responsible employee who fails to report is in violation of university policy.

The online training does not describe whether the reporting obligation applies to off-campus conduct that does not occur in the course of CU employment, educational programs, or activities. It does provide, however, that “anyone who experiences sexual misconduct, discrimination, harassment or related retaliation, whether they occur on campus or off campus may file a complaint with OIEC when the accused individual is a CU Boulder student, faculty, staff, volunteer, or other third party.” An explanatory note states “If the university receives a complaint against a CU Boulder employee about an alleged sexual assault off campus, CU Boulder will conduct a preliminary inquiry to determine if its off-campus jurisdiction applies and take steps to resolve the situation as warranted. It does not matter whether the complaint is reported by a CU Boulder student, a parent, another employee, or someone not affiliated with the university. An allegation against a member of the CU Boulder community triggers jurisdiction so long as it “adversely affects the health, safety, or security of any member of the university community or the mission of the university.” This statement, which references an off-campus sexual assault (as opposed to sexual misconduct more broadly), describes CU Boulder’s obligation to conduct a preliminary inquiry for all forms of sexual misconduct, including dating violence, to determine whether the off-campus conduct falls within OIEC’s jurisdiction.

Training regarding the reporting obligations of Campus Security Authorities under the Clery Act was also provided to members of the Athletic Department, most recently on September 28, 2016. Wroe said that this training was presented by Patrick Warwick-Diaz with CUPD. Wroe attended the training to address any potential overlap or confusion between Clery reporting and the mandate to



report all sexual misconduct, protected class discrimination and harassment, and related retaliation to OIEC. Wroe shared that during this training, she clarified for attendees issues related to the “responsible employee” mandate to report to OIEC. Wroe explained that her training outlines the requirement to report sexual misconduct to OIEC and that a standard message in her trainings is that “contacting other offices, contacting the police, or telling your supervisor does not constitute mandatory reporting.” As noted above, George attended a portion of this training; MacIntyre did not. Training records, however, indicate that MacIntyre completed the University’s online CSA training on September 21, 2016.

We have reviewed the content of the online Clery training in effect in September 2016, as well as the PowerPoint presentation used in the September 28, 2016 Athletic Department training. We also reviewed the 2016 Annual Security Report (ASR). We note that the ASR and training content provide internally inconsistent information as to reporting responsibilities for conduct that does not fall within the University’s Clery geography.

For example, in the ASR, under the section entitled Statement Encouraging Accurate and Prompt Crime Reporting, it provides, “Crimes should be reported to CUPD for inclusion within the annual crime statistics (if they occurred within CU Boulder’s defined Clery boundaries) and may be used to aid in the provision of timely warnings or safety advisories to the CU Boulder community.” This appears to be a broad prescriptive statement, however, rather than a delineation of campus security authority reporting obligations. In the online training, under Module 1: The Role of the CSA, the slide directs that a crime must be reported if it occurred on campus or in on-campus student residences, or if they take place on public property adjacent to campus, or in off-campus locations deemed closely related to the University. Despite setting forth these limitations based on Clery geography, the same slide also provides, “Regardless of where a crime takes place, as a CSA, you are required to report it to the police.” Further, in response to the question as to whether a CSA must report an assault between two students in an off campus apartment, the answer suggests that the incident must be reported as “both individuals were students.” Further, the slide suggests that even if the conduct had no nexus to the University, the CSA should nevertheless report the incident and refer the victim to campus resources.

Another slide of the online training provides a summary of the “important points to remember.” It first states, “As a CSA you must report crimes that take place on campus, in areas adjacent to campus, and in facilities affiliated with the University of Colorado.” Two bullet points later, the slide states, “For crimes that do not take place on campus you are not required to submit a report, but you should refer the victim for assistance.”

In the Clery PowerPoint used in the September 2016 Athletic Department training, there is an introductory video which states, “Under the Clery Act, in order for a crime to be counted, it technically needs to occur on campus property, on public property within or immediately surrounding the campus, or in off-campus housing or buildings managed or owned by the school. But don’t get caught up in geography – remember, it is always important to report all crimes to campus public safety, no matter what.” Similarly, the video explains, “They don’t need to know what the contiguous geography of the campus is... that’s what we need to know for our reporting. They just need to know something happened and report it. It could be ten feet out of our contiguous area, it doesn’t matter – it can still affect us, and we need to know about it. So they just need to know they need to report it.”

## **VIII. Opportunity for Review and Comment**

As noted above, on May 10, 2017, this report was submitted to the University to allow the parties the opportunity to review this report and the attached exhibits. Following their review, the parties were invited to offer any additional information or clarifications and/or to identify any additional witnesses or documents prior to the conclusion of the fact-gathering.

On May 15, 2017, all three parties submitted written responses to the reports offering additional or clarifying information. All of the comments have been incorporated into the factual chronology above. In his written response, George also noted, “I would like to also ask that there should be information in this report relative to the due process of the employee or legal obligations of the employer to handle allegations like the ones we received.”

MacIntyre submitted several documents. In those documents, MacIntyre detailed his cooperation with the review and provided additional discussion about his phone records, which he asserted confirmed that he did not receive the Complainant’s voicemail or iMessages.<sup>147</sup> MacIntyre then provided a three-page section entitled Protocol, which excerpted portions of the policies at issue and explained that the protocol was for the Head Coaches to report allegations to the Athletic Director.<sup>148</sup> MacIntyre also highlighted his lack of training from OIEC, emphasizing that his last training was in January 2013 before OIEC was created.

In addition, MacIntyre submitted a document entitled Evidence of Athletic Department Protocol.<sup>149</sup> MacIntyre also included two documents: the agendas from the Coaches’ Meeting Minutes dated September 28, 2015, and May 21, 2016.<sup>150</sup> The September 28, 2015 minutes indicate that the CU Boulder Campus Policy has a “MANDATORY Obligation to Report” sex assault or sexual harassment, allegations of discriminatory behavior or remarks and assault. The 2015 minutes also include the CU Athletics Policy, which references a “MANDATORY Obligation to Report to SWA and Athletic Director” any allegations, accusation or violations against any student-athlete from Police, Detectives, RAs etc.” The 2015 minutes further note that the “Head Coach is required to inform their Sport Supervisor and Rick immediately.” The minutes from May 31, 2016 read simply, “Baylor; Title IX; reporting immediately to supervisor.”

## **IX. Findings**

### **A. Overview**

We were engaged to conduct an impartial, thorough, and prompt inquiry pursuant to applicable university policies and procedures regarding the failure to report allegations of dating/domestic violence involving Tumpkin, and to provide recommendations, as necessary, to improve the University’s policies and practices. This report addresses the question, under Regent Policy 1(C), the University of Colorado Sexual Misconduct Policy (APS 5014), University of Colorado Boulder Discrimination and Harassment Policy, the University of Colorado Boulder OIEC Process and Procedures, and related University policies, whether the parties – MacIntyre, George and DiStefano

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<sup>147</sup> Exhibit 15.

<sup>148</sup> Exhibit 16.

<sup>149</sup> Exhibit 17.

<sup>150</sup> Exhibit 18.

– violated their policy or contractual obligations to report an allegation of dating/domestic violence to the Title IX Coordinator or OIEC.<sup>151</sup>

Before reaching findings in this matter, we engaged in a robust fact-gathering process that included multiple opportunities for the parties to provide information, to respond to information gathered, and to offer additional information or observations to aid us in compiling a complete record. In reaching a determination, by a preponderance of the evidence, about whether the reported conduct constituted a violation of University policy, we evaluated the reliability of conflicting accounts by considering factors such as the details of the parties’ and witnesses’ accounts; the timing of the parties’ actions; demeanor; interest, motive or bias; the existence of corroboration (or the lack of corroboration where it should be expected to exist); the circumstances of the disclosure by the Complainant; and how all of that information fit together to determine the context surrounding each of the party’s response to the report of dating/domestic violence.

Our findings with respect to the application of the policies to the facts are as follows:

1. We find sufficient evidence, by a preponderance of the evidence, to establish that DiStefano, George, and MacIntyre each failed to report an allegation of dating/domestic violence by a University employee to the Title IX Coordinator or OIEC in violation of APS 5014.
2. We find insufficient evidence, by a preponderance of the evidence, to establish that DiStefano, George, and MacIntyre failed to report under the Boulder Discrimination and Harassment Policy.
3. Because we find that APS 5014 (the system policy) controls, and that the failure to report was a violation of APS 5014, we do not need to reach the question whether the OIEC Process and Procedures would also apply to the three parties. We note, however, that under the P&P as written, if the policy were deemed to apply as a campus policy, rather than a unit policy, we would find sufficient evidence, by a preponderance of the evidence, to establish that DiStefano, George, and MacIntyre each failed to report an allegation of dating/domestic violence by a University employee to the Title IX Coordinator or OIEC in violation of the P&P.<sup>152</sup>
4. We find sufficient evidence, by a preponderance of the evidence, to establish that DiStefano, George, and MacIntyre violated Regent Policy 1(C) – Principles of Ethical Conduct.
5. We find sufficient evidence, by a preponderance of the evidence, to establish that DiStefano, George, and MacIntyre failed to consider or meet their reporting obligations as outlined in the training for Boulder Campus Security Authorities.

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<sup>151</sup>We were not tasked with making personnel recommendations and will not do so.

<sup>152</sup>As noted above, CU Boulder distinguishes between campus-wide policies and unit policies. Campus-wide policies are “governance documents” adopted by CU-Boulder and applicable across the Boulder campus. A campus-wide policy must be approved and enacted by the Chancellor. In contrast, units have the authority to adopt their own policies to govern their operations, so long as they are consistent with higher sources of authority. A unit policy may supplement, but cannot contradict, an APS or campus policy.

6. We defer to the University the determination whether the parties also violated the Laws of the Regents.
7. We also defer to the University the determination whether the parties violated the terms of their employment contracts.
8. We find that DiStefano, George, and MacIntyre failed to appropriately exercise their institutional and supervisory authority with respect to Tumpkin.

We note that the vast majority of the facts in this review are not in dispute, including the ultimate factual determination as to whether or not the parties failed to elevate the report to OIEC. In fact, in each of the early February post-*Sports Illustrated* public statements, the parties admitted as much. On February 3, 2017, DiStefano offered an apology, on behalf of himself, MacIntyre and George. DiStefano wrote, “We regret that as soon as each of us knew of the allegations of domestic violence, written evidence or not, we did not report them to our [O]ffice of Institutional Equity and Compliance.” DiStefano continued, “In hindsight, we should have done so here.” While not acknowledging that the matter should have been reported to OIEC, on February 9, 2017, MacIntyre reinforced his view that his obligation as a university employee was to notify his superior and that he had done so promptly. Also on February 9, 2017, George wrote, “First and foremost, I want to acknowledge that I could have handled this situation better. . . I also should have engaged our Office of [Institutional] Equity and Compliance right away. . . In the future, we will do better involving our experts around the campus immediately.”

We also note that each of the parties has offered an alternative explanation for the failure to report the allegation to OIEC. While we share those explanations here, as discussed in greater detail below, we do not find that the proffered reasons justify the failure to report to OIEC or the failure to exercise timely supervisory authority.

## **B. Sexual Misconduct Policy (APS 5014)**

### **1. Finding**

We find sufficient evidence, by a preponderance of the evidence, to establish that DiStefano, George, and MacIntyre each failed to report an allegation of dating/domestic violence by a University employee to the Title IX Coordinator or OIEC in violation of APS 5014.

### **2. Policy Elements**

APS 5014 requires reporting of sexual misconduct, which includes “intimate partner abuse (including domestic or dating violence)” defined under Section III.E as “any act of violence or threatened act of violence against a person with whom the individual is or has been involved in a sexual or dating relationship. . . This definition includes intimate partner violence, dating violence and domestic violence.”

Further, the reporting requirement for responsible employees is as follows:

Any faculty or staff member who is considered a responsible employee . . . who witnesses or receives information regarding any possible sexual misconduct

prohibited herein is required to promptly report to the Title IX Coordinator or designee all known details about the alleged sexual misconduct, including:

- (1) Name of the alleged victim;
- (2) Name of alleged perpetrator;
- (3) Name of any alleged witness; and
- (4) Any other relevant facts, including the date, time and specific location of the alleged incident.

All individuals, even if not considered a responsible employee, are highly encouraged to promptly report such information to a responsible employee or directly to the Title IX Coordinator or designee.

A **responsible employee** is “any employee who: (1) has the authority to hire, promote, discipline, evaluate, grade, formally advise or direct faculty, staff or students; (2) has the authority to take action to redress sexual misconduct; and/or (3) has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX Coordinator. . .”

The APS applies to conduct that occurs on campus and off-campus, including on-line or electronic conduct, if the conduct (1) occurred in the context of an employment or education program or activity of the University or (2) has continuing adverse effects on campus.”

### 3. Discussion

In reviewing these three sections together, we conclude that the requisite elements are established for each of the parties:

- DiStefano, George, and MacIntyre were each aware of a direct report of dating/domestic violence, which constituted reportable sexual misconduct under APS 5014. For the purposes of this reporting requirement, it is immaterial if the conduct happened one time or over a period of time.<sup>153</sup>
- Based on their leadership roles – DiStefano as Chancellor of the CU Boulder campus, George as the Athletic Director, and MacIntyre as the head football coach – each was a responsible employee under the APS. Because of this designation, each party was required to report the dating/domestic violence to OIEC.
- The conduct, as described by the Complainant, occurred in the context of an employment or education program or activity of the University. The conduct reportedly occurred in locations such as the Renaissance Hotel, the Omni Hotel, and the Broadmoor, where the University of Colorado was paying for Tumpkin’s lodging or the event was a University-sponsored program or activity. While the parties may

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<sup>153</sup>While MacIntyre and the Complainant differ in their recollection of the details of the December 9, 2016, telephone call, we find that even under MacIntyre’s recollection, there was sufficient information that triggered a reporting responsibility to OIEC.

not have been aware of all of the locations where Tumpkin's conduct reportedly occurred, the allegations should have been reported to OIEC to allow OIEC to conduct an inquiry into whether the conduct fell within APS 5014's jurisdiction. The purpose of the reporting requirement is to allow such an inquiry to be conducted and to allow appropriate officials to make a determination as to whether the sexual misconduct occurred in the course of University employment or program.

There has been much discussion by the parties about the impact of jurisdictional restrictions on their reporting obligations. The plain language of the APS, however, does not tie the reporting obligation to geographic jurisdiction. While APS 5014 does have a jurisdictional limitation with regard to the University's ability to impose disciplinary action, the reporting obligation and the jurisdictional limitation are distinct. The reporting requirement applies to "any possible sexual misconduct" – without limitation – and reporting allows appropriate follow up to determine if jurisdiction exists. Even in those instances where jurisdiction is found ultimately not to exist, centralized reporting allows for services to be provided to victims and for referral to other appropriate agencies.

MacIntyre and George have each suggested that while they were broadly aware of the University's Title IX policies and procedures, they were unaware of the specific reporting requirement set forth in the APS because they had not reviewed the policy, nor had specific training on the policy. We recognize that it would have been preferable if MacIntyre and George had completed online training after the APS was implemented, but the policy requirements nonetheless existed, and high level employees such as MacIntyre and George should ensure that they are aware of their obligations, especially given their role as standard bearers for the employees they each supervise. We also note that the 2013 online training, which each completed, explicitly referred to dating violence. APS 5014 did not amend or revise the reporting obligation as set forth in the 2013 training, which explicitly provided, "If you become aware of an allegation of sexual assault, rape, domestic violence, dating violence, or stalking on the Boulder campus, you should immediately report it to the police, as well as the ODH [Office of Discrimination and Harassment] or the OSC [Office of Student Conduct] so that the matter can be criminally investigated and so that the Boulder campus can promptly investigate and take appropriate steps to protect the potential victim and our community."<sup>154</sup> Although it tied the reporting obligation to conduct "on the Boulder campus," we believe MacIntyre and George had sufficient awareness of the elements of sexual misconduct that they should have known to report dating/domestic violence to OIEC.

MacIntyre asks us to find that there was an internal Athletic Department protocol that allowed him to discharge his reporting obligation to the Title IX Coordinator by elevating the report to the Athletic Director. We decline to do so. We are mindful of the meeting agendas presented by MacIntyre, which instructed coaches to report misconduct to the Athletic Director, and concur that there was a general custom and practice that MacIntyre relied upon in his response to the Complainant's disclosure.<sup>155</sup> We also note that MacIntyre's contract required him to report to George "serious student athlete or football staff misconduct" that he knew or should have known about. MacIntyre complied with this instruction, which we read to augment, rather than supplant MacIntyre's reporting obligations as a responsible employee. MacIntyre's direct report to George does not relieve MacIntyre of his reporting obligations, nor does it absolve MacIntyre of

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<sup>154</sup>Discrimination and Harassment Policy training as of June 21, 2013.

<sup>155</sup>MacIntyre's contract also required him to report the conduct to law enforcement, which he did not do here. This provision in the contract should be nuanced and reconciled with the VAWA amendments to the Clery Act, which requires that the University advise a complainant of their right to notify, or decline to notify, law enforcement.

responsibility for not being familiar with and adhering to the APS. To do so would negate the entire concept of “responsible employee” reporting, as it would allow supervisors to unilaterally relieve their subordinates of reporting obligations. Nonetheless, the information proffered by MacIntyre as to his understanding of his reporting obligation may serve to mitigate the University’s response to the violation.

Similarly, as to George, we note that his contract required him to report to DiStefano “serious student athlete or Athletic Departments staff misconduct” that he knew or should have known about. George complied with this requirement, which again, we view as augmenting, not supplanting, the reporting requirement in APS 5014. We also understand that DiStefano later informed George that there was no further reporting obligation. While the University of Colorado might consider this as a mitigating factor when determining appropriate remedial actions, we do not believe this relieved George of his reporting obligations, particularly when the evidence reflects that George possessed more information (knowledge of at least an impending court order) than he shared with DiStefano.

Finally, we find that both MacIntyre and George were familiar with Simons’ role as the Title IX Coordinator and with OIEC as the University department which responded to all forms of sexual and gender-based harassment and discrimination and interpersonal violence. MacIntyre provided information confirming his attendance at Coaches’ meetings with Simons, and invited her to provide training for the football team. George worked closely with Simons on several issues, and had direct interaction with Simons about how OIEC had resolved allegations against student-athletes. While the integration of OIEC and the Athletic Department needs to be strengthened and formalized, there were sufficient nexuses that support the conclusion that both Simons and OIEC were a known and valuable resource for the Athletic Department and the University.

The same hold true for DiStefano, who having spent more than 40 years at CU Boulder, was present during the Lisa Simpson litigation and broad scale reform of the Athletic Department. DiStefano also commissioned the 2014 external Title IX audit and supervised the creation of centralized Title IX functions through OIEC, the development of the APS and the P&P, and the hiring of Simons. DiStefano works closely with Simons, who reports directly to him, and he has expressed his confidence in – and reliance on – Simons. In light of these close connections, and what has been described by both DiStefano and Simons as an excellent professional relationship, it is hard to reconcile DiStefano’s decision not to consult Simons or contact OIEC for guidance and advice. Instead, DiStefano reviewed the P&P and determined, erroneously, that there was no reporting requirement. As a consequence, as detailed below, the failure to share the report with OIEC deprived the University of the ability to evaluate the nature and extent of the conduct, any impact it may have on the campus community, any employment action and any provision of information to the Complainant about procedural options and available resources.

We acknowledge that the context of this report, involving a complainant who is not a student or employee, and conduct that occurred in multiple locations, not all of which were immediately recognized as part of an education program or activity, raised questions about the applicability of the policy. In light of each party’s policy and contractual obligations to the University, however, it was incumbent on the party to seek clarity about the reporting obligation. MacIntyre initially did so by elevating the report to George and asking how to proceed. George initially did so by elevating the report to DiStefano and posing the same question. DiStefano, however, did not consult with University Counsel or Simons in resolving a reporting question of first impression, which would

have provided the University with the opportunity to assess the report in light of applicable University policies.

We cannot, and will not, speculate as to the state of mind or intent in each of the parties regarding the failure to share the report with OIEC. Even were we to presume good intent, mistaken application of the policy, or simple ignorance, the inaction cannot be justified in light of the known facts identified in this review.

### **C. Discrimination and Harassment Policy**

#### **1. Finding**

We find insufficient evidence, by a preponderance of the evidence, to establish that DiStefano, George and MacIntyre failed to report under the Boulder Discrimination and Harassment Policy.

#### **2. Policy Elements**

The elements of the Discrimination and Harassment Policy are virtually similar to the elements in the APS, with one exception. The Policy “prohibits *discrimination, harassment* and/or related *retaliation* based on *protected class* in admission and access to, and treatment and employment in, its educational programs and activities.” The Policy does not explicitly include dating or domestic violence as a form of discrimination or harassment. Notably, the 2013 online training module interprets the Discrimination and Harassment Policy as requiring reporting of domestic violence and dating violence, but this is not clearly articulated in the written policy.

The statement of jurisdiction mirrors APS 5014 and applies to conduct that occurs on campus and off-campus conduct, including on-line and electronic conduct, if the conduct (1) occurred in the context of an employment or education program or activity of the University or (2) has continuing adverse effects on campus.”

Similarly, the Discrimination and Harassment Policy sets forth the same reporting responsibilities:

Any faculty or staff member who is considered a *responsible employee* . . . who witnesses or receives information regarding any possible *discrimination, harassment or related retaliation* based upon protected class is required to promptly report to the Office of Institutional Equity and Compliance (OIEC) all known details about the alleged *discrimination, harassment, or retaliation* including:

- (1) Name of the alleged victim;
- (2) Name of alleged perpetrator;
- (3) Name of any alleged witnesses; and
- (4) Any other relevant facts, including the date, time and specific location of the alleged incident.

All individuals, even if not considered a *responsible employee*, are highly encouraged to promptly report such information to a *responsible employee* or directly to the OIEC.



### **3. Discussion**

As with the APS, we find that:

- DiStefano, George, and MacIntyre were each aware of an allegation of dating/domestic violence, which *could* constitute discrimination or harassment.
- Each was a responsible employee under the DH Policy.
- The conduct, as ultimately reported, occurred in the context of an employment or education program or activity of the University.

Had the campus policy mirrored the APS in scope and definition, we would make a similar finding of responsibility. Given the ambiguity in the written policy as to the inclusion of dating violence and domestic violence as specific forms of discrimination and harassment, however, we decline to find a policy violation under the DH Policy. While dating and domestic violence may constitute a form of sex or gender-based harassment or discrimination, this concept may be more attenuated to understand.

We are mindful that Wroe and Simons have described a consistent communications campaign and repeated message regarding reporting of sexual assault, dating violence, domestic violence and stalking, and that the parties should have been aware that the DH Policy required reporting of those forms of conduct. Because the statements in APS 5014 are explicit and directly on point, we find the APS the more appropriate policy under which to make a finding of responsibility. Accordingly, we find insufficient evidence, by a preponderance of the evidence, to establish that DiStefano, George, and MacIntyre failed to report under the DH Policy.

#### **D. OIEC Process and Procedures**

##### **1. Finding**

Because we find that APS 5014 (the system policy) controls, and have made a determination that the failure to report was a violation of APS 5014, we do not need to reach the question whether the P&P would also apply to the three parties.

We note, however, that under this policy as written, if the policy were deemed to apply as a campus policy, rather than a unit policy, we would find sufficient evidence, by a preponderance of the evidence, to establish that DiStefano, George, and MacIntyre each failed to report an allegation of dating/domestic violence by a University employee to the Title IX Coordinator or OIEC in violation of the P&P.

##### **2. Policy Elements**

The P&P is similar in scope and content to the APS, although it provides a more extended jurisdictional statement. According to Section C of the P&P:

The Process and Procedures govern all students, faculty, staff, contractors, patients, volunteers, affiliated entities and other third parties regarding:

- a. Conduct that occurs on or as it relates to University property or at official functions and University-sponsored programs conducted away from the campus. University property is defined as land, buildings and facilities in possession of or owned, used or controlled by the University or funded by University budgets; **or**
- b. Conduct that occurs off University property if it: (1) has a potential continuing effect on campus, including, but not limited to, adversely affecting the health, safety or security of any member of the University community or the mission of the University; or (2) involves any records or documents of the University.

The APS states that it applies to off-campus conduct that has “continuing adverse effects on campus,” while the OIEC statement applies to a “potential continuing effect on campus.” The P&P defines those potential continuing effects as including “adversely affecting” either “the health, safety or security of any member of the university community” or “the mission of the University.”

Section C.2 also explains that “OIEC’s jurisdiction does not depend on whether criminal charges are filed.” Further, the P&P addresses circumstances that do not fall within their jurisdiction as follows: “For employees, any other matters outside the scope of the Process and Procedures shall be handled by the appointing/disciplinary authority.”

The P&P defines prohibited conduct as including “engaging in sexual misconduct.” Consistent with APS 5014, the definition of sexual misconduct includes “intimate partner abuse (including domestic or dating violence),” which “means any act of violence or threatened act of violence against a person with whom the individual is or has been involved in a sexual or dating relationship. . . This definition includes intimate partner violence, dating violence, and domestic violence.”

The P&P specifically prohibits, “failing to report,” which occurs when “any responsible employee who witnesses, or receives a written or oral report of a complaint alleging, discrimination, harassment, sexual misconduct or related retaliation as covered by the Process and Procedures but fails to promptly report it to the OIEC.”

The P&P also contains expanded information about an employee’s reporting requirement. The P&P addresses the context when an employee learns of potential sexual misconduct, but the victim does not wish to report. Section F of the P&P provides that, “If an individual discloses an incident to a responsible employee who by definition is a mandatory reporter but the individual wishes to maintain privacy and requests that no investigation be conducted, that no disciplinary action be taken, or that the allegation not be reported to law enforcement, the responsible employee remains required to report all relevant information to the Executive Director of the OIEC or designee who will explain that the University prohibits retaliation and that the University will not only take steps to prevent retaliation but will also take strong responsive action if it occurs.”

The P&P reporting requirement must be read in conjunction with its jurisdictional statement, which states at Section C.4 that, “The University has an obligation and jurisdiction to conduct at least a preliminary inquiry to determine whether the alleged conduct occurred in the context of, or has continuing effects on, a University program, activity or employment. . . .”

### 3. Discussion

For the reasons addressed with respect to APS 5014, the same findings would exist here:

- DiStefano, George and MacIntyre were each aware of an allegation of dating/domestic violence, which constituted reportable sexual misconduct. For the purposes of this reporting requirement, it is immaterial if the conduct happened one time or over a period of time.
- Based on their leadership roles, each was a responsible employee. Because of this designation, each party was required to report the dating/violence to OIEC.
- The conduct, as reported, occurred in the context of an employment or education program or activity of the University. It also had potential continuing effects on campus, including, but not limited to, adversely affecting the health, safety or security of any member of the University community or the mission of the University. In addition, there is a specific provision in the policy that delegates the jurisdictional determination to OIEC.

#### E. Regent Policy 1(C) – Principles of Ethical Conduct

##### 1. Finding

We find sufficient evidence, by a preponderance of the evidence, to establish that DiStefano, George, and MacIntyre violated Regent Policy 1(C) – Principles of Ethical Conduct.

##### 2. Policy Elements

The operative provisions of the Board of Regents’ Principles of Ethical Conduct state:

In pursuing the mission of the University of Colorado, all members of the university community are responsible for understanding and upholding the highest standards of legal and ethical conduct. The Board of Regents’ policies describe principles of ethical behavior that articulate a basic ethical framework for the decisions, actions and behavior of all University of Colorado employees. These “Principles of Ethical Behavior” define the underlying expectations for the conduct and activities of university employees. They include:

##### **Responsible Conduct**

University of Colorado employees are expected to conduct themselves ethically, and in compliance with all applicable laws, regulations, and university policies.

University employees are expected to practice and model ethical and responsible behavior in all aspects of their work. Expected conduct includes . . . acting in good faith; being personally accountable for individual actions; conscientiously fulfilling obligations towards others; and communicating ethical standards of conduct through instruction and example.

##### **Reporting Suspected Misconduct**

The University of Colorado is committed to meeting federal and state legal

requirements and fostering a culture of compliance. University employees are expected to report known and suspected violations of university policies, as well as violations of applicable laws and regulations to appropriate offices. The university provides several options for reporting violations. Employees are encouraged to first report any known or suspected violations to their direct supervisor. . . All university employees who act in good faith in reporting known or suspected violations of law or university policy are protected from retaliation.

### **3. Discussion**

Because we find, above, that DiStefano, George, and MacIntyre failed to comply with APS 5014, we find that there is sufficient evidence, by a preponderance of the evidence, to establish that each party failed to conduct themselves “in compliance with all applicable laws, regulations, and university policies.” Further, the clear language of the Principles of Ethical Conduct states, “University employees are expected to report known and suspected violations of university policies, as well as violations of applicable laws and regulations to appropriate offices.” While employees “are encouraged to first report any known or suspected violations to their direct supervisor,” this does not obviate other reporting obligations of which the parties should have been aware.

Accordingly, we find sufficient evidence, by a preponderance of the evidence, to establish that DiStefano, George, and MacIntyre violated Regent Policy 1(C) – Principles of Ethical Conduct.

#### **F. Campus Security Authority Reporting Responsibilities**

##### **1. Finding**

We find sufficient evidence, by a preponderance of the evidence, to establish that MacIntyre, George and DiStefano failed to consider or meet their reporting obligations as outlined in the training for Boulder Campus Security Authorities.

##### **2. Campus Security Authority Reporting Responsibilities**

As outlined above, the Clery Act requires that schools report offenses and disclose statistics for crimes that are reported to the local police and campus employees designated as campus security authorities (CSAs).<sup>156</sup> CSAs include four groups of individuals and organizations:

- 1) A campus police department or a campus security department of an institution;
- 2) Any individual or individuals who have responsibility for campus security but who do not constitute a campus police department or a campus security department (e.g., security, guard or escort functions);
- 3) Any individual or organization specified in an institution’s policy as an individual or organization to which students and employees should report criminal offenses; and
- 4) An official of an institution who has significant responsibility for student and campus activities, including, but not limited to, student housing, discipline and campus

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<sup>156</sup>20 U.S.C. §1092(f)(1)(F); 34 C.F.R. § 668.46(c).

judicial proceedings. An official is further defined as “any person who has the authority and the duty to take action or respond to particular issues on behalf of the institution.”<sup>157</sup>

The Department of Education includes “a director of athletics” and a “team coach” as examples of employees who have significant responsibility for student and campus activities.<sup>158</sup>

Clery crimes that must be reported include those that occur on-campus, in or on non-campus buildings or property, or on public property within or immediately adjacent to and accessible from the school’s campus.<sup>159</sup> It is not necessary for the crime to have been investigated by the police or a CSA, nor must a finding of guilt or responsibility be made to constitute a reportable crime.<sup>160</sup>

Further, under the 2013 VAWA amendments to Clery, dating violence and domestic violence are Clery crimes which must be reported. Notably, the procedural requirements for disciplinary procedures set forth in Clery, as amended by VAWA, are not limited by Clery geography. As set forth in *The Handbook for Campus Safety and Reporting* (2016 Edition), “You must follow your [policy] statement regardless of where the alleged case of dating violence, domestic violence, sexual assault or stalking occurred (i.e., on or off your institution’s Clery Act geography).”<sup>161</sup>

The report by the CSA to the individual designated within the University, here CUPD, enables the University to carry out three key functions: 1) evaluate the report to determine if it must be reported externally under Clery (e.g., added to the daily crime log or included in the annual security report based on Clery geography or Clery definitions); 2) determine whether a timely warning should be issued; and 3) provide the complainant with written resources and rights as required by the VAWA amendments to Clery.

### 3. Discussion

Based on their function and role within the University, we conclude that DiStefano, George and MacIntyre each have reporting responsibilities as campus security authorities. Indeed, MacIntyre’s contract references this reporting obligation. According to his contract, MacIntyre acknowledges that he is a campus security authority and agrees to comply with all reporting obligations imposed upon a campus security authority by the Clery Act as well as by applicable University policies. MacIntyre also completed the University’s online CSA training on September 21, 2016. George also acknowledged that he is a campus security authority and we reviewed the training sign in sheet

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<sup>157</sup>34 C.F.R. § 668.46(a) (defining “Campus security authority”); *The Handbook for Campus Safety and Reporting*, 2016 Edition, at 4-2 to 4-3. The framing of the last bullet is consistent with the definition of a responsible employee under Title IX, reinforcing a conclusion expressed orally by members of the Clery Compliance Team that all CSAs are also responsible employees under Title IX. The Handbook further notes that “while there may be some overlap, persons considered to be CSAs for Clery Act reporting are not necessarily the same as those defined as “responsible employees” for Title IX. *Id.*, at 4-5.

<sup>158</sup>*Id.*

<sup>159</sup>20 U.S.C. § 1092(f)(1)(F), 20 U.S.C. § 1092(f)(12); 34 C.F.R. § 668.46(c), 34 C.F.R. § 668.46(c)(4).

<sup>160</sup>*The Handbook for Campus Safety and Security Reporting*, 2016 Edition, at 4-1 to 4-2.

<sup>161</sup> Note that this implies an extension of CSA reporting responsibilities (to properly evaluate and apply the elements of the disciplinary procedures required by VAWA with respect to sexual assault, dating violence, domestic violence and stalking) but this does not constitute a shift in the definition of Clery geography or expand conduct that the University must report externally in its Annual Security Report. This tension is not clearly reconciled in the *Handbook*, which is subregulatory guidance.

confirming that he attended at least part of the September 28, 2016 in-person Clery training presented by CUPD.

Given his broad oversight and leadership responsibilities, the Chancellor also falls within the criteria of an individual who has significant responsibility for student and campus activities.

None of the parties shared the Complainant's report with CUPD, nor did any of the parties identify the dating/domestic violence report against Tumpkin as a potential Clery crime which must be reported. We note that there is no written University policy, outside of the Annual Security Report, which addresses the identification of CSAs and their reporting obligations. The University has, however, set forth the reporting expectations to fulfill its Clery obligations in University training materials. We acknowledge that the guidance provided in the training materials may be confusing as presented, in that the materials suggest at one point that CSAs are only required to report crimes that are reported to have occurred on Clery geography, and yet in other places, provide a clear mandate to report all crimes regardless of where the crime occurred. Specifically, the online Clery training provides: "Regardless of where a crime takes place, as a CSA, you are required to report it to the police." Similarly, the script for the current online training program, described above, reinforces this conclusion with the following direction: "But don't get caught up in geography – remember, it is always important to report all crimes to campus public safety, no matter what."

During their interviews, MacIntyre, George and DiStefano did not articulate a clear understanding of their CSA reporting responsibilities, either generally, or with respect to the Complainant's report. As a result, the University did not have the opportunity to assess its Clery obligations with respect to external reporting, timely warning, and the provision of the specific procedural rights, resources, and options available in the context of dating or domestic violence. Had there been a report by any of the three, even in the absence of a report to OIEC, the Clery report would have served as a safeguard that triggered an appropriate institutional response and the University would have been better positioned to respond consistent with its institutional policy and values.

## **G. The Laws of the Regents**

We defer to the University and the Board of Regents the determination whether the parties also violated Articles 1, 3 and 11 of the Laws of the Regents.

## **H. Employment Contracts**

We defer to the University and the Board of Regents to determine the applicability of these findings to the terms of the parties' employment contracts, including: complying with the mission, laws, policies, procedures of the University; exercising supervisory oversight and authority of personnel; and reporting serious misconduct as outlined in University policy and the contract. The specific elements of MacIntyre and George's contract are outlined in Section IV, above.

## **I. Institutional and Supervisory Authority**

### **1. Finding**

In addition to their Title IX and Clery reporting obligations, we find sufficient evidence, by a preponderance of the evidence, to establish that the parties failed to appropriately exercise their institutional and supervisory authority with respect to Tumpkin.

## 2. Discussion

In addition to the reporting requirements under University policy, MacIntyre, George and DiStefano had institutional and supervisory authority with respect to Tumpkin, an assistant coach in the football program. In light of the report from the Complainant, each of these individuals had notice of potentially violent and dangerous behavior by a University employee with significant responsibility for and routine interactions with student-athletes, recruits, and employees. Tumpkin was also a high profile employee who was well known to the public and represented the football program, the Athletic Department and the University.

Upon receipt of the Complainant's report, it was incumbent on MacIntyre, then George, and ultimately DiStefano to take steps, in consultation with appropriate campus experts, to determine if Tumpkin posed a risk of harm to student or campus safety and to determine what, if any action, could or should be taken with respect to Tumpkin's continued employment at the University. At a minimum, those steps should have included seeking additional information about the underlying conduct, its nexus to campus, and its impact on the safety of students and other individuals Tumpkin may come into contact with through his CU employment. Given the underlying subject matter, we do not expect MacIntyre, George or DiStefano to have conducted their own factual inquiry, but rather, to ensure that the report was shared with the appropriate campus officials, including University Counsel, Human Resources, or as detailed above, OIEC, to allow for a coordinated and informed fact gathering and institutional response.

Instead of taking proactive steps to seek additional information, however, the parties' individual and collective actions harbored, siloed, and fragmented the known information. Information was shared orally by MacIntyre with George, and by George with DiStefano, which led to the dilution of facts at each juncture and created the conditions for the diffusion of responsibility. At no time did all of the parties gather together to triage the available facts, develop a plan to gather additional facts or consult with available University resources. Instead each party maintained his own account and relied upon oral conversations without written documentation that could supplement and ensure accurate memories and effective and coordinated communication. As outlined in the factual chronology, the quantity and quality of the information was diluted each time it was repeated, and each individual was free to process and recall information from their own perspective. As an example, MacIntyre is confident that he told George that the abuse occurred over a period of time; George denied that he knew about more than one incident. And as George elevated the information, it continued to narrow.

MacIntyre, George and DiStefano each lamented the availability of sufficient information to take employment action against Tumpkin, but took no steps to gather additional information, or request assistance from the University in gathering information. All three of the parties failed to effectively avail themselves of University Counsel or the University-designated subject matter experts in OIEC or Human Resources who could help them determine how to gather sufficient information to respond and inform personnel decisions in the wake of the Complainant's disclosure. Instead, MacIntyre turned to outside counsel, without ever seeking legal advice from the University. Similarly, George engaged in multiple conversations with Banashek, Tumpkin's counsel. While we are not aware of any explicit relationship between George and Banashek, Banashek was advising George about Tumpkin's status and sharing information (including conversations on the date of the first filing of the protective order on December 20, 2016). George should have shared that information with University Counsel to place it in context and evaluate the import of the protective

order and consider an appropriate University response. Had George connected Tumpkin's counsel with University Counsel, the University likely would have been in the position to know well before the bowl game that there was both a pending criminal investigation and civil protection order.

MacIntyre, George and DiStefano have each expressed their belief that they needed written documentation of the allegations in order to proceed with employment action. And yet, they took no steps to inquire about the existence of any documentation. There was no attempt to follow up with the Complainant to gain additional context or detail or to ensure that she was connected to available resources. Had an open line of communication been maintained between the Complainant and the University, the University would have been in the position to know well before the bowl game that there was both a pending criminal investigation and civil protection order.

George has provided multiple conflicting accounts about the level of his awareness of the existence of a protective order. By his own admission, he concedes that he was aware of "some kind of order." George explained that on December 21 (the day that the TPO was signed by Banashek on behalf of Tumpkin), it was "possible, highly possible, that [Banashek] talked about a restraining order." George also said that he did not remember talking about a temporary restraining order, but that he did recall Banashek talking about some kind of order that would take a couple of weeks.<sup>162</sup> George said that Banashek told him that the TPO had been filed. He reiterated that he was aware of "some kind of an order that would go to the judge," but that he did not know much about the order. George had a similar call with Banashek on December 22. George said that he knew he would get the opportunity to see the orders, but that he did not really understand the court process involved. George said, "I knew a protection order was in process," and acknowledged that he did not share that information with MacIntyre or with anyone else. George also said he did not go back and speak with O'Rourke or anybody else to check in on what the TPO meant. George acknowledged that had information been shared with OIEC, or had the TPO been explored, it would have been a different outcome. George said, "I wish I would have gone to OIEC or asked about the TPO – you have regrets and thoughts about what you could have done . . . – if we had just called OIEC back then, we wouldn't be sitting here now. I get that now, I didn't get that then."

In sum, because DiStefano, George, and MacIntyre each operated independently of one another, and independently of their policy and related obligations to the University, the University lost several important opportunities to gather relevant information and take timely action. For example, MacIntyre, based on Wayne's advice, blocked the Complainant's telephone number without connecting the Complainant to any other University employee or communicating any other available resource. In doing so, his stated interest, not wanting to become a witness, precluded the University from access to additional available information and an opportunity to respond. Similarly, George's failure to follow up on the information provided by Banashek deprived the University of the ability to request the docket and affidavit as early as December 22, 2016. MacIntyre's blocking of the Complainant's calls and George's continued interactions with Banashek also contributed to a perception that the University elevated protecting the football program over care for the Complainant or her welfare.

Other missteps contributed to the perception that the University was dismissive of the Complainant and her account. For example, MacIntyre and George shared the allegations with Tumpkin without any real understanding of the elevated risk that might pose to the Complainant. Given that the

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<sup>162</sup>The ex parte protection order granted on December 20 was temporary and would have required a hearing or agreement by Tumpkin before becoming final.



moment of disclosure of abuse is often one of the most dangerous and unstable moments for a victim, by speaking directly with Tumpkin without any safety planning in place, MacIntyre and George could have inadvertently escalated the danger for the Complainant. While no subsequent physical abuse was reported, as described in the Complainant's unheard voicemail messages to MacIntyre, the disclosure to Tumpkin, followed by the phone calls that she received from Banashek, increased her anxiety and exacerbated the traumatic impacts of the alleged abuse by Tumpkin.

We further note that MacIntyre consulted with personal legal counsel, who had been adverse to the University in other matters. MacIntyre's personal legal counsel provided what we consider to be ill-considered advice to block the Complainant's communications without first ensuring that the University had established alternate means of contact. MacIntyre's consultation with his personal legal counsel necessarily addressed his own interests, rather than his obligations under University policy. We do not mean to suggest that a University employee does not have the ability to consult with a personal attorney, but it cannot serve as a substitute for consultation with the University's own legal counsel. MacIntyre's consultation with his personal legal counsel and reliance upon her advice does not relieve MacIntyre of his responsibilities to the University, especially where the advice served to contravene a timely and effective response to the Complainant consistent with University policy.

Similarly, allowing Tumpkin to call plays at the Alamo Bowl and to continue to represent the University publicly was problematic in light of the information known to MacIntyre and George at that time. In this instance, MacIntyre's commitment to not influencing an investigation positively or negatively led to his taking a passive approach to his supervisory responsibilities. In light of the severity and significance of the allegations, which involved potential felony-level criminal conduct, an alternative approach may have been to suspend Tumpkin pending the gathering of additional information, rather than defer action – and from an outward perspective – elevate Tumpkin's stature and role at the bowl game. Finally, MacIntyre took the time to connect Tumpkin to an external resource, but did not extend available resources to the Complainant.

Even after January 6, 2017, information about this incident continued to be shared in a piecemeal fashion. This subsequently had a negative impact on the University's external communications. For example, on January 6, 2017, after the University obtained a copy of the TPO, neither MacIntyre nor George shared with anyone on that day that they had been aware of a report of dating/domestic violence since mid-December (December 9 to 10). Plati subsequently made inaccurate statements to the media.

This omission illustrates one of the downsides of maintaining information within silos in lieu of pooling information together in the context of a multi-disciplinary team or group of administrators. Individual actors, with partial information, shared information in an *ad hoc* manner. As a result, there was a lack of consistency in the level of information known by or shared with key administrators. Because the information was shared in a piecemeal fashion, administrators later in the chain of disclosure received a fractured or fragmented view of the facts and circumstances. As a result, the University relied upon differing and incomplete sets of information in determining the appropriate course of action. The failure to holistically consider all known facts and circumstances directly impacted the quality and nature of the decisions at key junctures in the process and caused

the University to miss several opportunities to minimize and even avoid the resulting consequences that ultimately occurred.<sup>163</sup>

## **J. Conclusion**

While we find that each party elevated the report to his supervisor, which could support an inference that there was no intent to hide or ignore the report, the failure to report the incident to OEIC violated University policy. This failure was exacerbated by the failure to consult with University Counsel and George's failure to elevate and share the information he was learning from Banashek. DiStefano, George, and MacIntyre each took steps that had the effect of insulating the conduct, rather than elevating it to the appropriate campus resources so that any risk to individual or campus safety, or to University mission, posed by the allegation, or by Tumpkin, could be fairly and impartially evaluated. As outlined in this report, each party has proscribed duties and obligations to the University by virtue of the policies and procedures, as well as the provisions of their employment contracts. Each had sufficient information to raise further questions and the need to seek additional knowledge and information. Further, while each expressly cited the view that they did not think they could move forward without a police report or protection order, they took no steps to obtain additional information beyond George's calls to Banashek. Indeed, the available information about George's interactions with Banashek undercuts a conclusion that George did not – or could not – have known about the existence of the protection order as early as December 21, 2017. Moreover, even when George and DiStefano decided to approach O'Rourke for legal advice, the question to O'Rourke was narrowly framed, did not reveal the full nature of the available facts, and was presented in a manner and at a time that precluded effective use of University Counsel.

Failing to coordinate and consider all known information in a strategic manner impacted the University's ability to promptly respond to the report in a manner consistent with its institutional values and well-developed policies and processes. We acknowledge that one of the most salient questions in this review may be answering the "why" for the failure to report. Because of the consistent failures to report available information to key decision-makers, the insulated and siloed approach to the Complainant's disclosure negatively impacted the public perception of the University's mission and values. Rather than being able to demonstrate the University's mission, values and commitment to individual welfare, campus safety, and effective implementation of Title IX and Clery, the University instead faced a public perception that University actors had intentionally elevated the success of the football program over concern for a victim of dating/domestic violence. The Complainant and the media have inferred that the failure to report was directly tied to protecting the football program, keeping Tumpkin in place through the Alamo Bowl, or maintaining a positive media presence through National Signing Day. While the temporal nature of those events and the delay in OIEC, OVA and employment oversight responses contributed to that perception, we decline to make an inference, positive or negative, as to the state of mind or intent of MacIntyre, George, or DiStefano.

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<sup>163</sup>These observations are particularly salient, given the high profile media coverage and national context with respect to sexual assault and dating/domestic violence within college and university athletics. 2016 was replete with media accounts about institutional failures and the filing of Clery and Title IX complaints with the Department of Education. Indeed, at the May 2016 head coaches' meeting, Baylor University was held out as an example of the significant impacts of failing to report suspected misconduct. We acknowledge our limited view in the context of this one incident, but nonetheless observe that the institutional actors here appeared to be disconnected from an understanding of institutional vulnerability regarding the significant risk posed by not reporting the conduct to OIEC.

The reality is that we may ultimately not know precisely “why” each individual declined to make a report to OEIC or to follow up in the proper exercise of supervisory authority. The failure to do so, in and of itself, however, deprived the University of the opportunity to evaluate the report, to make a reasoned, factual determination consistent with University policy and values, to more promptly evaluate any impact on campus constituencies, to provide the Complainant with access to available information about resources, and to take appropriate and responsive employment action. The failure to share the report with OIEC also gave rise to a negative perception of institutional bias that has the ability to undercut faith and trust in University processes.

## **X. Recommendations**

As outlined above, the scope of our review was twofold: 1) to conduct a factual inquiry into the University’s response to the Complainant’s report of dating/domestic violence and determine whether any conduct by the parties violated University policies; and 2) to provide recommendations, as necessary, to improve the University’s policies and practices. Our scope does not include making determinations as to potential personnel action or disciplinary action.

During the course of this review, we shared our observations about policies and practices with University Counsel and the Board of Regents. While this was not a full policy audit, like the one we completed in January 2014, we necessarily reviewed University policies, training materials, written communications and spoke with administrators about the implementation of University policies and the provision of training and education. University administrators have been receptive to our observations and recommendations, which broadly framed, address the following areas:

- Synthesis and alignment of system, campus and unit policies, with particular attention to consistency in definitions, scope and jurisdiction and clarification as to the scope and applicability of the P&P campus-wide
- Integration of reporting responsibilities under Title IX and Clery, as amended by VAWA, including:
  - Strategic and organized identification of training obligations across the University, including identification of campus security authorities
  - Clarification as to how jurisdiction impacts reporting obligations
- Targeted and routine in-person training for all Athletic Department employees and student-athletes
- Integration of the Athletic Department with OIEC, University Counsel and University Communications
- Centralized oversight of Title IX and Clery training content to ensure consistent application of University policy
- Review of contractual obligations to ensure consistency with federal law and University policy

- Development of a crisis/incident response protocol that encourages and mandates collaborative sharing of information to inform effective decision-making
- Clarify the role of personal or outside counsel vis-à-vis University obligations, policies and procedures
- Assessment of current Clery policies and procedures to ensure a coordinated and integrated approach to Title IX and Clery implementation

Based on our discussions with the University, the University has committed to implementing the following steps:

- **Policies:** The University of Colorado will amend APS 5014 so as to clarify the obligation to report off-campus sexual misconduct, including domestic and dating violence, that adversely affects the health, safety, or security of any member of the university community. Campus policies shall be modified to conform to APS 5014.

The university shall adopt and implement an Administrative Policy Statement defining obligations under the Clery Act. Campus policies shall confirm to this APS..

Any policies that impose substantive obligations applicable to all campus employees shall be adopted as campus policies through a formal policy process, rather than be implemented through unit policies.

- **Training:** All University of Colorado employees will receive online training upon hiring, which will include training on reporting sexual misconduct, including dating and domestic violence. All university employees will be required to renew their online training not less than every three years.

Whenever the University of Colorado modifies APS 5014 or any associated campus policies, responsible officials shall review the existing training to determine if it should be modified. If changes in APS 5014 or associated campus policies affect the responsibilities of members of the campus community, the responsible officials shall implement updated training in a timely manner and accelerate training renewals.

The University of Colorado will conduct an assessment to determine which operations present high risk exposure for discrimination or sexual misconduct, including dating or domestic violence. For those operations, the university will determine what additional training requirements are appropriate, with an emphasis upon in-person training. All employees designated as Campus Security Authorities will receive online Clery Act training upon hiring. The University of Colorado Police Department will conduct an assessment to determine which additional training requirements are appropriate, with an emphasis on in-person training.

Any online training will be reviewed by the Office of University Counsel to ensure that it is accurate and consistent with legal obligations.

- **Structure:** The University of Colorado will review how its departments responsible for implementing university, campus, and other sexual misconduct and crime reporting policies interact with other one another and will consider how information sharing and coordination by such departments can be improved.
- **Interactions with Outside Counsel:** University of Colorado employees have the right to consult personal counsel whenever they consider it appropriate. The university will advise employees that they are entitled to rely only upon advice provided by university counsel (or counsel that the university retains on their behalf) to the fulfill their duties and responsibilities as employees of the University of Colorado.
- **Contracts:** Current term contracts reflect the expectation that employees will report misconduct to their superiors, as well as to law enforcement if the misconduct involves potentially criminal conduct. The University of Colorado will modify new term contracts to also provide that employees are also required to report allegations of sexual misconduct, including domestic and dating violence, to those personnel and offices responsible for investigating such allegations.
- **Response to High Impact Events:** When informed of events that have a potentially significant compliance, safety, financial, or reputational impact, appropriate university officials will convene affected constituencies to define expectations and determine responsibilities.
- **Awareness:** The University of Colorado will initiate an awareness campaign highlighting dating and domestic violence, the reporting obligations of responsible employees and campus security authorities, and the resources available to victims.