

Exhibit H



July 22, 2014

INVESTIGATION REPORT

Complaint against Jonathan Waters, Director of the OSU Marching Band

EXECUTIVE SUMMARY

On May 23, 2014, a parent of a Marching Band member reported information about the Band's culture to the Office of University Compliance and Integrity. The parent was concerned that the Band's culture was sexualized and that its members were made to swear secrecy oaths about objectionable traditions and customs. The information provided constituted a complaint under university policy and Title IX, and the parent requested an investigation of these allegations.

This Office, which oversees Title IX compliance, investigated these issues, as required by university policy and federal law. We make the following findings:

- 1) The Marching Band's culture facilitated acts of sexual harassment, creating a hostile environment for students.
 - 2) Jonathan Waters, the Marching Band's Director, knew or reasonably should have known about this culture but failed to eliminate the sexual harassment, prevent its recurrence, and address its effects.
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This investigation report details these issues in the following sections:

- I. Relevant Background
- II. Scope of this Investigation
- III. Culture Allegations and Findings
- IV. Findings Regarding Response to Culture
- V. Additional Factors
- VI. Conclusion and Recommendations for Corrective Action

I. RELEVANT BACKGROUND

The Ohio State University Marching Band is nationally recognized for its traditions and innovative programs. Well known by its nickname, TBDBITL, the Marching Band plays at all home football games and travels to some away games.

More than 400 students try out each year for the Band's 225 spots. Women were first admitted into the Band in 1973, after Congress enacted Title IX. Today, approximately 21% of its members are women. Each member practices approximately 30 hours per week during football season to learn the music and the field formations. As a result of spending so much time together, members of the Band often describe its atmosphere as "a family" with strong bonds formed between students. The TBDBITL alumni club is very active and alumni often interact with current students.

Marching Band members are grouped by instruments, which are organized by row, and members are further organized within the row. Each row has a student squad leader and student assistant squad leader who, according to the Marching Band Statement of Policies and Procedures, are charged with:

[A]ssisting the Directing Staff in conducting marching drills and grading candidates during tryout week; assisting with the weekly challenges and music checks; uniforms and instrument inspections; recruiting; facilitate with [sic] row communications; providing on-the-field and off-the-field leadership to members of the row; and assuming responsibility for the actions of the row during all rehearsals, performances, and trips.

Michael Smith joined Ohio State as Assistant Director of Marching and Athletic Bands in August 2012. Smith has 30 years of prior experience in music education, teaching at every level, from kindergarten to universities.

Dr. Christopher Hoch has served as the Associate Director of Marching and Athletic Bands since August 2012. He served on the Band's directing staff from 2000 to 2002 as a Graduate Assistant Director, and returned as a Graduate Assistant Director in 2009. Hoch played trombone in the Band from 1995 to 1999.

Jonathan Waters has been Director of the Marching and Athletic Bands¹ since October 10, 2012. Before that he served as Interim Director from June 2012 to October 9, 2012, Assistant Director from January 2002 to June 2012, and Graduate Assistant from 2000 to 2002. Waters was a sousaphone player and member of K-L row in the Band from 1995 to 1999.

¹ The Athletic Band performs at all varsity sporting events, with the exception of fall football games. The number of participants in Athletic Band each semester varies between 250-300 members and anyone is welcome to participate. Directed by Waters, both the Marching and Athletic Bands report administratively through the School of Music. None of the facts in this report with the exception of footnote 7 relate to the Athletic Band.

II. SCOPE OF THIS INVESTIGATION

On May 23, 2014 a parent of a Marching Band member visited the Office of University Compliance and Integrity and reported that she had concerns about whether the Marching Band's culture was sexualized, and stated that its members were made to swear secrecy oaths about objectionable traditions and customs. The parent specifically described an annual tradition of members marching across the field in their underwear under the supervision of the Marching Band directors and staff, including Jonathan Waters.

The information provided by the parent constitutes a complaint under the university's Sexual Harassment Policy 1.15 and Title IX; the parent requested an investigation of these issues, which implicate university policy and federal prohibitions on sexual harassment and raise the possibility of a hostile environment in the Marching Band.²

At the direction of the Office of Legal Affairs, the Office of University Compliance and Integrity, which oversees Title IX compliance, investigated these issues, as required by university policy and federal law. Compliance Investigator Jessica Tobias and Program Manager Rebecca Dickson conducted an investigation in accordance with guidelines and requirements set forth by the Office for Civil Rights for Title IX investigations. Their efforts were overseen by Chris Glaros, Assistant Vice President for Compliance Operations and Investigations. Conclusions were made using a preponderance of the evidence standard. Witnesses interviewed include current students, alumni, and staff.³

- Complainant – Parent of Marching Band member
- Complainant's Child – Marching Band member
- Richard Blatti – School of Music Director
- Pam Bork – Senior Physical Therapist, Student Health Services
- Christopher Hoch – Associate Marching Band Director
- Michael Smith – Assistant Marching Band Director
- Jonathan Waters – Marching and Athletic Bands Director
- Witness 1 – Marching Band member
- Witness 2 – Marching Band member

² At the same time, a separate allegation was made involving Jonathan Waters' treatment of a specific student in 2013. That allegation was also investigated by this Office. Based on the evidence available, the claim could not be substantiated. That finding was presented to university leadership under attorney-client privilege but is not included in this report given protections afforded the student by the Family Educational Rights and Privacy Act (FERPA). Among other protections, FERPA requires redaction or other protection of any information that is "linked or linkable" to students in any way that "would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty." The United States Department of Education's Office for Civil Rights, which enforces Title IX, likewise advises universities to protect the confidentiality of Title IX complainants whenever possible. These protections, designed to maintain students' privacy, also help reduce the risk of retaliation by peers and others against those who raise these concerns.

³ The complainant and witnesses recommended specific people to interview and we have talked with or tried to contact each of them. As of July 15, 2014, we were still receiving information from some of the witnesses interviewed. One of our recommendations discussed in Section VI is that the Marching Band membership be surveyed regularly and anonymously about the Band's climate and culture; we did not randomly interview current Band members for this investigation.

- Witness 3 – Marching Band member
 - Witness 4 – Former Marching Band member
 - Witness 5 – Former Marching Band member
 - Witness 6 – Former Marching Band member
 - Witness 7 – Former Marching Band member
 - Witness 8 – Former Marching Band member
 - Witness 9 – Marching Band member
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III. CULTURE ALLEGATIONS AND FINDINGS

The Marching Band's culture facilitated acts of sexual harassment, creating a hostile environment for students.

The complainant reported concerns about whether the Marching Band's culture was sexualized. The parent further stated that the Band's members were made to swear secrecy oaths concealing objectionable traditions and customs. The parent specifically described an annual tradition of members marching across the field in their underwear under the supervision of the Marching Band directors and staff, including Jonathan Waters.

Our interviews explored this allegation, which led to witnesses describing numerous activities that relate to the Band's culture. These activities are organized in the following topics:

- Midnight Ramp
- Nicknames
- Tricks
- Rookie Introductions
- Rookie Midterms and Physical Challenges
- Trip Tic
- Songbook
- Other Misconduct on Buses
- Changing Clothes on Buses
- General Culture Statements

This information comes from current students, former students, and staff. Unless noted otherwise, specific facts were corroborated by multiple witnesses.

Midnight Ramp

Witnesses described an event called "Midnight Ramp," which they explained was a longstanding tradition involving Marching Band members wearing only their underwear marching into the football stadium through the ramp. Staff members, including Jonathan Waters, are present and oversee the activity. In recent years and under Waters' direction, Midnight Ramp has been held immediately following Fesler night, which is a semi-formal evening event where members learn about Marching Band traditions and, according to one witness, take oaths not to tell about Fesler.

Before 2010, students left the stadium after the Fesler night semi-formal event ended and returned at midnight to perform Midnight Ramp, without staff supervision.

Multiple witnesses provided similar descriptions of students stripping down to their underwear and entering the stadium through the ramp. Two witnesses indicated that a few Band members get completely naked. According to one female witness, more senior members of the Band warn new members to wear comfortable (fuller coverage) underwear before Midnight Ramp. She also stated that female members have gone shopping together at Victoria's Secret to buy underwear for the event.

Most witnesses indicated that participation in Midnight Ramp was not required. Some witnesses stated that students not participating in the tradition would receive negative treatment from other students and staff. Other witnesses stated that there were no consequences for not participating, while one witness stated that she was "told not to talk about it outside of the Band."

Assistant Director Michael Smith witnessed Midnight Ramp for the first time in August 2013 and was surprised by the tradition. He stated that he recalled thinking at the time, "I don't believe I just witnessed that." He stated that some students wore pajamas or shorts instead of underwear. Smith added that participation was not required and he recalled a female who did not participate. Smith said that Waters announced during a meeting that occurred the week of June 9, 2014 that Midnight Ramp would no longer take place.

Associate Director Christopher Hoch recalled that a student had alcohol poisoning during Midnight Ramp four or five years ago. After this incident, staff committed to being present at Midnight Ramp and since then this tradition has been in a state of transition. Hoch confirmed that Waters announced during a meeting the week of June 9, 2014 that Midnight Ramp would no longer take place.

During his interview on June 12, 2014, Waters stated that in May 2014 he initiated a conversation with student squad leaders about whether this tradition was still necessary. He said that Marching Band leadership decided to eliminate this tradition and replace it with something more appropriate. When pressed specifically about the timing of this decision, Waters wavered on whether it occurred in May. Notably, Waters learned of this investigation on May 26, 2014, when he was told that it involved allegations about the Band's culture.

Nicknames

Each new Band member (traditionally called a "Rookie") is assigned a nickname by upperclassmen. Multiple witnesses noted that many such nicknames are sexually explicit or have an implicit sexual meaning. One witness said that in 2013, all three new members of one row had sexual nicknames: "Captain Dildo," "Barker," and "Pat Fenis."

Various examples of sexual nicknames⁴ include:

- Ballsacagawea
- Bater

⁴ There are various Internet sites that attempt to define these slang terms. See, e.g., www.urbandictionary.com.

- Boob Job
- Donk
- ERV (“E” Row Vibrator)
- Fleshlight
- Gīna
- Jewoobs (given to a Jewish student with large breasts)
- Jizzy
- Mushroom Stamp
- Squirt
- Sugar Bush
- Swoob
- Taint Brush
- Testicles
- Tiggles
- Tits Mcgee
- Triple Crown
- Tulsa
- Twat Thumper
- Twinkle Dick

Waters stated that the Marching Band’s alumni network publishes an annual directory that includes nicknames for some members, and he provided its latest version. Many of the printed nicknames included in the new June 2014 TBDBITL directory are sexually explicit, including some names given to new members in 2013.

Such nicknames have also been printed on T-Shirts that are sometimes worn during Band practice.

Most witnesses indicated that staff did not call students by their nicknames. However, two witnesses stated that nicknames were used by Waters (sometimes when he was upset), including at least one sexual nickname (“Tiggles”). One witness indicated that Waters sought to discover assigned nicknames. According to one witness, Waters addressed nicknames in 2012 when he stated to the Marching Band as a whole to go “easy on the offensive nicknames.” However, the practice did not change thereafter.

Assistant Director Smith stated that everyone gets a nickname and acknowledged that they are often “pretty dirty” or involve sexual innuendo. He added that every row is different, but one particular row always had dirty names. He was not sure if the directors had said anything to correct the use of nicknames, but not all nicknames are used as much as others. Smith stated that he does not know many of the students by their nicknames.

According to Associate Director Hoch, nicknames happen, but the use of offensive nicknames is lessening. He stated that the nicknames are occasionally used in front of staff and any use of offensive nicknames is disciplined. He recalled one student being disciplined two or three years ago for using a new member’s nickname and treating the new member disrespectfully.

When asked, Waters denied using the nicknames. He confirmed that some nicknames were shared with the entire Band on Fesler night, but said there is no “official sharing.”

When asked to estimate how many current nicknames are sexual or offensive, Waters responded that “fifty percent” probably were “questionable.” When asked whether he thought such sexual nicknames are appropriate, Waters answered, “No.” When asked why he then tolerates such sexual nicknames, Waters replied, “Good point.”

Waters went on to rhetorically question whether nicknames should be outlawed altogether or if they should be tolerated on a “cleanliness level.” He stated that the Marching Band is still in a “transformative stage” regarding nicknames. Waters said that he reprimanded a student for using the nickname “Dr. Faggot” in 2011 when he was assistant director. He further stated that he was appalled by this nickname and he spoke with the squad leaders about it.

Tricks

Witnesses stated that “tricks” are acts individual Band members perform, either on command or at their own volition. Several witnesses described how tricks are assigned to rookies, and often are performed throughout their entire tenure in the Band. The tricks are usually connected to the students’ assigned nicknames. Several witnesses provided examples of sexually explicit tricks assigned to and performed by new Band members given sexually explicit nicknames. Examples of tricks include:

- A female student sitting on laps and pretending to orgasm. This included her sitting on her younger brother’s lap and pretending to orgasm on “make the Band night.” Her nickname was “Squirt.”
- A female student thumping the ground with her foot and pretending to orgasm. Her nickname was “Thumper.”
- Two females rubbing their chests together. Their nicknames were “Jewoobs” and “Tiggles.”
- A male student conducting a full-body demonstration of a flaccid penis becoming erect and spitting candy. This trick was also occasionally performed with another female student who pretended to stimulate the male student. His nickname was “Jizzy.”
- A student would act as if he was outside a strip club soliciting clientele, saying “girls, girls, we have these types of girls.” His nickname was “Barker.”
- A male student scooting across the floor on his hindquarters. His nickname was “Taint Brush.”
- A male student stamping other students’ foreheads with a penis stamp. His nickname was “Mushroom Stamp.”
- A male student chanting, “haaaay, we want some pussaay.” His nickname was “Captain Dildo.”
- A female student pretending to be a vibrating sex toy. Her nickname was “ERV”, which stood for “E Row Vibrator.”
- A female student would sing sexually explicit songs about someone. Her nickname was “Tulsa.”

Several witnesses stated that sexually explicit tricks were not performed in front of staff. They were

instead performed at student house parties, dinners sponsored by alumni, and during down time on trips. Some witnesses stated that non-offensive tricks were occasionally performed in front of staff.

Smith was not aware of any sexually explicit tricks being performed by students in the recent past. Smith stated that he had heard of sexually explicit tricks being performed in the distant past (twenty plus years). Hoch stated that tricks have been performed in front of staff but they were never inappropriate.

Waters stated that he never witnessed nor heard of any of the tricks listed above, and does not believe that such tricks are “performed on Band time.” According to Waters, most tricks were on the clean side and involved singing a theme song or a fight song. He shared that his nickname as a student was “Clark Kent” and his trick was to sing the Superman theme song. Waters could not recall any sexually explicit tricks from when he was in the Band.

Rookie Introductions

Several witnesses indicated that new Band members were subject to “Rookie Introductions,” which occurred at the front of a moving bus en route to away games. These sometimes included sexually explicit questioning and dirty jokes. A witness stated that one such episode entailed using a dildo as a microphone. Another witness confirmed that sexually explicit Rookie Introductions occurred in the Fall of 2013.

Two witnesses indicated that following Rookie Introductions, new Band members were made to march to the back of the bus while other students attempted to remove articles of clothing. These witnesses also stated that they had seen or heard of students being groped during the march. One male student was described to have had his pants taken down and fondled at the back of the bus after such an episode.

Smith acknowledged hearing harmless rookie questions on the bus, but denied hearing anything offensive. Hoch stated that he allows Rookie Introductions on his bus, but does not allow any offensive questions.

According to Waters, Rookie Introductions were prevalent in the ‘90s and started to dwindle throughout the years. Waters stated that he was not aware of students’ clothes being removed since becoming Director. He said that when this behavior was prevalent in the 90’s, students may have only torn off crossbelts and berets. Waters stated that he addressed Rookie Introductions when he became Director by asking the squad leaders if they still needed to do them.

Rookie Midterms and Physical Challenges

One witness stated that upperclassmen subject new Band members to “Rookie Midterms” on long bus trips that would contain written questions and physical challenges. The witness stated some questions involved “connecting the dots” activity to form a picture of a sexual position or sexual act. The witness provided a copy of the “Rookie Midterm” that was used in 2011 with students who are still currently in the Band. **See Exhibit A.**

The witness also stated that one physical challenge included in a midterm required new Band members to either place a condom on a banana, place a banana in his or her mouth and place a condom on it, or place a banana between a graduate assistant's legs and place a condom on the banana. Another example included "Find Mr. Big," in which students were asked to locate a hidden dildo on the bus.

Waters stated that he was aware of "Rookie Midterms," but did not know of any sexual content or behavior associated with them. He stated that he told the Marching Band that this behavior needed to stop. He believes the Rookie Midterms no longer occur.

Trip Tic

Multiple witnesses stated that a special newsletter named "Trip Tic" was produced by an anonymous member for away game trips. Two copies of the newsletter were distributed to each marching row. According to most witnesses, this publication included disparaging information about members and sexually explicit content, including sexual activities of members. Two witnesses stated that some issues included females and males listed by attractiveness ratings. One witness stated that an issue included a "Marry, Fuck, Kill" list.

Several witnesses stated that staff members knew about Trip Tic and often read it despite the fact that they were not supposed to see it. According to one witness, the X row members would typically give a copy to Waters.

Most witnesses indicated that Waters banned Trip Tic in 2012 after a female student was severely berated in an article. Two witnesses stated that the female student was in a romantic relationship with the percussion instructor at the time of the article. One student stated that the only reason Waters banned Trip Tic was because the percussion instructor asked him to ban it when it had cruelly disparaged the instructor's girlfriend.⁵

Smith and Hoch were not aware of the Trip Tic still being published.

Waters explained that he found the October 2012 issue of Trip Tic on the bus floor and read it. After finding the article about the female student, he made an inquiry into who published the newsletter, disciplined the student responsible, and required him to make a public apology. He also spoke to the entire Marching Band and emphatically stated that this was not acceptable and would not continue. Trip Tic has apparently stopped.

Songbook

Witnesses discussed a Songbook containing misogynistic and alternate sexual lyrics to Ohio State and numerous other collegiate songs, which were sung on bus trips. Many witnesses indicated that the Songbook is no longer distributed. One witness, however, provided a copy of the publication, a version written in 2006. See **Exhibit B**. The preface states:

⁵ It is unclear whether this relationship violated the University's Sexual Harassment Policy 1.15, which outlines expectations and parameters surrounding such relationships. We did not investigate the issue, as we were advised that the instructor is no longer employed by OSU.

The history of this publication goes back further than any of us will remember....Throughout the history of this book, it has been called many different things, ranging from Band Bible, Song Publication, and even The Unofficial OSUMB Handbook. The songs in this “item that does not exist” have been passed down from generation to generation during I-dots, bus trips, Beer Busts, and the occasional bored sober free time....Take it with you on trips and to parties....But never leave this out of your sight.

Recalling that women (always a distinct minority of the Band’s membership) were subjected to these songs while confined on buses, one witness observed that some of the songs went so far as to glorify violence against women.

Smith stated that students were singing dirty songs on a Band trip to Put-in-Bay on September 1, 2013, but he made them stop.

Hoch stated that alumni may have given students copies of the Songbook. He said that inappropriate songs are still sung on occasion but staff stops them when they are heard.

Waters stated that, as Assistant Director four or five years ago, he had heard students singing inappropriate, but not sexually explicit, lyrics set to Big Ten fight songs. He stated that not all the lyrics are “sexually derived.” He went on to say that he had no idea about the lyrics because he does not know them, but then admitted that some lyrics may have been sexual. He stated that, as Assistant Director, he addressed students singing inappropriate songs by speaking to the Band and squad leaders and by directing staff to not allow this behavior to continue. Waters stated that in 2013 a staff member reported stopping students from singing “inappropriate” songs on a bus. According to Waters, he has continued to address this behavior as Director by addressing it in the context of general bus behavior.

When asked if he had actually seen the Songbook, Waters said he had seen it as a student. He further stated that he has never seen the Songbook as a staff member. He added that he would be shocked if it was still circulated; however, he said that he is “not privy to the underground.” He stated that his impression is that the songs are passed down verbally and that the Songbook has been gone for years. He also speculated that it is possible that alumni may circulate it to current members at parties, but he has never seen it on Band time. Waters added that if he or any other staff members did see it they “would certainly deal with it.”

Other Misconduct on Buses

One witness indicated that students brought a box of pornography on the bus and shared these magazines with other students. Neither Smith, Hoch, nor Waters witnessed pornography being distributed.

Several witnesses stated that a “flying 69” formation was performed on the buses. This involved two students posing in the “69” position while holding themselves in the air from the luggage racks or allowing other students to hold them in the air. Pam Bork, a physical therapist from Student Health

Services who volunteered with the Band for 18 years, stated that she witnessed the “flying 69” performed on Waters’ bus during the September 14, 2013 Cal game trip. Waters denied seeing a “flying 69” as a Director or in recent years.

One witness stated that Waters texted dirty limericks to students. Waters acknowledged having cell phone numbers for squad leaders but denied ever texting dirty limericks.

Witnesses also described a longtime game called “roller bus” in which students would attempt to reach the front or back of a moving bus while other students tried to inhibit them. Pam Bork stated that Waters participated in this game as Director. Waters acknowledged doing so but said that the game was significantly toned down from previous years and was no longer dangerous.

Changing Clothes on Buses

Several witnesses stated that they routinely change clothes on the bus in front of members of the opposite sex. Many witnesses stated that this is a common practice for bands and happens in high school. One witness stated that she complained to Waters about having to change clothes on the bus and he ignored her.

Smith stated that students are usually able to change in a restroom if they are uncomfortable changing on the bus. He also said that he has not been asked for alternative accommodations but would assist students in finding alternatives if asked.

Hoch stated that under rare circumstances, changing on the bus is unavoidable. He also stated that no one has asked him for alternative accommodations, but if they did he would assist them in finding an alternative. Hoch added that students sometimes change in shifts to provide more room for changing; however, the shifts are not divided by gender.

Waters acknowledged that students often change clothes on buses in front of members of the opposite sex. He stated that they are at the mercy of the athletic department scheduling and do not always have alternative accommodations. He denied being asked by a student for an alternative accommodation.

General Culture Statements

Many witnesses expressed that being a member of the Marching Band was a lifelong dream. Several student witnesses shared with us that they considered the Marching Band to be their family and that row members often protected and stood up for each other. Witnesses also described a highly stressful environment where students were under pressure to learn extensive programs and maintain their row position each week.

One witness described the Band’s long-term culture as “sexualized.” The witness stated that during his first year in the Marching Band (circa 2007), an upperclassman shared a story about his new girlfriend, a cheerleader, who was very sexually conservative. According to the witness, the upperclassman played “just the tip,” which involved the upperclassman telling his girlfriend that he would only insert the tip of his penis into her vagina. The upperclassman told the witness that instead of doing that, he fully penetrated his girlfriend. The witness believed that this “sounded like rape.” After relating this story, the witness stated that the culture had not changed during his tenure (2007 –

2011) and “absolutely needs to be fixed.”⁶

Another witness described her first year in the Marching Band as “culture shock” and cited alcohol consumption at away football games as an example. Several students stated that alcohol use and abuse is a large part of the Marching Band’s culture. Another witness described the Marching Band as operating under a “culture of intimidation.” One student stated that the Marching Band is an “old guys” club where all-male rows are celebrated; however, another student stated that his row celebrated its history of being the first all-female row at one point.

Smith described the Marching Band’s culture as a work in progress. He stated that all large bands develop specific cultures. Smith added that OSU’s Marching Band is unique in that it has a large, active, proud, and at times stubborn alumni base that can be resistant to change. Smith stated that in 2012 the Marching Band leadership acknowledged that some things about the culture needed to change and he added, “things are so much better now.” When asked what has changed, Smith cited the increased acceptance of women over time and the improvement in students’ attitudes about hazing, which has resulted in fewer instances of hazing. Smith also recalled a speech to the Marching Band made by Waters after a Florida A&M hazing incident that resulted in the death of its band’s drum major. According to Smith, Waters discussed the incident and stated that this would not happen at OSU.

According to Hoch, the Marching Band’s culture is not perfect, but is moving in the right direction. He stated that dramatic changes have occurred over the past few years. Hoch said that no one has worked harder to address the culture than Waters.

During his first interview, Waters stated that the culture and treatment of women in the Band has been a work in progress. He said that the culture is not anti-women; however, the Marching Band’s roots are in the military and the term “rookie” is a pejorative. He noted that former Title IX Coordinator Andrea Goldblum and Student Conduct Director Justin Moses conducted a training session last November as a result of a sexual assault and that he believes this led to open and honest conversation, without citing specifics.⁷ According to Waters, alcohol consumption is a “big problem” and contributed to that assault.

⁶ This witness did not provide details regarding this incident, including whether a sexual assault had actually occurred or whether any OSU employee was aware of it. The witness suggested that the upperclassman’s ease in describing such purported conduct revealed the sexualized nature of the Band’s culture.

⁷ There are two prior incidents relevant to this report. First, in the Fall of 2013, a Marching Band member sexually assaulted a fellow Band member, leading to the former student’s expulsion following an investigation and adjudication by Student Conduct at that time. Second, an incident of sexual harassment by an Athletic Band member of a fellow Athletic Band member occurred in March 2013. Significant concerns were raised at the time about the manner in which Waters responded to the March 2013 incident. Both Legal Affairs and this Office had to intervene with Waters to ensure Waters reverse a decision that, if not corrected, would have led to a possible violation of Title IX. Specifically, a female Band member alleged sexual harassment by a male Band member, and Waters initially decided that both individuals would be excluded from the next Band trip. As this decision could have been construed as retaliation against a student for raising a Title IX complaint, Waters was advised that the female student must be allowed to take part in the trip. Both Legal Affairs and the Title IX Coordinator then offered additional consultation, training, and resources to the Band. An in-person meeting was held with Waters to discuss Title IX issues, and additional trainings were recommended. Although he agreed at the time, Waters made no effort to schedule any training until after a sexual assault in Fall 2013, when the Title IX Coordinator again stated that such training was required.

During his second interview, Waters stated that the culture is evolving and that changing the culture is still a process. He stated that he would not describe the culture as sexualized and that sexual harassment is not a part of the culture. He also said that sexual innuendo is found in much of what college students do.

Relevant Policy and Law Prohibiting Sexual Harassment

The university's Sexual Harassment Policy 1.15 makes clear that such "harassment is unlawful and impedes the realization of the university's mission of distinction in education, scholarship and service." Moreover, sexual harassment "violates the dignity of individuals and will not be tolerated." The Policy states that examples of sexual harassment include, but are not limited to:

A pattern of conduct that unreasonably interferes with the work or academic environment (not legitimately related to the subject matter of a course) including:

1. Sexual comments or inappropriate references to gender.
2. Sexually explicit statements, questions, jokes or anecdotes regardless of the means of communication (oral, written, electronic [e.g. email, social media, phone, etc.], etc.).
3. Unwanted touching, patting, hugging, brushing against a person's body or staring.
4. Inquiries and commentaries about sexual activity, experience or orientation.
5. The display of inappropriate sexually oriented materials in a location where others can view them.

The Office for Civil Rights (OCR) in the United States Department of Education is responsible for enforcing Title IX, which states:

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.

In 2001 OCR highlighted "longstanding legal authority establishing that sexual harassment of students can be a form of sex discrimination covered by Title IX." See Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (2001). OCR explained that:

Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual harassment of a student can deny or limit, on the basis of sex, the student's ability to participate in or to receive benefits, services, or opportunities in the school's program. Sexual harassment of students is, therefore, a form of sex discrimination prohibited by Title IX under the circumstances described in this guidance.

* * *

Conduct is unwelcome if the student did not request or invite it and "regarded the conduct as undesirable or offensive." Acquiescence in the conduct or the failure to complain does not always mean that the conduct was welcome. For example, a student may decide not to resist sexual advances of another student or may not file a complaint out of fear. In addition, a student may not object to a pattern of demeaning comments directed at him or her by a group of students out of a concern that objections might cause the harassers to make more comments. The fact that a student may have accepted the conduct does not mean that he or she welcomed it. Also, the fact that a student willingly participated in conduct on one occasion does not prevent him or her from indicating that the same conduct has become unwelcome on a subsequent occasion. On the other hand, if a student actively participates in sexual banter and discussions and gives no indication that he or she objects, then the evidence generally will not support a conclusion that the conduct was unwelcome.

* * *

A student may be sexually harassed by a school employee, another student, or a non-employee third party (e.g., a visiting speaker or visiting athletes). Title IX protects any "person" from sex discrimination. Accordingly, both male and female students are protected from sexual harassment engaged in by a school's employees, other students, or third parties. Moreover, Title IX prohibits sexual harassment regardless of the sex of the harasser, i.e., even if the harasser and the person being harassed are members of the same sex.

More recently, OCR's April 4, 2011 Dear Colleague Letter states that: "Title IX also prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, even if those acts do not involve conduct of a sexual nature."

OCR's 2001 guidance also states that sexual harassment can occur that does not explicitly or implicitly condition a decision or benefit on submission to sexual conduct, and explains that this type of harassment is generally referred to as hostile environment harassment. The 2001 guidance lists factors to determine if a hostile environment has been created, including:

- The degree to which the conduct affected one or more students' education.
- The type, frequency, and duration of the conduct.
- The identity of and relationship between the alleged harasser and the subject or subjects of the harassment.
- The number of individuals involved.
- The age and sex of the alleged harasser and the subject or subjects of the harassment.
- The size of the school, location of the incidents, and the context in which they occurred.
- Other incidents at the school.
- Incidents of gender-based, but nonsexual harassment.

In assessing these factors, OCR states:

It is the totality of the circumstances in which the behavior occurs that is critical in determining whether a hostile environment exists. Consequently, in using the factors discussed previously to evaluate incidents of alleged harassment, it is always important to use common sense and reasonable judgment in determining whether a sexually hostile environment has been created.

Analysis

Each of the allegations about the Marching Band's culture discussed above implicates university policy and federal prohibitions on sexual harassment. While some of the students may have engaged in such behavior and gave no indication that they objected, the interviews highlighted multiple situations in which students did not welcome this misconduct. In a culture so sexualized for so long, students' acquiescence and failure to complain cannot be taken as evidence that the range of this misconduct was welcome.

As for the factors listed by OCR's 2001 guidance indicating the existence of a hostile environment:

- The misconduct described above affected many students' musical education through the Marching Band, some to a significant degree, as evidenced by feelings of regret and shame that were communicated in our interviews.
- The misconduct described is highly sexual, frequent, and longstanding as part of the Marching Band's culture.
- Much of the misconduct was directed by upperclassmen towards newer members of the Band. Some of this misconduct was directly witnessed and permitted by Band staff.
- The subjects of the sexual harassment were impressionable and developing students.
- The misconduct occurred in multiple locations involving the Marching Band, including practice at the stadium, bus trips, alumni events, and off-campus parties. Much of the misconduct occurred during official Marching Band activities when students were under the supervision of staff.

For these reasons, we find that the Marching Band's culture facilitated acts of sexual harassment under both university policy and Title IX, creating a hostile environment for students.

IV. FINDINGS REGARDING RESPONSE TO CULTURE

University policy and Title IX both require that individuals who know or reasonably should know about sexual harassment that creates a hostile environment must take action to eliminate the harassment, prevent its recurrence, and address its effects. Information gathered shows Waters knew

about the Marching Band's hostile environment and did not take adequate measures to address it as required.

Relevant Requirements

The university's Sexual Harassment Policy 1.15 states:

The university administration, faculty, staff, student employees and volunteers are responsible for assuring that the university maintains an environment for work and study free from sexual harassment.

The policy specifically includes a "duty to act," which requires the reporting of sexual harassment within five working days of awareness.

In 2001, the Office for Civil Rights set forth a university's responsibility "to respond promptly and effectively to sexual harassment" as follows:

If a student sexually harasses another student and the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the program, and if the school knows or reasonably should know about the harassment, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence. As long as the school, upon notice of the harassment, responds by taking prompt and effective action to end the harassment and prevent its recurrence, the school has carried out its responsibility under the Title IX regulations. On the other hand, if, upon notice, the school fails to take prompt, effective action, the school's own inaction has permitted the student to be subjected to a hostile environment that denies or limits the student's ability to participate in or benefit from the school's program on the basis of sex. In this case, the school is responsible for taking effective corrective actions to stop the harassment, prevent its recurrence, and remedy the effects on the victim that could reasonably have been prevented had it responded promptly and effectively.

See Department of Education Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (2001).

OCR's 2011 Dear Colleague Letter further reiterated a university's responsibility to students under Title IX as follows:

If a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.

Analysis

Waters knew or reasonably should have known about sexual harassment that created a hostile environment.

As detailed in Section III above, Waters was aware of extensive sexual harassment.⁸ In particular:

- Waters knew about Midnight Ramp, and observed and monitored it as staff. Almost every witness stated that he was present and witnessed the annual Midnight Ramp tradition.
- Waters admitted that fifty percent of rookie nicknames are considered offensive or sexual in nature. Moreover, Waters provided a copy of the TBDBITL Alumni Directory, which was updated in June 2014 and lists sexually explicit nicknames, including some given to new members in 2013. Waters also stated that he knows that “tricks” exist in connection with nicknames.
- Witnesses stated that Waters would receive copies of Trip Tics on bus trips. According to one witness, the X row members would typically give a copy to Waters.
- One witness stated that she complained to Waters about changing on the bus in front of members of the opposite sex and he ignored her.

In addition, as recently as September 2013, a series of events related to the University of California game demonstrate Waters’ notice of a hostile environment. Pam Bork, Physical Therapy Manager with Student Health Services who volunteered for 18 years with the Band, resigned from the Band after the game because of students’ alcohol abuse and Waters’ reluctance to address the problem. Bork reported to Waters that students were drinking excessively on the trip. She stated that Waters did not want to discuss the topic of drinking with the Marching Band and suggested that she should do so. On that bus trip, she said to Waters: “If I have to hear the word ‘penis’ or ‘vagina’ one more time, I’m going to scream.” According to Bork, she also witnessed a “flying 69” being performed on her bus, which is also the bus Waters monitored. Bork relayed that other students (non-Band members) who were on this bus were “horrificed” by this atmosphere.

Bork added that she was concerned that someone would get hurt and that she quit the Band because she believed “something bad was going to happen.” Bork then referenced a sexual assault that had occurred as what she feared could come to pass.

The staff interpreted Bork’s concern as being limited to drinking. Smith stated that the students’ alcohol consumption bothered Bork. He added that she was concerned she would lose her license if someone became seriously ill because of alcohol poisoning. Hoch stated that they followed up on

⁸ The complainant’s allegation in this investigation was against Jonathan Waters; therefore, we considered all of the relevant information as it related to him. We address the separate knowledge and actions of Associate Director Christopher Hoch and Assistant Director Michael Smith throughout this report and, in Section VI, recommend their responsibility be considered separately.

Bork's report of alcohol consumption and did not find any problems.

Waters stated that he checked with staff and squad leaders to see if they had witnessed any excessive drinking on the Cal trip. He could not find any proof of drinking and could not see how the students could have had time to drink given the busy schedule. Waters stated that he told Bork that he "would love to have her speak" to the Marching Band about alcohol and when given the chance to do so, she quit her position mid-speech. Waters described Bork as "emotionally up and down" and someone who "stirs dissent."

After Bork's resignation from the Band, Smith acknowledged her assessment of its culture in two emails:

Thursday, September 19, 2013 (five days after the Cal game)

Pam,

I just want to drop you a note of thanks for all that you have done for the marching band. In the short time that I have known you, I have been in awe of you [sic] dedication to the well-being of all of us who are associated with the band. You are tireless in your efforts, and I don't quite know what the band is going to do without you. But I also want you to know that I totally respect and understand your decision. Perhaps it will be seen as a wake-up call.

On a personal note, I have come to think of you as a good friend, and I hope to see you again sometime soon. Perhaps coffee some day can work.

Please be happy and healthy!

Mike

Monday, October 28, 2013

Hi Pam,

It was great seeing you the other day. Let's do it on a regular basis!

I want to clarify something; I do believe that both Jon [Waters] and Chris [Hoch] really understand how important that you were to this band. I don't for a minute doubt that. I do, however, believe that they began looking at your concerns as a kind of blowing off steam on your part, as opposed to serious, thoughtful concerns that they should heed and act upon. And I have no doubt that they are starting to understand how correct your assessments of the band's culture is [sic].

As I said the other day, I desperately want to see you back with this band. I am going to see if we can get those changes to happen.

Mike

The information provided by Bork demonstrates that the Marching Band's physical therapist put Waters on notice of issues concerning alcohol consumption and the Band's sexualized culture in September 2013.

Given the nature and volume of the information available to Waters, he had knowledge of sexual harassment that created a hostile environment.

Waters failed to take action to eliminate the harassment, prevent its recurrence, and address its effects.

Waters claims taking some steps to address these issues, which included not allowing Trip Tic and disciplining a student for using an offensive nickname. However, he described the culture as evolving and stated that changing the culture "is still a process." His philosophy was demonstrated by the fact that he allowed Midnight Ramp to occur for two years under his direction before he ended it, only in June 2014. He also discussed generally addressing the Band about cultural issues in a "heavy handed" manner by telling members "this will not happen again." Yet Waters stated that the best initiation of change comes from student leaders.

During his second interview on July 1, Waters said he would provide a list of efforts he has made to address the Band's culture. We subsequently emailed him on July 3 to remind him that such a list would be helpful in this investigation. On July 11, Waters stated that his computer malfunctioned and the list that he was preparing was lost. On July 14, Waters provided a document describing his thoughts about the Band's culture and his efforts to improve it; the document does not change the analysis in this report.

Witnesses did not, however, report any significant change, or effort to change. In fact, only one witness stated that there had been transition in the culture of any kind. Another witness stated that speaking with Band directors about the culture was futile. She added that Waters "wants to be a cool guy in the Band." Similarly, Bork stated that Waters "just wants to be [the students'] friend."

OSU policy requires faculty and directors to report sexual harassment within five working days. Similarly, under Title IX and related OCR guidance, university staff is required to take action to eliminate sexual harassment. Intending to eliminate sexual harassment over a period of years does not constitute sufficiently prompt or effective action.

For these reasons, we find that Waters knew or reasonably should have known about this sexualized culture but failed to eliminate the harassment, prevent its recurrence, and address its effects.

V. ADDITIONAL FACTORS

The investigation revealed additional issues relevant to the allegations raised by the complainant.

Abusive Conduct by Waters

One issue that was raised during this investigation was whether Waters was sometimes abusive towards students. Two situations in which Waters yelled and cursed at students were corroborated—the first by a recording, the second by multiple witnesses.

First, a witness shared that he was called into Waters' office with Associate Director Christopher Hoch after a disagreement during practice the week of September 23, 2013. This witness provided us with a recording of Waters yelling and cursing at him in a private meeting also attended by Hoch, which he has also shared with other students and Pam Bork.⁹ The witness had been previously suspended from the Band for violating its policies. According to Waters and Hoch, he had a history of attitude problems. The witness remains upset about Waters' treatment towards him and asked that this situation be investigated separately.

A second witness described an incident following her submission of an evaluation of Waters when he was Assistant Director. The mid-term evaluation was intended to be anonymous. But she hand delivered the evaluation to the student secretary because she was late in turning it in. According to the witness, Waters contacted her later that evening and asked her to come to his office the next day to discuss her evaluation, despite its supposed anonymity. She stated that Waters raised his voice and swore at her because she indicated in her evaluation that he tends to favor certain students. The witness could not remember the exact words Waters used with her, but she recalls not being able to stop crying. Her account was relayed contemporaneously to others, including physical therapist Pam Bork, who provided corroboration.

We asked the Associate and Assistant Directors about these issues. Hoch recalled being present for the first situation above and recalled Waters saying something about the witness "standing on his head" if told to do so by Waters. But he did not recall that the conversation was laced with profanity. When told that we had credible evidence that Waters did yell and curse at the witness, Hoch stated that he was not necessarily comfortable in the meeting, but the witness' behavior needed to be dealt with. When pressed, Hoch said he did not agree with the language and did not know if it was warranted. But Hoch said he did "not want to throw him [Waters] under the bus."

Smith stated that Waters occasionally raises his voice during rehearsal to get students' attention. He added that this is a common practice for most band directors.

During his first interview, Waters stated, "in all my years I've never yelled, screamed, or cursed" at a student. During his second interview, when asked about these accounts, Waters stated that he might raise his voice on occasion when warranted and he may have raised his voice with the first witness above. Waters then admitted to sometimes cursing in front of students, but never at them.

Waters' Reaction to Social Media Content

On June 13, 2014, Waters contacted our office to inform us of a comment posted by the complainant

⁹ The audio recording of this incident was provided to the university on July 9, 2014, and the Office of Legal Affairs maintains the university's copy. Among other things, Waters is heard saying: "You fucking better realize who you're dealing with . . . We tell you to stand on your head . . . you'll stand on your Goddamn head."

to a reporter's personal Facebook page. The reporter is a Marching Band alumnus and had posted a story about a Lakewood High School Band Director (another Band alumnus) who had been arrested for having sex with one of his students. Waters noted that in the mug shot posted online, the accused is wearing a TBDBITL t-shirt. The complainant's comment on the Facebook page linked the Marching Band's culture to the alleged sexual assault in Lakewood. Waters said that he just wanted us to be aware that this was "out there." We cautioned him not to respond.

We subsequently learned from a witness, who is friends with the reporter, that Waters called the reporter and asked him to remove the complainant's comment from the Facebook page. The comment was removed.

When asked about this in his second interview, Waters originally said that he did not know the reporter and did not contact him. Later in the interview, Waters recanted his statement and said that he was "not forthright." Waters then acknowledged that he did contact the reporter, but denied asking him to remove any comments. He stated that he asked the reporter to "let the news be the news." When asked why he did not express concern about other negative comments on the Facebook page about the Band's culture, he stated that he did not see any.

Waters stated that the news story regarding the Lakewood band director was also posted to the TBDBITL alumni social media account and he asked for it to be removed. Waters stated he believed he was protecting the reputation of the Marching Band by addressing both of these situations. Waters said the Band's "image reflects leadership."

VI. CONCLUSION AND RECOMMENDATIONS FOR CORRECTIVE ACTION

For the reasons described above, we make the following findings:

- 1) The Marching Band's culture facilitated acts of sexual harassment, creating a hostile environment for students.
- 2) Jonathan Waters knew or reasonably should have known about this culture but failed to eliminate the sexual harassment, prevent its recurrence, and address its effects.

University policy places a "duty to act" on the university administration. Similarly, the Office for Civil Rights states that a university has a responsibility to take "prompt and effective steps to respond to sexual harassment" and that "if a school determines that sexual harassment that creates a hostile environment has occurred, it must take immediate action to eliminate the hostile environment, prevent its recurrence, and address its effects." See April 4, 2011 Dear Colleague Letter.

Many of the recommendations below are derived from OCR guidance and Resolution Agreements OCR has made with other institutions that were found to have a hostile environment for students. Each of these corrective actions should be developed, implemented, and monitored by the university's Title IX Coordinator and other appropriate leaders.

Evaluate and Strengthen Marching Band Leadership

- Realign the values of the Marching Band to the university's academic mission.
- Assess the effectiveness of Marching Band staff's leadership and management.
- Take appropriate personnel action to address all concerns.
- Review the organizational oversight of the Marching Band, clarify accountability for its operations and activities, and establish expectations for an independent view of the Band's activities.
- Create a committee of Marching Band members, staff, and alumni to identify strategies for changing the Band's culture (based on an anonymous benchmark survey discussed below) and ensuring that its members:
 - Understand the university's prohibition against sex discrimination, including sexual harassment and violence, and retaliation;
 - Recognize sex discrimination, sexual harassment, and sexual violence when they occur;
 - Understand how and to whom to report any incidents;
 - Understand the connection between alcohol and drug abuse and sexual harassment or violence; and
 - Feel comfortable that university officials will respond promptly and equitably to reports of sexual harassment, sexual violence, and retaliation

Policies and Procedures

- Review and revise as necessary all Marching Band policies and procedures to ensure compliance with Title IX and university policies; highlight expectations and options for concern reporting; and align Band values to the university's academic mission.
- Communicate regularly that the Marching Band will not tolerate sexual harassment and violence and will respond to any incidents and to any student who reports such incidents.

Counseling and Training

- Continue to offer counseling, health, mental health, or other holistic and comprehensive victim services to all members of the Marching Band affected by sexual harassment, and notify students of all Title IX related services and supports available in the university.
- Require annual training for all Marching Band members and staff about sexual harassment, sexual violence, hazing, retaliation, and alcohol abuse.
- Require annual training for all Marching Band staff on recognizing and appropriately addressing allegations of sexual harassment or sexual violence under Title IX, including

prohibitions on retaliation.

- Require regular culture training that focuses on adherence to university values and the need to replace negative culture with positive culture.
- Require annual leadership and management training for all Marching Band staff.
- Provide annually to all Marching Band members and staff written materials on sexual harassment and sexual violence, which should include but not be limited to:
 - What constitutes sexual harassment or sexual violence;
 - What to do if a student has been the victim of sexual harassment or sexual violence;
 - Contact information for counseling and victim services;
 - How to file a complaint with the university and the options and means to do so, including through EthicsPoint, the university's anonymous reporting line;
 - The role of the university's Title IX Coordinator and how to contact her; and
 - What the university will do to respond to allegations of sexual harassment or sexual violence, including interim measures that can be taken
- Ensure that the annual anonymous culture surveys described below serve to measure the effectiveness of the trainings provided.

Climate Surveys and Controls

- Conduct "climate checks" of Marching Band members and staff to:
 - Anonymously collect specific data and establish a 2014 baseline about the Band's culture and the concerns of students and staff;
 - Measure change through annual and anonymous follow-up surveys;
 - Assess the effectiveness of efforts to ensure that the Band is free from sexual harassment, sexual violence, and alcohol abuse;
 - Plan proactive steps to replace negative culture with positive culture;
 - Identify any additional matters that need to be investigated and addressed; and
 - Share data as appropriate with the Marching Band alumni community and seek its assistance to improve the Band's culture
- Establish independent monitoring and review of information gathered and the steps taken to reverse an insular culture with external accountability.