

**Minutes of the Meeting of the Academic Council held via Zoom
Thursday, October 15, 2020**

Kerry Haynie (Academic Council Chair / Political Science & African and African American Studies): Welcome, everyone, to our October meeting of the Academic Council. I hope all of you and all of yours continue to be well. I also would encourage all to you and all of yours to get a flu shot. It's that time of the year. If you haven't yet, please get a flu shot. I know everyone is tired and in much need of a break. Hang in there –we're about one month away from the last day of classes, so hang in there. But, let me also say that our students are exhausted too. The lack of a break built into the academic schedule is really taking a toll. A good number of our students are experiencing fatigue and mental stress, more so than usual. So our students are under some severe stress and more so than what we normally see at this time in the semester. As we all know, they are living and studying under conditions that are adding to the normal end-of-semester stress. So, I encourage each of you and all of our faculty to be mindful of this and reach out to our students when you get a chance. Check in with them outside of class, if you can, and I also encourage you to provide whatever relief you deem appropriate to lessen some of these pressures. Our colleagues at DukeReach and Student Health are available to assist as needed, so please take advantage of these resources if you need them.

NAME CHANGE OF THE GRADUATE DEGREE IN PSYCHOLOGY TO PSYCHOLOGY AND NEUROSCIENCE

Haynie: Since our September meeting, ECAC, on the Council's behalf, approved a resolution to change the name of the Graduate School's Psychology PhD and Masters of Arts degrees; these degrees changed from Psychology to Psychology and Neuroscience. The proposal we received came from the Academic Programs Committee (APC) and it was approved by APC unanimously. The reason this was done is because of an administrative oversight when the departments merged and the name changed back in 2006. Academic Council and the Board of Trustees approved a merger of the departments and the name change, but there was an administrative oversight and the names of the graduate degrees were not changed at the same time. So, ECAC approved the change and this means now the degrees reflect the title of the department which is what the department intended. The approved resolution has been forwarded to the Provost and it will go to the Board of Trustees for their consideration and I'm sure approval. So, if you see notice of a degree and that the trustees are taking some action on a degree, it is not a new degree, it's the same Psychology degree with the name changed to be consistent

with the department's name and to meet the intent of the Council back in 2006. Are there any questions? Seeing none, I will continue.

I want to share information about the Academic Council's Faculty Scholars award. The original process for this award was back in the spring. When we all abandoned campus in March because of the pandemic, the selection process got derailed. The Faculty Scholars Committee has very graciously agreed to accept nominations and to select class of 2021 award winners this semester. I want to thank the committee for their willingness to take this on. In fact, they're doing double duty this year because we moved the cycle to the fall and will resume the process in spring 2021.

Sally Deutsch (History) serves as chair of the committee;
Doug Boyer (Evolutionary Anthropology);
Danny Lew (Pharmacology and Cancer Biology);
Hai (Helen) Li (Electrical and Computer Engineering); and
Jarvis McGinnis (English).

Thank you, colleagues, for taking on this task. And then I will also say that we have all the nominations in and Sandra and Susan informed me yesterday that we have a record number of nominations for the Faculty Scholar awards, 38 nominations, and so thank you all for nominating your students.

APPROVAL OF THE SEPTEMBER 17, 2020 ACADEMIC COUNCIL MEETING MINUTES

Haynie: We will move now to the approval of the September 17th meeting

minutes which were posted with our meeting agenda. Are there any corrections to the minutes?

[Minutes approved without dissent]

REVISIONS TO DUKE'S DATA LICENSING POLICY: LARRY CARIN, VICE PRESIDENT FOR RESEARCH

Haynie: The next item on the agenda is the proposed revisions to Duke's data licensing policy. Larry Carin, the James L. Meriam distinguished professor in the Department of Electrical Engineering at Pratt School, and Duke's Vice President for Research, is with us today to discuss some suggested revisions to Duke's data policy. Larry provided a document that was posted with the agenda and he will take some questions following his presentation. We will vote on these proposed changes at our November meeting. As you know, under Council rules, we have the presentation in one meeting and we vote at the next, after Council has time to consider the proposal. When Larry takes questions, let me remind you, as you ask the question, to identify yourself and your department affiliation because Sandra and Susan will transcribe the minutes and we need that information. So thank you for that.

Larry Carin (Vice President, Research): So I figured the first question you might ask is, what is the process that we used to get here? First of all, this issue started because there's been an increase in recognition of the importance and value of data generated in the Health System. We're talking about exclusively human subjects data. And so there were many decisions that were made somewhat in an ad hoc way over some time, and Health System leadership – Dr. [Eugene] Washington [Chancellor] and Dr. [Mary]

Klotman [Dean, School of Medicine] – felt that we needed to develop a policy. So this policy was constituted by an ad hoc group of leaders largely within the Health System. I'll show you their names in a moment. We drafted that policy, we showed it to Kerry, and he asked us to bring it to the OLV Board (Office of Licensing Ventures), which is our faculty oversight board with regard to IP (Intellectual Property) translation. We did that on July 20th and they approved it. They made one small edit, but basically they approved it. And now we're here today. So this is the group of people who drafted this policy. [refers to slide – committee members listed are:

Colleen Shannon, Chair (Chief Compliance and Privacy Officer, Duke University Health System);
Adrian Hernandez (Vice Dean and Executive Director, Duke Clinical Research Institute);
Jeffrey Ferranti (Chief Information Officer and Vice President for Medical Informatics);
Ann Bradley (Associate General Counsel);
Gavin Foltz (Associate Dean and Executive Director, Office of Research Contracts);
Michael Pencina (Vice Dean for Data Science and Information Technology);
Eric Perakslis (Rubenstein Fellow);
Scott Elengold (Associate General Counsel);
Robin Rasor (Executive Director, Duke Office of Licensing Board);
Dinesh Divakaran (Director, Digital Innovations, Duke OLV);
Larry Carin (Vice President, Research);
Joseph Rogers (Medicine / DCRI);
Greg Samsa (Biostatistics and Bioinformatics); and
Susanna Naggie (Infectious Diseases).

So, a lot of leaders across the Health System, and I was involved as well. Also, you can see Legal Counsel, et cetera. I'll keep going and we can come back to this if you want. Let me just briefly pull up the policy. [refers to slide] I assume that you have had a chance to read it. I'm not going to read it to you of course. I'll just highlight a few points and then I will take any questions that you have. The key thing, first of all, notice that I'm representing a group, so I'm basically the messenger. There have been a lot of other people who have put this together. Colleen Shannon, who is responsible for protecting data within the Health System, she was the Chair of this whole process. So the point of all this was what I had said before, the recognition that the human subjects data is increasingly important. This is of course because of the advent and advance of data science and machine learning. There are two components of this: one is policy on what data we share, or license, the procedures by which we do that, the principles by which we do that, and then, secondly, if there is money, in other words, if we're paying for this, how those funds will be distributed. So those are the two principles. The most important part with regards to our principles is that we wish, wherever possible, that the data are de-identified. So that means that they cannot be traced back to the identity or the source, the human being responsible for the data, and then, if at all possible, to identify the human subjects to let them know how their data is being used. The second part is the principles of payment. Now this is actually slightly more complicated and it required a degree of innovation. So the most important principle that I'll just say in plain English, if data are constituted as a consequence of standard of care, in

other words, the traditional standard of care within the Health System, then any money that is accrued from the sale of that money goes to Duke University, full stop. It does not go to any faculty or clinician, et cetera. and the reason is that this is their job, to do this work, and so in the context of this policy we introduced this term that you can see bolded here which we call “data enhancer,” and so that is somebody within Duke who is doing something beyond standard character, beyond their job to enhance the data and to place it in a form where it is useful for data science. And if one is deemed to be a data enhancer then that individual will be financially compensated if there is any revenue from it. So we describe what that is. Then with regard to the revenue itself, if there's revenue and if there is a data enhancer involved, after Duke is compensated for costs associated with constituting that data, then all remaining revenue is divided as you see it. [refers to slide] So the data enhancer, in other words, the faculty would get 30 percent of revenue and the rest would be split between Duke University and the Duke University Health System. So that's it. I want to emphasize that this policy is exclusively focused on human subject data, so it's not all data at Duke. So let me stop there and if there are any questions, I'm happy to take them.

Haynie: Thank you, Larry. Are there any questions for Larry? So, again, we will vote on this at our November 19th meeting. If you have questions for Larry in the meantime, please send them to us at the Academic Council office and we will get those to Larry in advance of the November meeting and then we'll vote there. Thanks again, Larry.

TITLE IX CHANGES AND REVISIONS TO APPENDIX N IN DUKE'S FACULTY HANDBOOK: KIM HEWITT, VICE PRESIDENT FOR THE OFFICE OF INSTITUTIONAL EQUITY AND NEERA SKURKY, ASSOCIATE GENERAL COUNSEL

Haynie: The next item on the agenda is the report on the new Title IX guidelines and we will hear from Kim Hewitt, Duke's Vice President for the Office of Institutional Equity regarding some changes that have been mandated by federal policy. Neera Skurky, Associate General Counsel, is also with us. She worked with Kim and other Duke legal experts to make sure that Duke's in compliance with the new rules. As you may know, on May 6th, the US Department of Education published revised regulations regarding sexual harassment under Title IX of the Educational Amendment of 1972. Pursuant to these regulations, revisions went into effect on August 14th of this year. Now because Academic Council was not in session when the rules were announced and took effect, Kim and Neera met with me and then with ECAC to discuss the implementation of the new guidelines. These changes have impacted Appendix N in the Duke Faculty Handbook, so following Kim and Neera's presentation, I will call on our colleague Larry Zelenak of the Law School to see if he has any comments associated with these changes. Larry has been chairing an ad hoc faculty committee that ECAC appointed what seems like ten years ago to examine Appendix N, and when these two changes came about, we asked this committee to take a look to see if there would be any particular impact on our faculty hearing process; and there are some impacts on that process. This committee took a look and we are satisfied that we are okay, but

Larry is available to answer any questions that may arise. I'll turn it over now to Kim.

Kim Hewitt (Vice President for the Office of Institutional Equity): Thank you, Kerry. Good afternoon. As Kerry explained, back in November the Department of Education published a notice of proposed rulemaking with some pretty significant changes to how universities should respond to Title IX, and then at the beginning of May, the new rules were announced with the implementation deadline of August 14th. Though these final rules imposed some sweeping changes on how Title IX matters are handled according to a very specific definition, these complex rules only apply to a subset of all the sexual misconduct matters that we address at Duke. So this graphic shows that there's this big pool of conduct that's potentially sexual misconduct, but within this Title IX regulatory definition is a very small category of kinds of cases that will be subjected to this big regulatory architecture. [refers to slide] And so within this narrow Title IX, as the government has defined it, are cases that are directed against somebody in the United States – so in this narrow context it does not include anything that might occur outside of the United States – within a Duke program or activity, and then according to how they define Title IX sexual harassment, it includes quid pro quo harassment, and then their definition of sexual harassment includes unwelcome conduct that is severe, pervasive and objectively offensive such that it would deny a person access to Duke programs and activities – and that's a much narrower definition of sexual harassment than we would address as part of our regular Duke processes; and then sexual

assault, stalking, dating violence and domestic violence as those terms are defined in the Violence Against Women Act. So these are in the intersection, and I'm not going to go into this "actual knowledge" thing because it's not super instructive or helpful, but within these concentric circles is where we find the government's definition of Title IX sexual harassment for which there applies this rigorous grievance process. [refers to slide] So within this narrow scope, the major changes will apply, again, only to cases that fall within these specific definitions. Now, these new rules do apply to cases where faculty and staff are accused, thus the changes to Appendix N that Kerry alluded to in the beginning. So historically we didn't have some of these requirements in the faculty/staff context and then, you've probably read about this, they now require a live hearing with cross examination and an appeal before anything might get into the Faculty Hearing Committee process. So in terms of how we approach this problem, and Kerry shared some of that, we brought together a working group in May with representatives from the Counsel's Office, the Provost's Office, HR, Institutional Equity, and Student Affairs. We developed a week by week timeline to get through all of this work. We did engage an outside lawyer who is an expert in this – the rules here are nearly 2,000 pages, just voluminous details – to guide us through this process. We talked about whether or not we would just think about our policies with respect to this narrow area, and elected to do more of a holistic review of our policies and procedures. We broke down into some subgroups where we really focused on staff and faculty issues, student [issues], and some of these odd procedural or evidentiary rules that are applying in this context. We came up with

this umbrella policy with separate procedures depending upon who the accused person is, and I'll talk about that in more detail in a few minutes. We did incorporate several meetings that mostly took place in July, including meetings with ECAC and other important constituencies in the Duke community, in order to get their feedback as we were developing these rules, and again, keeping in mind that our goal was to apply these rules narrowly, in order to be compliant and build on our existing structures that we think were working well and to try to make some improvements to the broader policy as we work going forward. So the result is an umbrella policy that's called the Policy on Prohibited Discrimination, Harassment and Related Misconduct that covers all harassment, discrimination and sexual misconduct in the Duke context. And related to that umbrella policy there are three procedures. The first set of procedures are Title IX Sexual Harassment Grievance Procedures and these are the procedures that would apply if something falls in this narrow category of the government's defined Title IX sexual harassment. And then there are separate Complaint Handling Procedures for Discrimination and Harassment Matters involving a student as the accused person, and there is still collaboration and engagement with the Office of Student Conduct there, and then the third set of procedures are Complaint Handling Procedures Involving University Faculty or Non-Faculty Staff as a Respondent. And those are largely the procedures that already existed prior to these new federal regulations with a few adjustments and changes for clarity. So in terms of the Title IX requirement for live hearings, the live hearings will really operate like little mini trials. The regulations also indicate that advisors

will be assigned to the parties for the purpose of doing cross examination only. So in our model we're going to have the hearings be presided over by an Independent Hearing Officer. We've developed a list of lawyers, some have worked with Duke before, who have the requisite skills to operate as an Independent Hearing Officer, a separate list of advisors who are also lawyers for this hearing stage. So if someone doesn't have their own lawyer that they want to use in this process we've developed a list of lawyers that Duke will retain for these purposes. And then there is the decision maker. Though this whole adjudication process will fall within OIE's jurisdiction, for these cases OIE will only investigate. So we will investigate, not make a decision, not make a determination. The decision maker will be the Independent Hearing Officer. And then a Dean or other appropriate leader will provide recommendations for sanctions or discipline to the Hearing Officer that the Hearing Officer will include in their outcome letter or their final determination. The parties are also entitled to an appeal of this hearing which will be presided over by a retired judge or someone who has the skills to review at a lower level the hearing that would have been presided over by an Independent Hearing Officer. There are three grounds upon which you can request an appeal. There's new material information, if there was a conflict with one of the investigators or the Title IX coordinator, or procedural error that impacted the outcome of the hearing. And once that hearing is completed and there is a finding and a determination of remedial actions that should take place to make the complainant whole, the Title IX process concludes at that point. So this would be the end point for all of the Title IX

process. And then at that point any sanctions that aren't remedial to the complainant can be challenged through the Faculty Hearing Committee process or, in the case of a non-faculty staff person, through the dispute resolution process. So Kerry, maybe I could pause here if there are questions at this point?

Haynie: Any questions at this point? I'm scanning the raise hand function [in Zoom].

Hewitt: We can also wait for questions but I know that was a big chunk to digest. So one of the things we did spend some time on, as we were doing consulting meetings with various constituent groups, was to think about the concept of reporting or the obligation to report or the notion of responsible employees, which is something that the Department of Education dispensed with with respect to the formal Title IX rules, but lots of universities, including Duke, have spent considerable time thinking about how they socialize this notion with the community and educate people about who needs to bring information forward and helping others understand what are confidential resources and what aren't. So this was one thing we spent a lot of time talking about, how we can make the definitions that we have now clearer and who should be required to report. We decided to select this language, "required to promptly consult with OIE," and we looked at some peer institutions and how they were handling this and borrowed this idea of requiring a consultation as a way to thread the needle on the mandatory reporter notion. More reflective of what we want is for people to come forward when they learn about sexual misconduct or discrimination and to provide details so we can work

together to think about what's an appropriate response. After having these consultations we talked a lot about whether it should be all faculty or it should be limited in some way, and so we came up with this defined list, [refers to slide] and did decide to go forward with indicating that all faculty should bring information forward and encouraging non-supervisory employees that they are expected to bring information and encouraged to bring information forward and to consult with OIE. Again, I know we've probably talked before about this issue, really understanding that we want the chance to have a conversation about the information, think about an appropriate response, recognizing that when OIE becomes involved, in most cases what we will do is send an outreach email to the person who was impacted, inviting them to come and talk to us again. That person has the option in most cases to choose not to engage or decide if they want to engage. Of course, in limited circumstances, the university might have to do something without that person's involvement, but really we are more motivated to have people participate in the process and understand what their resources are and what is available to them. What does this mean specifically with respect to Appendix N? I will ask Larry and Neera to hop in on this one but I brought it down to these three points. [refers to slide] This is a narrow carve out just for Title IX sexual harassment matters and really it does limit – there can be no challenge to that final determination of the Title IX process and any outcome that is specifically connected to remediation of the complainant or making that person whole. Those aspects of the process cannot be challenged in the Faculty Hearing Committee process but any other sanctions that are non-remedial

in nature or discipline can still be addressed via the Faculty Hearing Committee Process. So maybe I'll pause there if Larry or Neera would like to add something.

Larry Zelenak (Law School): Yes, that's a very nice summary of the Appendix N aspects. I'll just say a little more. The ad hoc committee members who considered this were:

Samuel Buell (Law School);
Nan Jokerst (Electrical and Computer Engineering);
Marin Levy (Law School / Member of ECAC); and
Tom Metzloff (Law School / Faculty Ombuds) and myself.

Basically what we were trying to do was preserve as much jurisdiction for the Faculty Hearing Committee as we could, consistent with the regulations, with our understanding being that appeal rights had to be symmetrical for the complainant and respondent, which meant that if we had allowed a respondent who was found to have committed a Title IX violation to appeal to the Faculty Hearing Committee, we'd also have to allow a complainant to appeal to the Faculty Hearing Committee from a finding of no violation. We thought that would be pretty inconsistent with the purpose of the Faculty Hearing Committee to permit an appeal like that. So as was very nicely summarized on the slide, we decided the best thing to do, given the limited range of choices we were presented with under the regulation, was to say that there's no appeal to the Faculty Hearing Committee by anybody from a final determination that there has been a Title IX violation or not, as the case may be. But that's as

narrow as I think it can be, given the regulations, because as Kim explained, it doesn't apply to anything within the jurisdiction of the Faculty Hearing Committee other than Title IX. There's a lot of other things that are outside of Title IX. Also, it doesn't apply to sanctions. So anyway, that's what we did and it's not what we would do if the regulations didn't exist, but it was the best choice given the constraints.

Haynie: Thank you Larry. Any questions for Larry or Kim at this point? And let me say there was one concern that Larry, Kim, Neera, the Provost and I sat down to discuss, and I think Kim clarified it. The faculty, we were concerned about this issue of sanctions because it's possible that a remedial action, the action to make the complainant whole, could also act as a sanction, and how do you separate those? Larry and I, and the faculty who were a part of this, were somewhat put at ease when we learned that the Hearing Officer will make no recommendation for sanction or remedial action before consulting with a Dean or the Provost. We didn't want an outsider, not understanding the culture of a university, to impose some sanction that may not really fit. So we at least have some eyes and ears from the university, so the Provost and the Deans will be involved when it comes to sanctions from these cases.

Hewitt: I had one more slide to talk about what we're thinking about going forward. We have created a set of FAQs that we're going to be posting shortly, because we know this is complex, and we also are going to post the policy again. So we had a short period of public comment at the end of the summer which got crunched in the time there. We want to have some time to

see how one or two of these cases really operate and then we're going to revisit it at the beginning of the year, post the policy and the procedures again for public comments, and we can get some feedback. I mean, we've already had some real-time analysis on what we thought was our first employee case and it's complex. Even what seems like a simple question is not simple in this context, so we're going to be working also on creating some more really digestible tools to help people understand this process and understand the differences between the narrow Title IX and the broader sexual misconduct. Also just really working to investigate some more alternative resolution processes that we want, and we can engage in this process as well. So I just wanted to share that, also, as we think about going forward with next steps.

Haynie: Are there any questions for Kim?

Harvey Cohen (School of Medicine / Clinical Sciences): Could you give a couple of examples of things that are considered remediation type stuff versus sanction type stuff?

Hewitt: That's a good question. Neera, if you can think of a good example, please feel free to jump in at this point. Changing an advisor, that might be something that would happen that would make a person whole but wouldn't be something that the individual person could challenge or would want to challenge. Other kinds of academic accommodations would be another example if it was a student making an accusation against a faculty person. But as Kerry talked about, it could be a difficult distinction if this person is going to be in a different lab or depending upon how connected their scholarship or their research might be to the accused.

We may face some harder questions about how we thread the needle on what's remedial and what's a sanction that can be challenged.

Neera Skurky (Associate General Counsel): And just to chime in, I think a good example of something that's remedial is implementing no contact between the respondent and the complainant and that's something that specifically focuses on the complainant and making sure that they don't have to interact with this person throughout the rest of their time here. But something that might be a sanction may be telling that faculty member that they're not to mentor or have any trainees in their lab, period, until they complete some required harassment training. That's something that extends beyond just the complainant and so I think we would say that that's not a remedial action focused on the complainant if it's something broader that then can be challenged.

Josh Socolar (Physics): Thanks very much for dealing with these regulations that might constrain Duke to do things in a way that we wouldn't really want to do. But you mentioned at the beginning that having to do this exercise caused you to go back and look at the entire policy, at the broader policy, and my question is about Duke's definition of sexual harassment outside the narrow Title IX specifications. I had an exchange with Kerry about this which quickly devolved into disputes about the semantics of words like "adversely affect" and "significantly affect." In looking at other universities' definitions of sexual harassment one sees some nuanced differences that could be meaningful. So my question to you is, where on the spectrum of breadth and narrowness of a

definition of sexual harassment do you think Duke lies? Are we being stricter than places like Stanford and MIT? Are we being consistent with their definitions or are we interpreting the definition of sexual harassment more broadly?

Hewitt: I think ours is actually more generous than the MIT definition and I should know the Stanford definition because I was part of a review committee that looked at the overall structure of their sexual misconduct this past fall. We looked at other institutions and on the spectrum it would be hard for me to get a definitive answer on that. I would say ours would probably be more on the generous side and the narrow side as I'm looking at it. We did go back and do some benchmarking so I would have to maybe get back to you to say specifically where we compare to the Ivies. Plus, I'm not even sure I could do that. We have a definition of hostile environment harassment, a definition of generalized harassment that is clearly looser than the Title IX one, allows for a consideration of unwelcome conduct that is severe. So you could have one single severe incident that would fall within the context of our definition. I did look at the MIT one on that question and I think ours is pretty clearly more generous than that particular definition, or easier to meet the standard.

Haynie: Thank you, Kim. Let me say something about Josh's question about the exchange that he and I had. He asked the question about the MIT policy of me and I passed it along to Kim and to two other lawyers who came back with their responses. It wasn't a semantic debate as I gave you the advice that I received from three lawyers.

Nan Jokerst (Electrical and Computer Engineering): Thanks Kerry. This has come before Academic Council, the question of our definition of sexual harassment, over the last five years -- this is the third time we've discussed it. You'll remember Howie [Kallem, former Director of Title IX Compliance], at a previous Academic Council meeting saying that the discussion had gone into limbo. So, I'm glad to hear that it's come back, but I think Josh is remembering a discussion from a previous Academic Council meeting where -- I'm reading now off of Duke's harassment statement that is on the web -- and harassment is when there is conduct that is sufficiently severe, persistent or pervasive to significantly interfere with an individual's work, education, living conditions or participation in university programs or activities. As we had stated at that Academic Council meeting a couple of years ago, Stanford's basically "test" for harassment is a hostile environment test only and it does not require the "severe persistent or pervasive nature such that it significantly interferes with a person's work." And so where we left it a couple of years ago is with a request from the Academic Council to review our wording on what constitutes harassment, specifically in light of Stanford's hostile environment, because it does seem that we have a much more difficult standard that has to be met compared to Stanford's hostile environment standard. And so this is the discussion that I know we've had in Academic Council twice in the last five years and I would like to again ask that we review Stanford's policy and look at our own policy and consider the wording associated with hostile environment. Thank you.

Hewitt: Just for clarification, and I will look again at Stanford's definition, but hostile environment, as we understand that term borrowed from the case law, is unwelcome conduct of a sexual nature that is severe and pervasive or persistent. That's the definition of hostile environment that reflects our definition, so we do have a hostile environment standard in our policy which is pretty similar to most other universities. But we can do a comparison specifically to the Stanford language. So, just to make it clear, we don't *not* have an environment standard, that *is* hostile environment.

Skurky: Just to chime in. Kim, as you know, is relatively new and I'm relatively new to Duke. I've been here for a couple of years so I may have come after some of these discussions, but yes, just to echo what Kim said real quickly, there's two types of harassment. There's quid pro quo and there's hostile environment and this language is the legal definition. And certainly, we're open to talking about revisiting that, but I think it's very important to understand that finding someone responsible of harassment is a very serious thing. So we've tried to track the legal standard in this definition because something that one person could consider hostile, when you get into an academic freedom space there, a first amendment space, it is not clearly defined, so we've tried to track that legal definition. But I think we're open to talking about it more.

Jokerst: Yeah, tracking the legal definition is definitely important, but as a non-legal person, when I read the Stanford harassment statement that is posted for their university and I read ours, ours seems to be a more difficult standard to meet for an individual who

may be suffering from sexual harassment, and although the term as a legal definition of hostile environment may reflect our definition, from a community perception standpoint they do read very differently.

Haynie: Thank you, Nan.

Christine Drea (Evolutionary Anthropology): My question is, when someone meets the requirements for having displayed inappropriate behavior and sanctions are imposed, how are those sanctions going to be monitored, and who is doing the monitoring, and is there going to be academic memory about these things? Currently the experience that I've observed is that there are sanctions that have been imposed, but have not been actually put into effect or monitored.

Hewitt: That's a really good question. So in the process, the leadership person, if they are in this formal process and in the non-Title IX process, will give input on what the sanctions should be that will then be wrapped into the outcome. From an OIE perspective, this is something we've talked a lot about, how we can create some additional structures to extend that boundary. Because I think we've historically thought about our role and being at the point where we make a determination and potentially make some recommendations for sanctions, but we haven't taken the additional step to then follow up and make sure those sanctions or recommendations were imposed. And so we've begun to create a system internally where we track the conclusion of our investigations and then we do a check in at 30 days to go back to the leadership and say we're following up on those recommendations so that we can keep a record of that, and then think about whether or not we need to access

other resources to try to move those things forward. So that's a really good question.

Manoj Mohanan (Sanford School of Public Policy/ Member of ECAC): I just wanted to follow up on the last question. I think it was a two-part question. The second part was on the institutional memory of these things, because I thought one of the stumbling blocks in implementation of long-term sanctions of these types is you're not allowed to bring up the case references when the same person is accused the next time around and that becomes really difficult from an OIE perspective. Is that correct? Are we doing something differently about it?

Hewitt: We maintain a database in our office that keeps a record of the complaints that come in and the outcome determination. And as we integrate this additional step we'll have better metrics or information about what sanctions have been imposed and some tracking for whether or not they were implemented and followed. So this is a work in progress but that's what our objectives are right now.

Haynie: Kim, I have a question. So this policy, the new regulations, if there's a change of administration in November, will there be additional changes to Title IX? I know that's something in dispute. What's the word on the ground about potential additional changes to this policy?

Hewitt: So, because they went through a process of rulemaking and established this as law, then there would be no opportunity to automatically get rid of these with a new administration. That would take some time. Neera, maybe you

have more insight on how much time it would take? Historically there has been guidance. We were getting guidance – there was Obama era guidance about Title IX that could be easily eliminated with the new administration, but this is law so it would take a whole process of rulemaking and creating new resolutions. In terms of thinking about this as a holistic project, we imagine that if it comes to that, the way we've got it set up, we could easily eliminate this one aspect of our procedures if these are eliminated. So we could still have the flexibility in our broader structure to dismantle these if we have that opportunity at some point in the future.

Haynie: Thank you Kim, Neera and Larry, and let me also add that Kim, Neera and I agreed that as, heaven forbid, cases emerge – we hope they don't but certainly they will – that we will revisit some of this, particularly the faculty hearing aspects. If we see problems that come up, we will reconvene and discuss some of those problems, some tricky things that we can't anticipate with regards to faculty due process in our hearing procedures. So thanks again to you all for doing this. Larry, thanks again for taking on Appendix N. One day we will be done with that appendix!

ANNUAL REPORTS FROMS THE FACULTY AND SCHOOL OF MEDICINE OMBUDS REPRESENTATIVES, PROFESSOR TOM METZLOFF FROM THE LAW SCHOOL AND DR. LAURA SVETKEY FROM THE SCHOOL OF MEDICINE

Haynie: The last item for today is to hear from the Faculty Ombuds, Dr. Laura Svetkey from the School of Medicine and Professor Tom Metzloff from the Law School. I'm sure you all are by now

experts on Appendix N -- Appendix N mentions that the Faculty Ombuds are to collect various data, including the number of contacts they have, the types of concerns they hear, and the units within the university from which concerns emanate. Appendix N also calls on the Ombuds to present to the Academic Council an annual report of these data and this is the purpose of this agenda item today. Now I should say that what the Ombuds are permitted to disclose and share publicly is governed by a code of conduct and professional ethics so there are some limitations. In addition to that report that the Council will receive this afternoon, the Ombuds will present to the President and to ECAC a written report, a more detailed report. The President and ECAC will review the more detailed report and determine if there are patterns of persistent issues that require some attention or if there's some policy changes that are needed to improve some areas. So I want to thank Laura and Tom for taking on this task and for being here today to present their report. We'll start with Laura.

Laura Svetkey (Ombuds / School of Medicine): I've had the honor of being in this role since September 1st, 2019, and in preparation for taking on that role I was trained by the International Ombudsman Association in the four core principles of being an Ombuds: confidentiality, impartiality, independence, and informality, and there are Ombuds definitions of those terms, if anybody wants to ask, I'm happy to talk about it. As I mentioned, I have been in this role for a little more than a year. I want to show you some of the data that have accrued over that year within the School of Medicine. Over that 15 month period, there have been 58 unique individuals who have

requested time with me as an Ombuds. Those individuals came from 17 different departments, centers, or institutes and there is an average of 3.3 visitors per department or unit with a range of one to 17. I'll say more about that in a moment. 43 percent of the visitors have been women which is proportional to women on our faculty in the School of Medicine. 8.6 percent have been from underrepresented groups and again, proportional to the faculty composition. Something that was interesting to me was that a third of them were junior faculty level, instructor, assistant professor level, and two-thirds were from mid or senior level faculty, including 15 full professors who sought consultation, although often they were seeking consultation about somebody that they were supervising. I've received a complaint from a couple of people who actually are not under my purview, I'll bring that up in a moment as well. This is the number of visits. [refers to slide] There were a total of 111 visits, so an average of two per visitor, and again the range was one to 25. 25 visits for a single visitor – that was quite an outlier – and visits include not just face to face or Zoom encounters, but emails, phone calls, et cetera. The average duration of a visit was 86 minutes, I would say the vast majority were an hour, and over the 13 months that I've been doing this there were an average of 5.8 visits per month. I looked at the last six months compared to the first six months that I was doing this to see if there was any indication that the pandemic was having an effect on use of the Ombuds, and it was about double the rate per month during the period of April 1st to October 14th. Of course, that was after I'd been in the role for six months and so maybe some of that is because people got to know me and knew that I was available. And then in addition to

actually interacting with folks, I've consulted with other Ombuds and in particular Tom Metzloff, who you're going to hear from in a moment. The International Association of Ombudspople has a mentor program, so I have a mentor at another institution who I consult with on a monthly basis, and I've had various conversations with OIE. I want to highlight some observations that might be considered trends or areas that warrant further attention. Two of the School of Medicine departments had more than five percent of their faculty seek a consultation with me and that seems very high to me. Maybe these departments need some special attention. Various people attempted to talk to me who were not School of Medicine faculty, and it turns out that there are important constituents in the School of Medicine who have no Ombuds. It's unclear who the Ombuds is for the School of Nursing. I don't think it's me; maybe it's Tom. I think that needs to be clarified. And there is, in fact, no existing Ombuds for residents, fellows and staff in the School of Medicine. I will say that underrepresented racial and ethnic groups were not disproportionately represented in the stats I just showed you. We know anecdotally that this population is experiencing structural racism, microaggressions and other concerns that may not bring them to an Ombuds and maybe there's a way to make the Ombuds role more effective for that population. I would say there are similar concerns about women. They were not overrepresented in folks who came to talk to me, but clearly there are some concerns about structural gender bias and microaggressions. Along those lines, it was very common for somebody to come to me with an issue they were trying to

deal with for themselves, and saying, I want to resolve this for myself but more importantly I want to resolve this for my department, my division, my unit because I think this is a systemic problem, there's a climate issue, there's something structural here that needs to be addressed. As an Ombuds, I don't really have the tools or the authority to do that and it was often unclear to me how to help that person find recourse in that situation. There were other things that came up, for instance, conflicts between School of Medicine and non-School of Medicine faculty. There's some gaps in process, I think, in terms of how either I as an Ombuds or the institution deals with conflicts like that. But let me stop and see if there are questions at this point.

Anne West (Neurobiology / Member of ECAC): I have two questions which are: Laura, how do people generally find you? And I guess one of the things I wanted to say was, I actually served in an informal role as Ombuds for my department and I know that other departments are doing this as well – because having local people who could negotiate issues is useful – but I had no formal training and also I know that there's an Ombuds, but I had not known it was exactly you within the School of Medicine. So I guess that was my question: are you interfacing at all with departments in some way?

Svetkey: So, there was an announcement, it's on various websites, on the OIE website, the School of Medicine website, et cetera, and it's been announced in the Faculty Affairs Steering Committee that Ann Brown (Vice Dean, Faculty, School of Medicine) chairs. I would say that for the most part people come to me because either somebody that they've talked to

has heard that I was in this role – sometimes that's their Chair or Vice Chair, so somebody in an authority position who heard about it because they were in an authority position – or sometimes it's word of mouth. I haven't honestly advertised. I've been a little nervous to do that, but certainly if the Academic Council feels that that's warranted I can do that. I will say something about the informal Ombuds. You're not the only one who is doing that and I think it's a really important function for people to know that there's somebody they can come and talk to informally and confidentially. I think it may be slightly problematic to use the word Ombuds because that has some legal implications, particularly related to confidentiality. There are things that you might be required to report that I as an official Ombuds am not required to report and so I would just explore that a little bit. I'm happy to help you do that.

West: Yeah, I was going to say, I know that other departments have done it as well and so I was going to just suggest that it might be something you want to advertise to the Chairs of departments, that if they are doing this or thinking of doing it that they form a network of these folks with you to solve issues like exactly the ones you just mentioned. It is very useful to us, for instance, to be able to use that word in training grants, but I don't know what the rules are. So here's the idea: I think if you could somehow form a network with that more informal group you could probably help those – maybe you don't want to advertise to everyone but maybe you want to advertise down to those of us who are within the departments and could help us out a little bit.

Svetkey: Yeah, it's a great idea and I'm happy to do that. The other thing is that this training that I received was awesome. I mean, it was really good and I went there under President Price's auspices. But I don't know if there would be any prohibition to somebody else getting that training.

Tom Metzloff (Ombuds / Law School): Can I say one word about that? Because I've had that come up on the university side. Political Science had a program where they wanted to create some internal mechanism for dealing with some of the issues that an Ombuds could deal with. They were initially going to call it an Ombuds and I think it's wrong to actually do that. Ombuds is a formal phrase that's in the Faculty Handbook. It has connotations that have legal implications for confidentiality and I think the term that was decided on, it's a good term, was "liaison." So there are some departments that have faculty liaisons for dealing with some issues and, in fact, I've been talking recently with some other departments about creating these internal systems but I think it's a mistake to call it Ombuds. I think there should be something else, but I think there are excellent programs. There are a lot of things that I will be talking with the faculty member about that would be probably better handled through either some department or different level system.

Sally Kornbluth (Provost): The comment about liaison is good. I think if it were formally "Liaison to the Ombuds Office" and Laura and you also, Tom, had some kind of informal network, then things like the training grant usage that Anne referred to, it could still serve the same purpose without violating the legal definition.

Metzloff: Absolutely.

Haynie: Thank you. I want to be careful that we don't create more work for these already overburdened Ombuds because it is a lot of work that we don't see. Laura, are you good?

Svetkey: I'm good, thanks.

Haynie: Okay, great, so Tom.

Metzloff: A lot of what Laura said certainly matches my observations. So the biggest change this year, of course, was the creation of the second Ombuds position for the School of Medicine, because I was doing this position and it was significantly more work than I think anyone anticipated, and about half of my – I call them cases, they're not cases – it's my Law School training – half of the situations did involve School of Medicine faculty. I certainly think there are unique institutional infrastructure issues and governance issues on the School of Medicine side that warrant having a second Ombuds with much greater expertise than mine in the School of Medicine. It did have the impact in the year through July 1st, 2020 of reducing the amount of situations I dealt with by about a third. It's still, I think, significant, roughly 50 matters that I dealt with. Some of those were continuations, but these are faculty – we call them visitors, we don't call them clients – so 50 visitors. I don't think I had anyone that I dealt with 25 times like Laura did, but maybe some that got close. So there is a tremendous range in terms of the amount of time, depending on the problem. The problems ranged from really an amazing array of different situations, from compensation issues, financial issues, to promotion, tenure matters that faculty members were

concerned with, to situations involving intra-faculty disputes as well as disputes with Chairs over a wide variety of items, and of course the issues of discrimination and harassment. My numbers were very similar to Laura's in terms of gender and underrepresented minorities consistent with the percentage in the university. Close to half of my situations were women, very much matching their percentage in the population of faculty. It's hard to speak about the impact Covid had, but I think it has [had an impact]. The number of cases this summer had increased. My number of 50 was about 22 in the fall and then a little higher number in the spring, but starting in the summer, which are not counting these numbers, the number has increased. Some of that is that there is a great deal of anxiety that faculty members are feeling that shows up this way, some of them financial questions. There were some financial issues that faculty had that they came to me to talk with and I think we were able to obtain some information and deal with that. It is very hard to speak about trends and we do have an opportunity as Ombuds to discuss trends. My own sense of it is so many of our situations are really one-offs. They're very individual disputes that faculty have or concerns that faculty have, either with their Chair or other faculty members, sometimes with students, although I have seen very few student matters. It's very infrequent that I have faculty who are dealing with student issues. The one trend line that concerns me that I do want to bring up, that will be in my report, Kerry, that I'll send to you, is what I think seems to be an increase in the number of suspensions or administrative leaves that faculty are being put on. When I first became Ombuds three and a half years ago, I was informed and spoke with University

Counsel and others about the possibility that faculty would be put on administrative leave or suspended pending some investigation, and I was told that that would be a very limited situation where situations involved security issues, where a group of university officials would have made a careful determination that was justified as what I think is a significant remedy. In the past year – again, these could be just one-off situations – the number of administrative suspensions has increased. The impact on faculty who are suspended, not allowed to come to their office, not allowed to do their work on their research as well as their teaching, is quite significant. It's perhaps made worse in a Covid era when the investigations that are then being conducted sometimes by OIE, sometimes by HR, sometimes by other organizations go slower than it probably normally does. But it concerns me and it hits me that in some of these situations, at least from my vantage point – which, the first thing that they teach you in Ombuds school is there's always another side to the story – I already knew that from being a lawyer – but I did not see the significant safety issue or risk to the institution that would justify this. I do think that the faculty needs to look hard and seriously about whether there needs to be some mechanism for assessing whether or not an administrative suspension of the faculty member is necessary and justified in the circumstances where it's being done. So that is the one trend issue that I've seen in the past year that gives me great pause. Thank you. It's certainly a pleasure to get to meet with so many Duke Faculty. I'm always amazed at the breadth and the amazing talent that the university has. It is truly awesome to get to interact with so many incredibly talented people.

Haynie: Thank you, Tom. Are there any questions for Tom?

Sam Buell (Law School): It would be possible to file a complaint with the Faculty Hearing Committee – I'm also the Faculty Hearing Committee Chair, for those who don't know – to dispute a due process violation having been placed on one of these statuses. Is that not right? Do you not raise that as a possibility for these folks?

Metzloff: We absolutely talk about that possibility. The question in some ways is timing. It's almost as if – sorry for everybody else, I'm going to put this in legal speak which Sam will appreciate – it's as if the university is getting a temporary restraining order but there's no mechanism for how to move for a preliminary injunction because it stays in place for longer than you want a temporary restraining order to stay in place. I don't know how quickly the Faculty Hearing Committee could come to look at it right now. I'm not even sure what the standards are. I had thought that the standards were a significant safety interest to the university, which we appreciate the faculty can be involved in situations like that. So I think that probably would be a logical step, if Academic Council and ECAC thought that this problem was serious enough to justify some measure, because the damage that's done is very significant for the faculty involved in these situations. Now it could be that at the end of the day these investigations will prove something that would justify the kind of penalties that would make it not a big deal, but I think it's a serious question and some sort of opportunity for due process within real time, within a week or two in the middle of the suspension or maybe even before

suspension is put in place to begin with is something that I think should be seriously considered.

Haynie: Any other questions for Professor Metzloff? Let me thank Tom and Laura again for their presentations. What ECAC will do when we receive the report – the Ombuds report to President Price – ECAC will look at the report and will raise any issues that we've seen and patterns that we've seen with President Price and things that we think need attention we will bring to his attention. Some of the faculty matters that Tom raised, we can take a look at with our own procedures, our own Academic Council procedures as they pertain to the Faculty Hearing Committee on some of these. In fact, we've already started the conversation with the Provost on some of these matters: the hearing process and due process and when sanctions can take place. Sally, anything you want to add?

Kornbluth: The only thing I wanted to add was – yes, we should continue those discussions, but I also wanted to mention, which has just been announced, just to make folks aware because Tom alluded to not having that many student dealings, is that we're expanding the Student Ombuds Office as well. It's used pretty heavily by undergrads. Some schools have their own systems for this with their graduate or professional students but there's going to be more capacity for Ombuds function for the students, which they actively requested, should it be required.

Haynie: Thank you Sally, and we'll report back to Council if there are any patterns that we think you should be aware of, we'll certainly report back. Before we adjourn I'd like to recognize President Price. As you all have noticed, I hope, in

your email, President Price sent a statement to the community that's a follow-up statement to the Juneteenth statement on the anti-racist policies and anti-systemic bias at Duke. President Price?

Vince Price (President): Thank you, Kerry, and I'll be very brief. Basically I wanted to thank our faculty as well as the leadership: Sally, Tallman [Trask, Executive Vice President], Gene Washington in the Health System, and our Deans, because there has been substantial activity, as I hope is clear in my message, since I made my Juneteenth statement. I would encourage all of you going forward to take a look at the [website](#) that we've constructed. It is a work in progress by design because we do want to create a single portal for sharing information and resources that could be deployed at different parts of the university and significant data as we gather them. So I believe that the faculty [climate] survey is still in the field. I encourage you to complete that survey if you have not already done so. We will be, as we customarily do, conducting student surveys and we will be, for the first time, systematically surveying our staff with a launch of a survey in spring. So that website, and in general the keeper of these data, will be Kim's office, the Office of Institutional Equity, but it is not an attempt to make Kim's office the keeper of programs. It is to create an opportunity to curate information and to be more responsive to the community at the local level. So again, I just wanted to express my thanks, Kerry, for your leadership and the support of ECAC and others and to all of our faculty who have in so many different ways stepped up. If you go to the Resources page, for example, you'll see some wonderful videos that we have put

together. Programming has been done for our faculty, for our alumni, by our faculty, for our students, by our students. I'm very inspired by the way that the community has been responding.

Haynie: Thank you, President Price, and as I said to Vince when I saw the information, I think Duke has now been propelled to the forefront of our peers in addressing these issues. It's an ambitious effort and impressive effort, a very good start and the faculty will be here to work with you, Vince, and the rest of the team to make some progress on these issues. So thank you for your leadership in this regard.

Price: Thanks, and let me congratulate Sally and colleagues on the Duke Endowment grant. It was announced as part of this message that will support these efforts, I hope the first of many grants to support these efforts.

Haynie: Thank you again. Before we adjourn, let me also just remind you, let's take care of ourselves, let's check in with our students when we get a chance and see how they're doing. They need it and they want it. Let's please make an effort to do that. If there's no other business, we're adjourned until November the 19th. See you then. Take care, everybody.