



# **Student Conduct Administration & Title IX: Gold Standard Practices for Resolution of Allegations of Sexual Misconduct on College Campuses**

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**ASCA 2014 White Paper:**  
**Student Conduct Administration & Title IX: Gold Standard Practices for Resolution of Allegations of Sexual Misconduct on College Campuses**

Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681) requires that institutions of higher education address issues of sexual discrimination, which include sexual assault, affecting their students. The White House, Congress, the U.S. Department of Education’s Office of Civil Rights (OCR), the media, students, and parents are demanding effective and fair resolution procedures. Campuses are left searching for how to resolve these cases and are being questioned as to whether they can adequately address crimes of sexual violence that may come before them. In response, the chief leadership of the Association for Student Conduct Administration (ASCA) has compiled a summary of “gold standard” practices for resolving these cases through student conduct procedures. As the experts in student conduct administration, ASCA is the national association for student conduct professionals and currently has more than 3,100 members from more than 1,500 institutions.

There is no one-size-fits-all model for addressing incidents of sexual misconduct. With different missions, resources, staffing models, funding sources, system policies, and especially campus cultures and student populations at postsecondary institutions across the United States, each college or university must develop its own policies and procedures. This report (a) identifies the guiding principles that should underlie all student conduct policies and procedures, as well as the recommended practices that are required for an institution to be a “gold standard” in responding to allegations of sexual misconduct, (b) outlines differences among various types of resolution methods (i.e., single-investigator, hearing board, or hybrid model), and (c) provides guiding questions for institutions to consider as they determine the most effective resolution method(s) for their unique campus environments.

First and foremost, it is important to understand that a learning-centered, fundamentally fair student conduct process should occur on all campuses. Institutions must remember that they have an obligation to all students, including students who may have been harmed, students who are accused of causing harm, and the rest of the student body. All students (including victims, complainants, respondents, and witnesses) involved in the student conduct process should be treated with care, concern, honor, and dignity.

Campuses are not meant to be courtrooms, and the courts support this distinction. While television shows such as *Law and Order* might be the only frame of reference that parents, students, and others may have, we must teach them that campus proceedings are educational and focus on students’ relationships to the institution. The field of student conduct is rooted in ensuring that individual students’ rights are upheld as they engage in an educational process about the behavioral (and sometimes academic) standards of the campus community. This involves a reasonable process for the institution to determine whether behaviors have violated campus policies and to impose appropriate consequences if necessary. For behaviors that may violate college policies and the law, victims are encouraged to pursue criminal procedures if they seek outcomes beyond the jurisdiction of what the campus can offer or impose.

There are five stages of student conduct resolution procedures: policy, initial interactions, investigation, adjudication, and institutional response. Within each of these are recommended practices that can help an institution to address and resolve incidents of sexual violence effectively. This report is supplemented by appendices containing guiding documents that institutions can use to improve their student conduct resolution procedures.



Recommended practices include but are not limited to the following:

- All employees should be trained on the basics of the campus policy, resolution process, and how to provide information to students about their options for support.
- Mandated reporting, mandated sanctions, or other such requirements should be carefully considered, as they may discourage reporting.
- A victim's request for confidentiality should be honored when possible, but the request must be weighed against the institution's obligation to all students.
- Legalistic language (e.g., rape, judicial, justices, prosecutor, defense, guilty) should be removed from policies and procedures. ASCA recommends use of "student conduct" instead of "disciplinary" or "judicial" to reflect the spectrum of student conduct practices.
- Consider what students find reasonable when determining and writing policies and procedures; communicate procedures widely and follow them.
- Ensure that behavioral standards for employees, students, and community members are compliant with Title IX. If there are distinct resolution processes depending on whether the accused is an employee or a student, ensure that both operate effectively and are communicated clearly to students.
- Effective interim actions, including multiple forms of remedies for the victim and actions restricting the accused, should be offered and used while cases are being resolved, as well as without a formal complaint.
- Select a resolution method that fits the institutional culture and promotes the best resolution process for students. It should contribute to creating a culture of reporting; it should not mirror the criminal process.
- Use the preponderance of evidence (more likely than not) standard to resolve all allegations of sexual misconduct
- The proceedings should be equitable and sensitive; there should be no direct questioning of respondents and victims by each other, and the parties need not be in the same room.
- Both complainants and respondents may consult with an advisor of choice, but institutions should impose guidelines limiting advisors' participation in student conduct proceedings.
- Training campus experts should include the Title IX team/coordinators, investigators, adjudicators, appeals board members, and so forth. Trust in them to revise policy and procedure annually as needed.
- Devote adequate staff, resources, and funding to manage cases. Investigators must be able to set aside other responsibilities to ensure that investigations are prompt and thorough.
- A Title IX team should be developed to review and revise policy, assess campus climate, lead prevention efforts, and assist the Title IX Coordinator

Given the importance of expanding understanding of the role of campus conduct processes in resolving the societal issue of sexual violence, the full report is available free to the public at <http://theasca.org>. This report will also be disseminated to the White House, the Department of Education's OCR, higher education associations, legislators engaged in discussions about pertinent federal or state mandates, and other relevant entities.



## **Section I. Introduction: The Intersection of Title IX and Student Conduct Administration**

On June 23, 1972, Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681) was signed into law; it 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.”<sup>1</sup> Over the past 40 years, higher education has learned more about what the Department of Education’s OCR expects with regard to policies, procedures, investigations, interim and permanent remedies, and other aspects of cases subject to Title IX. As of June 2014, institutions strive to achieve compliance amid a critical atmosphere with many seemingly valid viewpoints as campus processes are under scrutiny by victims, parents, accused students, attorneys, the media, the U.S. government, and watchdog groups. Victims/survivors are filing OCR complaints about how colleges are (or are not) addressing incidents, forcing campuses to reconsider policies or procedures that may currently be weighted toward protecting accused students more than those whom they may have harmed. While there is discussion suggesting that campuses leave behaviors that also may constitute a crime (e.g., rape) to the police and courts, Title IX describes the campus’s obligation to respond when a potential criminal behavior based on sex or gender affects the ability of a student to participate in his/her education or campus programs. Further, student conduct practitioners have an unlegislated, philosophical obligation to address any misconduct that adversely affects the campus community. As “dedicated professionals striving to positively affect student behavior while respecting individual rights as defined by the law and the institutions’ missions,”<sup>2</sup> student conduct administrators are positioned to be the most effective and impartial at leading campus management of these cases. In fact, many of ASCA’s long-held beliefs and training curricula have been consistent with the federal government’s recent guidance.

Often, student codes of conduct and their related procedures apply to behaviors exhibited by an institution’s students while policies under Human Resources govern the behaviors of employees. Regardless of whether the behavior was exhibited by a student, employee, or community member, the campus has an obligation under Title IX to protect a harassed/affected student’s access to an education. Sometimes a hostile environment may be present, even if the individual(s) who caused it cannot be identified. OCR has made it clear that student conduct processes to address sexual harassment and sexual violence on campus cannot exist in a vacuum and that imposition of sanctions alone is not an adequate institutional response.<sup>3</sup> While there are many aspects to effective Title IX compliance, this document focuses on student conduct policies, investigation, and resolution procedures that are critical components of comprehensive institutional compliance efforts.

Since the enactment of Title IX in 1972, the field of student conduct administration has changed dramatically, moving from the *in loco parentis* Dean of Women/Dean of Men disciplinary model to one that includes an array of resolution options. In 1986, the Association for Student Judicial Affairs (ASJA) was formed to serve the unique needs of campus judicial officers. In 1993, ASJA began to offer an intentional training institute to equip student affairs professionals with skills to conduct effective adjudication efforts on their campuses. In 1994, the Violent Crime Control and Law Enforcement Act (Pub. L 103-322) was passed and raised the question as to “the ability of educational institutions’

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<sup>1</sup>*Title IX and Sex Discrimination*. U.S. Department of Education’s Office for Civil Rights. Retrieved from: [http://www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html).

<sup>2</sup>Daisy M. Waryold & James M. Lancaster, *The State of Student Conduct Current Forces and Future Challenges: Revisited* (Association for Student Conduct Administration, 2013), 10.

<sup>3</sup>Questions and Answers on Title IX and Sexual Violence, p. 25, Retrieved from <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.



disciplinary processes to address allegations of sexual assault adequately and fairly.”<sup>4</sup> In 2000, Sophie Penney, Lawrence Tucker, and John Lowery led efforts to conduct a national baseline study on the adjudication of sexual assault cases, with a return rate of 41% from 170 residential, commuter, public, and private institutions. The survey explored institutional protocols for addressing reported incidents of sexual assault, including methods of adjudication, the standard of proof used, investigation procedures, training of hearing board members, roles of attorneys and advocates, and rights afforded to complainant and respondent. The study resulted in recommendations to ASJA practitioners that parallel some current OCR guidance, such as providing both the complainant and respondent with written notice of charges and employing practices that promote a culture of reporting.<sup>5</sup>

In 2004, Ed Stoner and John Lowery published the “Model Code,” which became a blueprint document for campuses to benchmark and revise their policies and procedures to protect the rights of accused students and of complainants/victims while promoting campus community standards. The philosophy underlying the model code was to treat all students with equal care, concern, respect, and dignity, which is very much in line with the equity principle discussed in the April 2011 Dear Colleague Letter. In 2008, the Association’s name was changed to the Association for Student Conduct Administration (ASCA) to reflect the philosophical shift from antiquated legalistic and courtroom-like proceedings. In 2014, ASCA incorporates equity for all participants in the conduct processes to meet the needs of its 3,100+ members at more than 1,500 institutions, including residence hall directors, single-person conduct officers, community college professionals with multiple responsibilities, Vice Presidents, and Deans of Students. Membership in ASCA and attendance at the ASCA Gehring Academy are now common requirements in student conduct-related job descriptions. Despite the changing nature of the field, ASCA has consistently focused on equipping student conduct administrators with practical skills related to the overlap of legal influences and student learning in order to address student behavior effectively through an educational and socially just lens.

Ultimately, this resource serves to provide a set of best practices that underlie a fundamentally fair conduct process for **all** students affected by sexual misconduct. While there is overlap, this document does not address aspects of Title IX institutional compliance requirements often found outside of student conduct, such as preventative education or victim advocacy, nor does it focus on Clery Act reporting requirements. These recommendations for effective student conduct practice are based on a review of the existing administrative, legislative, and judicial guidance related to Title IX (see Appendix A for a list of sources), feedback from the ASCA Sexual Misconduct/Title IX Community of Practice, and the collective experiences of the practitioners serving as the chief leadership of ASCA. These principles and key concepts can also be applied to types of cases beyond sexual misconduct. We believe that this is the first document of its kind, written by and for current practitioners in the field, as well as for those who are involved in providing guidance or discussing potential laws regarding how colleges handle conduct complaints pertaining to sexual misconduct.

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<sup>4</sup>Sophie W. Penney, Lawrence Tucker, and John Wesley Lowery, *National Baseline Student on Campus Sexual Assault: Adjudication of Sexual Assault Cases: A Study by the Inter-Association Task Force of the Association for Student Judicial Affairs*. Association for Student Judicial Affairs (2008): 2.

<sup>5</sup>Penney, Tucker, and Lowery.



## **Section II. Guiding Principles**

Regardless of institutional type or campus culture, some overarching philosophies are at the heart of fundamentally fair and equitable student conduct procedures. These principles aim to treat all students with respect, care, and dignity, no matter what role they play in the student conduct process. These underlie the training and programs offered by ASCA and are re-iterated in the guidance from OCR.

**First and foremost, student conduct is an educational process.** Student conduct professionals transform student behavior by establishing and disseminating policies, providing preemptive education, having conversations to challenge students' perspectives, facilitating resolution of complaints and conflicts, and implementing accountability measures (sanctions) when necessary. The educational nature of student conduct procedures is supported by a fundamental guiding legal document, the *General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline at Tax-Supported Institutions of Higher Education* (Western District of Missouri, 1968), which was written by a group of federal judges from Western Missouri. It states, "The discipline of students in the educational community is, in all but the case of irrevocable expulsion, a part of the teaching process. In the case of irrevocable expulsion for misconduct, the process is not punitive or deterrent in the criminal law sense, but the process is rather the determination that the student is unqualified to continue as a member of the educational community."<sup>6</sup> Just as we offer academic instruction, we also have a responsibility to educate students on the impacts of their behaviors on others.

**Effective student conduct procedures directly support the mission of the institution and the role of higher education in the United States.** Student conduct policies and procedures promote a positive learning environment for all students, educate students about their responsibilities as members of the college/university community, and allow an institution to impose educational sanctions fairly when behavior violates those standards.<sup>7</sup> Students voluntarily join campus communities, and appropriate behavioral standards should be imposed in addition to societal laws, so long as they further the mission of the institutions while upholding basic civil rights of students. Most college and university mission statements include some form of institutional duty to prepare students for lifelong success and learning.<sup>8</sup> This reiterates Thomas Jefferson's notion in the *1818 Report of the Commissioners for the University of Virginia* regarding the need for institutions to teach students to form "habits of reflection and correct action, rendering them examples of virtue to others, and of happiness within themselves."<sup>9</sup> The functional role of student conduct administration on college campuses is to help students to translate knowledge into action—to form behavioral habits that will enable them to be successful beyond the brick-and-mortar or virtual walls of the institution. At times, to the dismay of parents, other students, faculty, and senior-level administration, decisions are not made *for* students nor do we control their actions, but we can influence their behavior.

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<sup>6</sup>*General Order on Judicial Standards of Practice and Substance in Review of Student Discipline in Tax-Supported Institutions of Higher Education*, 45 F.R.D. 133 C.F.R. (1968).

<sup>7</sup>Edward N. Stoner II and John Wesley Lowery, "Navigating Past the 'Spirit of Insubordination': A Twenty-First Century Model Student Code of Conduct with a Model Hearing Script," *Journal of College and University Law*, 31(1), (2004): 4-5.

<sup>8</sup>*About Community Colleges*. American Association of Community Colleges. Retrieved from <http://www.aacc.nche.edu/aboutcc/pages/default.aspx>.

<sup>9</sup>Thomas Jefferson, "Report of the Commissioners for the University of Virginia". August 4, 1818. Found in eBook *Thomas Jefferson, Political Writings*. Authors: Thomas Jefferson, Joyce Oldham Appleby, and Terence Ball. Published 1999. p. 300

**We have an obligation to respond to sexual violence that affects students.** Recently, it has been asked why, when campuses do not respond to murder, they should respond to rape? The answer is that we *would* respond to murder. We would provide support and assistance to those affected by the behavior and we would most likely take action against the student who committed the act. We certainly would not wait for the legal system to act before we would act to protect the campus community. We would not call the act “murder”; the act would fall under a policy prohibiting physical abuse or physical harm. Our response to sexual assault is similar. We acknowledge that we are a microcosm of larger society and that no one can “guarantee” the safety of others, but we also recognize the significance of our influence on student behavior. We not only have an obligation to protect the members of our campus community; federal legislation requires us to do so—and it is the right thing to do. In his report Jefferson charged institutions “to establish rules for the government and discipline of the students.”<sup>10</sup> We would be abandoning our own authority if we failed to address incidents of sexual violence affecting our students.

**Campuses are not courtrooms.** In cases involving behaviors that could violate college policy and law, we encourage use of the criminal and civil systems in addition to the campus process. We do not find students “guilty” of crimes such as rape or murder, but we have an obligation to determine whether they are responsible for conduct that threatens the health or safety of another person, including sexual misconduct. While campuses have a role in addressing sexual assault, our role is not to “bring perpetrators to justice.”<sup>11</sup> The most serious consequence that we can impose on a student is to prohibit the student from attending our college or university. A student should not need a lawyer to participate on his/her behalf in an educational campus process. We do not seek to replicate adversarial or litigious proceedings on our campuses because we believe that they do not support cultures of reporting and that they are antithetical to the goal of student learning. A comprehensive overview of the judicial support for this principle is detailed in the May 1, 2014 Law and Policy Report #487: *Campuses or Courts? Different Questions and Different Answers*. Given the importance of this topic, the copyright to that document has been waived and it is available free to the public on the ASCA website.

**“Some kind of notice and some kind of hearing”<sup>12</sup> is still relevant.** Dating back to *Goss v Lopez* (1975), our practices are built on ensuring that an accused student is informed of what policies may have been violated, has the opportunity to review any pertinent information, and has the opportunity to be heard by sharing his/her side of the story. To ensure the safety and the operations of the campus during this time, colleges may impose interim action (as well as other remedies under Title IX) while the situation is being resolved. Policies and procedures must be in compliance with applicable state and federal laws, while campuses have the flexibility to resolve complaints through whatever means are most effective, efficient, and equitable, given the variety of resources and support available on each campus. No single model fits all institutional types; there are important considerations for all options, including the single-investigator model, the administrative or panel hearing board model, or a hybrid model. Institutions are encouraged to think beyond the traditional formal “hearing” when considering resolution options.

**Fundamentally fair means equitably fair to both parties.** Student conduct professionals are often caught between individuals and groups with competing interests. Victim advocate groups promote an approach that is victim centered, while attorneys and watchdog groups often seek to keep campus processes weighted to the rights of the accused. Campus attorneys often advise us to take great care to protect the rights of accused students, but we must do the same for those who feel that they have been

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<sup>10</sup>Jefferson, p. 309.

<sup>11</sup>White House Task Force to Protect Students from Sexual Assault, *Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault*, April 2014: ii.

<sup>12</sup>Stoner and Lowery: 12.

harmed. The complainant and the respondent are usually *both* students; we must treat them as such. This is not a new concept to student conduct professionals, as this value informed the Model Code and has been incorporated into the foundational training at the annual ASCA Gehring Academy since 1993.

**Consider what your sophomore self would want.** Think back to your sophomore year of college. What kind of policy would you understand and how would you even know to look for it? Who would you tell your story to first? Listen to victims on campus. Several OCR resolution agreements require campuses to create committees of students who give feedback about campus procedures and make suggestions for improvement to create a campus that does not tolerate sexual harassment. ASCA recommends that this be done proactively by having students involved in the policy revision process to ensure that policies and procedures make sense to them. OCR focuses on what *students* consider to be reasonable, especially in how to identify campus confidential and responsible reporters. In addition, the student body will likely have thoughts on who should hear these cases: a single administrator? a panel with a majority of students? We must respect the privacy of students once they are engaged in the process by sharing information only with those who need to know the information.

**“Other duties as assigned” is not enough.** Campuses must devote staff, resources, and funding to address cases involving sexual misconduct adequately. Calling Title IX compliances an “unfunded mandate” is not an excuse. Acknowledging that the caseload and nature of these cases looks very different on a residential campus with a team of hall directors and a centralized conduct office from a commuter technical school with one conduct officer, there is no one way to design a staffing model to process cases. Some campus officials may be wearing so many hats that the integrity of the process comes under question; there may be a need to provide staff who are dedicated to these cases. Each campus must assess its climate, caseload, and current staffing levels to determine whether enough staff and resources are provided to manage these situations effectively.

**The conduct process alone is not enough.** The Student Code of Conduct typically applies only to *student* misconduct. Under Title IX, students can also file complaints about behaviors by faculty, staff, and nonstudents when these behaviors affect access to education or programs. Also, the college may still need to conduct investigations and address behaviors affecting the campus, even if a victim does not wish to pursue the conduct process or if the identity of the person who engaged in the behavior is unknown. In addition to the formal conduct process, there are other ways to address campus incidents, such as education, additional monitoring, policy revision and dissemination, and remedies provided to those who are affected. OCR has put increased focus on the campus climate, so we should track trends and encourage reporting of themes and concerns, not just formal complaints. Finally, we cannot operate in a silo; the OCR guidance and White House Task Force reinforce a reality that we already know: It takes a campus-wide effort to change campus culture and to be compliant with Title IX.

**Training is critical.** No matter what resolution method is used, no matter who investigates or who makes decisions about complaints, those persons **MUST** be adequately trained. We must train anyone who interacts with students on a regular basis, including faculty, so they know how to refer students appropriately. Investigators and adjudicators must be trained on the complexities of same-sex relationships, the way trauma can be experienced by members of various ethnic backgrounds, and the dynamics of power in relationships, for example. Appendix C contains a list of suggested training topics.

**Be reasonable.** We have conversations every day about time, place, and manner. We cannot codify every possible student behavior that might violate campus standards. And yet, some of us seek specific and exact instruction from OCR or attorneys in order to implement new policy or to go forward. We must feel confident in determining what is reasonable, based on a comprehensive review of existing guidance, an understanding of our campus culture, and consideration of the experiences of our





students, especially those who may feel victimized or harassed. In addition, not all details in the national guidance and regional resolutions from the OCR offices are exactly aligned. While we welcome additional training opportunities and advanced guidance from the government, we must use professional judgment to do what is best for our campus, acting in the spirit of available guidance.

**Follow your policies.** This is a fundamental rule in student conduct. Do not create policies or procedures that you will not actually practice. Do not make a college President or an attorney the Title IX Coordinator if he or she is not available for students or does not have time or expertise to oversee the process. Be sure that all employees know what to do if a student reports an incident. Equally important, do not have policies that contradict, conflict, or are misaligned. The same standards should apply to any act of sexual harassment, whether by a student, employee, or campus visitor. The consequences and remedies may look different, depending on the relationship of that party to the institution. Finally, have policies and procedures that students can understand and navigate. This can be especially challenging if policies are overly legalistic or if the student body (as in many community colleges) includes a high percentage of ESL students, students with disabilities who may need alternate format materials, dual-enrollment high school students, or students who have lower cognitive functioning.

**These cases are complex.** Many cases involve alcohol or other influences, partial or absent memories of what happened, few or no witnesses, and a student who has been harmed by someone whom he/she knows. Many of these cases would not likely be prosecuted in a court of law and involve making decisions based on available information. Despite the complexity, we have the responsibility and the means to address them effectively. It is important to evaluate each case and make improvements where possible. We often survey accused students about their experience, but we should survey *both* students about their experiences and then make changes where appropriate and necessary. Any case could result in one or both students leaving the institution, so it is important to invest adequate resources toward successful resolution. Also, any case could result in a lawsuit or OCR complaint, which does not necessarily mean that anything was done wrong. These are often very emotionally charged cases, with strong feelings on both sides. Some cases, even when conducted flawlessly, result in no one being happy with the results.



### **Section III: Standards of Practice**

This section describes critical elements and recommended practices pertaining to cases of sexual misconduct that every campus should be incorporating, regardless of student population, size, institutional type, mission, public or private status, or Carnegie classification. Many of these concepts can be extrapolated to all student conduct complaints, as they are found in the foundational training provided through the ASCA Gehring Academy, infused in other ASCA programs, and reiterated by the OCR in their recent and historic guidance on Title IX. Promising practices are described for each of the five stages of the student conduct resolution process:

- A. **Policy:** *the expectations for student behavior and the procedures for addressing potential violations, both of which should be published widely to the campus community and anyone who might be affected by students' behavior on campus.*
- B. **Initial Interactions:** *the initial interactions that a student has with the process, following an alleged incident. This includes the reporting and intake process, requests for confidentiality, and interim measures imposed. This is also the stage at which an institution determines whether it has official "notice" and what its obligations for action might be.*
- C. **Investigation:** *the information gathering phase. This includes both formal and informal investigations, depending on the institution's obligations to act, the extent to which a request for confidentiality can be honored, and the surrounding climate concerns.*
- D. **Adjudication:** *the process by which a determination is made as to whether or not a policy was violated.*
- E. **Institutional Response:** *the campus actions that occur as a result of the outcomes of the adjudication. This can include imposition of sanctions, continuation or imposition of remedies for the victim, targeted or campus-wide educational responses, and enforcement of additional security or other such measures.*

Following the recommendations for each stage are questions for consideration. These questions are intended to serve as a starting point to help campus personnel to discuss the student conduct resolution process and identify areas that might need review or revision.

#### **A. Policy**

**Include the critical components.** We have developed a list of the key elements of a sexual misconduct policy based on effective student conduct practices, as well as a review of the guidance and settlement agreements from OCR (Appendix B). Many campuses already have many of these in place. As more guidance has been issued, the amount of information that must be contained in the policy has increased. This results in the need to balance compliance with effective and convenient delivery of the information. As Title IX applies to all behaviors of sexual or gender-based discrimination and the Clery Act applies to all crimes that may occur in Clery-reportable areas on or near the campus, institutions should also review policies and procedures beyond student codes of conduct and related procedures to ensure that students who experience discrimination by an employee receive appropriate remedies and procedural protections.

**Communicate effectively and transparently.** Whether it is in original or revised guidance, the recent Q & A Guidance, or the outcomes of OCR campus investigations, a common theme is that policies must be written in a way that students can understand them and they must be communicated to the campus in

an effective manner. Both recent guidance and the White House Task Force Report convey that it is not enough to *believe* that we have effective policies; we must conduct ongoing assessments to ensure that they are effective. Students should understand what will happen if they report, if they are accused, if the case proceeds to a hearing, and so forth. Policies and procedures should not be buried in websites, catalogs, or at the end of annual security reports. In addition to campus-wide climate surveys, consider surveying those who participate in the resolution process: accused, victims/complainants, and witnesses.

**Be nimble.** Because policies and procedures must be transparent for the campus community and reflect the campus culture, there should be some vetting or review during the policy revision process. However, it should not take months to get policies passed, and non-experts (e.g., faculty, untrained attorneys, administrators removed from the conduct process) should not be permitted to block or hinder implementation of a Title IX-compliant policy. As state laws change, campuses must keep relevant definitions and procedures up to date. ASCA has long advocated comprehensive reviews of campus conduct codes every 2 to 3 years to minimize the need for complete overhaul of policies that have gone unrevised for years.

#### Questions for Consideration:

1. Does the policy include the elements included in Appendix B?
2. What search words can a student type into the college website to find this policy?
3. Does every faculty member, staff member, and student know about this policy? Where are they most likely to look for it?
4. How would a parent, spouse, or other family member learn about the policy and procedure?
5. Do students see themselves in the policy or procedures, or would they feel the need to involve an attorney or a parent in order to understand it?
6. Is the policy within two to three clicks from the main college website?
7. How quickly can we revise this if the laws change or we realize that we need to update it?
8. Do prospective students have easy access to this information?
9. Does the policy reflect the values of the campus community?
10. How does the policy help articulate that we do not tolerate sexual misconduct on the campus?

#### ***B. Initial Interactions***

**Make it easy to report.** We believe that the initial interaction that a victim has with the campus will dictate the rest of his/her campus experience surrounding the incident. For example, if the first conversation includes something like, “You’re not going to want to go before a hearing board of three older faculty members that you might later have as instructors and discuss intimate details of your sex life,” that student is not likely to file a formal complaint. Think about “reporting” from a student point of view – what does it mean to “report” informally or seek help? Who do students think have responsibility to take action? Once you have a policy in place, do what you can to promote reporting. Consider online reporting, a 24-hour hotline, and accepting reports in person. Do not create barriers – you are still on “notice” of a complaint even if it does not come on a specific form or by a certain time of day. You are even on notice just by reading something in the local newspaper. Once you are on notice, you must do something. Doing nothing is *never* the right answer. Give both the complainant and the respondent a supportive environment in which to share information – which requires adequate training of your campus and especially those involved in the initial intake of complaints. Develop a pool of trained support persons who can be present with a respondent when he/she is informed that a complaint has

been made. Remember, the primary responsibility of the person fielding the report is to capture a true and accurate narrative of the information, not to determine whether the information has merit.

**Keep the campus AND the individual in mind.** If an affected student does not want to proceed with the formal conduct process, follow the suggestions in the April 2014 OCR Q & A to determine whether the campus has a compelling need to pursue the complaint. Students should be aware that campus events designed to create space to discuss experiences in an open way, such as Take Back the Night, are not considered official notice of a complaint; although the College may be able to identify trends that should be addressed outside of a formal conduct process. The campus must also maintain the option to initiate complaints on its own behalf to protect the whole campus community if needed.

**Interim remedies are not predicated on a formal campus conduct process occurring.** Even without a formal complaint, the campus must take measures to protect an affected student. While our field has often focused on protecting the rights of accused students, we must put this focus on an equal level with that of the student complainant, and minimize burden on the complainant with regard to interim measures. If a student does not want to proceed with a complaint, the institution must still review and determine if it is part of a larger pattern of harassment and, if so, institute remedies to address it.

Questions for Consideration:

1. Who on campus do students talk to about their personal lives?
2. How can we expand faculty and staff skill sets in order to expand the possible pool of people that students might trust with their experiences?
3. How do we communicate to students that they can get help even if they don't want to report something formally?
4. What standards do we use to determine if we go forward, even if a victim asks us not to?
5. Do faculty know how to respond if a student asks him/her directly for an interim remedy?
6. Is our entire student conduct resolution process easy to explain to someone so he/she can make an informed decision as to whether or not to file a formal complaint?
7. How does a student learn about how to report an incident at 2am on a Saturday morning?
8. What kinds of support do we offer to both the respondent and the complainant during the initial part of this process?

### ***C. Investigation***

**Honor the involved students.** Ensure that students know what to expect, including what will happen with information that they share. When possible, obtain consent from the student complainant prior to beginning an investigation. Be prompt and appropriate, and keep the complainant and respondent informed as to the progress when possible, including simultaneous written notice of outcomes. Reveal only as much as necessary to get the necessary information about the case. Take time to be appropriately thorough but do not cause unnecessary delay.

**Do not place the burden on either student to “prove” the case.** The institution has an interest in finding out what actually happened in order to make the most informed decision possible. Campuses may have an interest in conducting an investigation even if a student does not wish to file a formal complaint or have his/her identity disclosed. Conduct a broad sweep to learn what you can; there may be critical witnesses that neither the complainant nor respondent would seek to hear from. Look at social media, text messages, and emails for additional information.

**A Title IX investigation is different from a law enforcement investigation.** While a police report may be a source of information in your investigation, it focuses on whether a law has been broken and the establishment of probable cause, not whether a campus policy was violated. Depending on circumstances, police and the student conduct investigator may be able to interview a party at the same time to minimize the need to discuss the incident multiple times. On the other hand, there may be a need to time things so fact finding about possible criminal activity can conclude first. A Memorandum of Understanding (MOU) between campus and/or local law enforcement can be helpful in establishing guidelines on how and when information can and should be shared with campus investigators. Regardless, investigation files should tell a story from start to finish about the incident and the investigation, including any delays in the process.

**Ensure a sustainable investigation model.** Whether investigations are done through Human Resources, a single investigator, an outside company, the student conduct office, or the student affairs division, have an adequate number of well-trained people to do this work, especially during high incident times.

Questions for Consideration:

1. How are investigators trained? Would the campus tolerate external investigators?
2. Do students trust the people who conduct investigations?
3. Is there an MOU with local law enforcement officials to clarify multijurisdictional procedures before such a case arises?
4. How effectively and quickly does the campus and/or community law enforcement share information with campus investigators?
5. Is there a consistent template for investigation reports, so that no matter who conducts them, the process and report are similar?
6. Are there checklists to guide discussions with students about the process?
7. Are there enough investigators for the number of cases on campus?
8. Do the investigators have access to and good relationships with the Title IX Coordinator(s)?
9. What kind of trust does the campus have in the investigator(s)?
10. Do investigator job descriptions accurately portray the qualifications and time required?

#### ***D. Adjudication***

**There is no one-size-fits-all resolution method.** Given the differences among institutional types, student bodies, campus cultures, and resources, it is unrealistic to apply one resolution model to the 7,000+ institutions across the United States. However, these standards of practice apply to all resolution models, including a student panel hearing, a single-investigator-and-adjudicator model, or some hybrid model. The key is to select the one that best fits campus needs.

**Ensure that resolution method(s) promote a culture of reporting.** Provide choices to students when possible, including the option for a complainant to not be in the same room as the respondent during adjudication. Procedures that permit the accused to be present at all stages of the hearing could result in a complainant not wanting to proceed further in order to avoid facing the accused student.<sup>13</sup> If one student has the choice, both should have the choice.

**Do not attempt to be a mini-courtroom.** There is no need to “prove beyond a reasonable doubt” that someone violated a college policy in order to find that person responsible. There should never be direct

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<sup>13</sup>U.S. Department of Education, Office for Civil Rights. *Letter to Notre Dame College*. September 24, 2010 (TS): 5.

questioning between respondent and complainant or victim when resolving allegations of sexual violence. While students may have an advisor present, the campus should set and uphold clear parameters for that person's involvement in the proceeding: to *support and advise* the student, not to *represent or advocate* on his/her behalf. Hearings and meetings should always be closed. Do not succumb to attempts to delay the process; offer *prompt* resolution (generally 60 days). Hearings should be structured so that they encourage the parties to tell their stories without personal attacks or reference to prior sexual histories, unless they have direct bearing on the question of responsibility in the case at hand.

**Ensure that both students have the opportunity to tell their stories.** Both complainant and respondent should have the chance to present information, review information ahead of time, vocalize experience, and present witnesses to the incident. Ensure that the resolution body and investigator have adequate training regarding how to engage students in the process. Offer a pool of trained advisors who can support students as they participate in the campus conduct process (depending on the campus, this can be students, staff, and/or faculty). Facilitate a process that is socially just and equitable; do not permit attorneys, parents, or anyone to create power differentials that adversely affect the process, or re-victimize anyone.

**Use preponderance of evidence as the standard of proof.** ASCA recommended this long before OCR stated it in the April 2011 Dear Colleague Letter. If the goal is to provide an equitable process, complainant and respondent must be allowed to participate in the process equally. These cases sometimes come down to believing one party as more credible than the other. If we start from the premise of clear and convincing or beyond a reasonable doubt, we are essentially saying to the victim, "Even if I believe you over the accused, if I don't believe you by this higher standard, I have to find in the accused student's favor." This devalues the victim's sense of personal value to the institution. Use of the "more likely than not" or 51% model is the only truly equitable standard for campus conduct cases.

**Decision makers must be well trained.** Given the complexity and sensitive nature of these cases, all adjudicators must be well trained. For a comprehensive suggested list of topics, refer to Appendix C.

*Refer to Section IV for the questions pertaining to adjudication models.*

### ***E. Institutional Response***

**Be intentional and appropriate in sanction selection.** As sexual misconduct ranges from repeated unwanted comments to single acts of sexual violence, there must be a wide range of sanctions available and a deep understanding of the factors relevant to sanction selection. While an act of sexual violence can never be "undone," there may be situations in which sanctions or remedies can include some restoration of harm caused. Engage the campus community in conversation about appropriate sanctions and create a sanctioning guide. If you have minimum sanctions for certain violations, ensure that there are no unintended side effects, such as hindrance to reporting or a hearing board wanting to adjust a finding of responsibility in order to issue or avoid a specific sanction. Include the rationale for sanctions so that both students understand the decisions.

**Implement ways to monitor future behavior.** Ensure adequate measures to uphold sanctions. Include notations on transcripts if a student is suspended or expelled to reflect accurately the student's new relationship to the institution. This can help a future institution to address behavior that may affect its students. Think beyond sanctions (if someone is not a student), reach out to other schools, talk to community police, and so forth. Work with other campus entities to ensure that climate check follow-up



occurs. Ensure that the Title IX Coordinator is informed of sanctions so he/she can assess trends. Finally, remember that sanctions are not enough with regard to remedies.

**Provide both parties the opportunity to appeal, based on specific criteria.** An appeal is not a rehearing of the case or an opportunity for the appellate body to substitute its judgment for that of the original hearing body. Typical criteria include an error of due process that adversely influenced the outcome, newly discovered material information that was not available at the time of the hearing and would have a significant impact on the outcome, demonstrable bias by a hearing official, or sanction(s) that are inappropriate for the violation(s). The appeals personnel should be adequately trained. There should only be one level of appeal. While appeals may not be completed within the 60-day guidance set by OCR, they should be resolved in a timely manner, relative to the case. Finally, sanctions should usually be enacted even while the appeal is being considered.

**Understand the difference between “processing” and retaliation.** Complainants and respondents may need to discuss what is happening to them as they engage in the conduct proceedings. They may seek support from formal (counselors, clergy, victim advocates, attorneys) and/or informal (parents, friends, advisors, coaches) resources. While “gag orders” should not be imposed, if their processing of the experience becomes problematic, educational conversations should take place to address this. A tangible adverse effect may result in some form of retaliation. If a complaint is filed and the respondent or respondent’s friends discuss the case in a way that adversely affects the complainant, the retaliation may be a continuation of a hostile environment that was created by the initial complaint (if the complaint is substantiated).<sup>14</sup> Retaliation should be addressed immediately and effectively.

Questions for Consideration:

1. Do the hearing bodies issue sanctions or give recommendations for sanctions?
2. Are students, faculty, adjudicators, and senior administrators on the same page with regard to the kinds of sanctions that should be issued for certain cases?
3. How are members of appellate bodies trained?
4. Is retaliation addressed in the code of student conduct?

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<sup>14</sup>Office for Civil Rights. *OCR Civil Rights Seminar*, Chicago, IL, April 25, 2014.



## **Section IV. Resolution Models**

A common phrase in the field of student conduct administration is providing “some kind of hearing”, which translates to one or more members of the campus community reviewing the available case information; listening or reviewing information from the complainant, respondent, and witnesses; and determining a finding of responsible or not responsible for each alleged violation. A variety of options are available for resolution of complaints of sexual misconduct. Regardless of which resolution method is used, Title IX requires that an investigation occur for any complaint of sexual discrimination. Some campuses have specialized entities or processes that resolve only cases of this nature. Other campuses ensure that all adjudicators/hearing bodies can resolve any type of case.

### ***Hearing Model***

The hearing model is the traditional model of student conduct adjudication. The hearing is often an in-person event (although parties can participate via phone, Skype, or similar means) and varies in length depending on the complexity of the case. Some hearing bodies have the authority to issue sanctions, while others may give sanction recommendations to Student Conduct or Student Affairs staff members who have the authority to impose sanctions appropriate for the violation. The roles of the student conduct office/staff in the hearing process vary, and can include the following:

- **Advisory:** providing advice to board/hearing body as needed and ensuring that procedures are followed
- **Logistical:** coordinating scheduling, developing the hearing agenda, collecting information
- **Investigative:** conducting the investigation and presenting it to the hearing body so the hearing can focus on follow-up questions and offering an in-person opportunity to the complainant and respondent to share with the hearing body
- **Complainant:** the student may conduct staff initiate complaints on behalf of the college
- **Supportive:** some campuses offer advocates or advisors for students who are participating in a hearing as either a complainant or a respondent

In this model, an investigation typically occurs prior to the hearing to (a) ensure that there is enough information to substantiate a complaint going forward for consideration, (b) provide separation between investigation and adjudication of the case, and/or (c) promote an efficient hearing by having a trained professional conduct much of the fact-finding work for the hearing body.

### **Administrative Hearing**

Administrative hearings most often involve one adjudicator who is trained in student conduct. Large and residential campuses may have student conduct offices with multiple administrative hearing officers, while small or commuter campuses may only have one adjudicator or may train employees from outside of student conduct or student affairs to serve as administrative hearing officers.

### **Panel Hearing**

Panel hearings range in size, with at least three members. Composition varies and can include a combination of faculty, staff, and students. Both composition and size are often dependent on campus culture: A commuter college with a transient student population may have fewer students than employees on the panel. A small residential college with an activist student body may have more or all students on the panel. While OCR currently discourages campuses from having students serve on panels, we believe that there is value in ensuring that student perspectives are present in the process, so long as they are effectively trained to participate. Our society allows 18-year-olds to serve on juries



that make decisions with much more at stake. We believe in the value of including the student voice in conduct processes, but we also understand the responsibility of adequate training and oversight of the process. While panel hearings with students may be the best resolution method for some campuses, they may not work at all for others.

### ***Investigation Model***

The investigation model removes the need for an in-person hearing, while still providing procedural protections to both complainant and respondent. In this paper we define an *investigation* as the process of collecting information pertaining to a complaint or incident, interviewing relevant parties, and synthesizing the material so it can be used to determine whether or not a policy violation occurred. This definition differs from the OCR definition of a Title IX investigation.<sup>15</sup> The student conduct process can be used to fulfill the Title IX investigation requirement so long as it is compliant with Title IX. Here is the basic flow of the investigation model:

- Complaint is filed and assigned to an investigator.
- Complainant is interviewed and interim action/remedies may be implemented.
- Respondent is informed of the nature of the complaint and the policies in question.
- Complainant and respondent have the opportunity to meet with the investigator and provide information regarding the complaint, including suggesting witnesses.
- Witnesses may be interviewed.
- Complainant and respondent review a summary of the incident information prepared by the investigator and can provide additional response or information.
- An investigation report (including policy analysis) is completed and forwarded to an adjudicator to issue findings and sanctions (i.e., outcome).

### ***Hybrid Models***

Campuses may choose to use a hybrid model that combines aspects of these two models. For example, one student conduct staff member might conduct the investigation; a different staff member would review the information and offer an administrative resolution for the case. If either the complainant or respondent does not wish to accept the resolution, the case goes to a hearing body to analyze the information and determine outcomes and any sanctions. Another model might include a Title IX investigation completed by an equity office, with the case being referred to the campus conduct process to determine appropriate sanctions for policy violations.

### ***Alternative Dispute Resolution***

In addition to the traditional resolution methods, other options may be appropriate in certain cases. None of these should completely replace the other adjudication methods as the only resolution option available on a campus, but one or more may be effective in some cases. Keep in mind that interim and long-term remedies still should be provided to a complainant, even if these methods are used.

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<sup>15</sup>Page 24 of OCR's April 2014 *Q & A Guidance* defines a Title IX investigation as "the process the school uses to resolve sexual violence complaints. This includes the fact-finding investigation and any hearing and decision-making process the school uses to determine: (1) whether or not the conduct occurred; and, (2) if the conduct occurred, what actions the school will take to end the sexual violence, eliminate the hostile environment, and prevent its recurrence, which may include imposing sanctions on the perpetrator and providing remedies for the complainant and the broader student population."

### **Informal Resolution**

Many campuses use an “informal resolution” process in which an accused student and a conduct officer reach agreement about the violations and imposed sanctions and resolve the case without a formal hearing. While this is a common practice for violations such as alcohol, noise, misuse of technology, academic dishonesty, and so forth, this process may not meet requirements of Title IX. In complaints of sexual harassment, there must still be an investigation, a finding as to whether sexual harassment occurred, notification to the complainant about the outcome, appropriate remedy(s), and option for appeal.<sup>16</sup> With the need to ensure equity in the process for both parties, there is a flaw in this method of resolution if there is a complainant and yet only the accused student has to agree to the outcome. The institution should likely implement an appeal process for the complainant, or may reach informal resolution only when all three parties agree (complainant, respondent, and institution).

### **Mediation**

The April 2011 Dear Colleague Letter made it clear that mediation may not be used to resolve complaints of sexual assault, and the reasons for this are obvious. The dynamics are not equal, and the potential for re-victimization as well as unintended effects are too great. However, following a Title IX investigation and notification of the outcomes, there may be cases of sexual harassment in which both parties wish to have mediation as part of moving forward as students on the same campus. An example is a case in which a male student is unaware of the effects of some of his comments on a female complainant and wants to understand them better. The female is interested in meeting with the male and a facilitator to share this information. With the help of a trained facilitator who provided the follow-up about their agreed future communication methods, this case can be resolved to the satisfaction of both parties. Mediation may also be helpful when an investigation determines that there was no violation of Title IX or college policy, and the college can assist the involved students in discussing how to move forward.

### **Restorative Justice**

The restorative justice (RJ) model resonates with the concept of remedies under Title IX and suggests balance in considering the rights of both parties: those who were harmed and those who did the harming. When done effectively with willing parties who can engage in productive dialogue, an RJ process can provide deeper learning and engagement in the process. There are many ways to implement restorative justice that are worth exploring in a variety of cases. Some campuses have utilized RJ in place of a traditional hearing in which the accused acknowledges having caused harm to the other party and the violation is at a lower level. Others have successfully implemented RJ in addition to the traditional hearing to provide some closure to the parties. This option is especially worthy of consideration in cases in which the complainant says, “I just want him to know that what he did to me was wrong.” If your campus is interested in RJ as an option, we recommend that the facilitator be well trained and that much care is used in utilizing this option.

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<sup>16</sup>U.S. Department of Education, Office for Civil Rights. *Letter to Notre Dame College*, September 24, 2010 (TS): 5.

### Comparison of Resolution Models

	<b>Investigation</b>	<b>Admin Hearing</b>	<b>Panel Hearing</b>	<b>Hybrid Model</b>
Staff Resources	<ul style="list-style-type: none"> <li>Requires more time by fewer staff members</li> <li>Can be overwhelming during high case time, especially if not the sole focus of the position</li> <li>Creates risk if staff turnover is common</li> <li>Can be outsourced</li> </ul>	<ul style="list-style-type: none"> <li>With a pool of administrators or with one or more who focus on this, offers a flexible schedule</li> </ul>	<ul style="list-style-type: none"> <li>Requires time from panel members for cases and training to promote consistency</li> <li>Still requires advising by conduct staff and/or training</li> </ul>	<ul style="list-style-type: none"> <li>Allows for investigations to be done outside of student conduct</li> <li>Can be outsourced</li> </ul>
Privacy of Information	Fewest people are exposed to the information	<ul style="list-style-type: none"> <li>Limited number of people can access information</li> </ul>	<ul style="list-style-type: none"> <li>Information usually exposed to greatest number of people</li> <li>Often includes sharing information with faculty and students</li> </ul>	<ul style="list-style-type: none"> <li>Depends on size of hearing body</li> </ul>
Logistics	<ul style="list-style-type: none"> <li>Can usually be the most expedient, depending on investigator's other duties</li> </ul>	<ul style="list-style-type: none"> <li>Medium level of coordination required</li> </ul>	<ul style="list-style-type: none"> <li>Requires most extensive coordination of schedules</li> </ul>	<ul style="list-style-type: none"> <li>Allows most options for customization</li> </ul>
Training Required	<ul style="list-style-type: none"> <li>Requires ongoing training for investigator(s) and adjudicator(s)</li> <li>Must address turnover</li> </ul>	<ul style="list-style-type: none"> <li>Requires ongoing training for the hearing officer</li> </ul>	<ul style="list-style-type: none"> <li>Extensive training required to ensure effectiveness and minimize risk</li> </ul>	<ul style="list-style-type: none"> <li>Depends on the number of people involved.</li> <li>May require different types of training for different entities.</li> </ul>
Consistency	<ul style="list-style-type: none"> <li>Offers potential for great consistency, depending on number of investigators and adjudicators</li> </ul>	<ul style="list-style-type: none"> <li>Offers potential for great consistency, depending on number of adjudicators and communication among them</li> </ul>	<ul style="list-style-type: none"> <li>Least likely to be consistent, depending on level of training and dedication of board members</li> </ul>	<ul style="list-style-type: none"> <li>Depends on construction of model</li> </ul>
Campus Support	<ul style="list-style-type: none"> <li>Must have credible investigator(s) to maintain support of process</li> <li>Students may feel it is too "secretive" or it may be most trusted because of this</li> <li>Requires openness by legal counsel</li> </ul>	<ul style="list-style-type: none"> <li>Requires trust in the administration for students to report</li> <li>May be most trusted by student body</li> </ul>	<ul style="list-style-type: none"> <li>Ensures that campus voice is heard in decision and sanctioning</li> <li>May be seen by students as most supportive, depending on culture</li> </ul>	<ul style="list-style-type: none"> <li>Varies, depending on process</li> </ul>



## **Questions to Ask Your Campus**

### **Campus Culture**

1. What level of trust do students have in the student conduct office/staff?
2. Is the student body transient or consistent? Are there students who are engaged and willing to serve on boards consistently?
3. What involvement do faculty, staff, and students want to have in the conduct process?
4. What politics affect this decision?
5. Can the same process be used for student and employee misconduct? How well do Human Resources and Student Conduct employees communicate with each other?

### **Support From Campus Leadership**

1. Does the campus leadership trust and support the conduct staff?
2. What models does the institution's attorney support and why?
3. Do campus stakeholders understand the student conduct process?
4. What role(s) do senior staff want to have in the process?
5. Is funding for adequate training provided?

### **Staffing**

1. Can staff members focus on investigations, or will that interfere with other job duties?
2. Are there faculty members who are willing to be trained and serve on boards consistently?
3. Is there adequate staffing to ensure appropriate separation between the initial adjudicating body and the appellate body, so students have a fair chance for an appeal?
4. Is enough staff involved to manage any perceptions of conflict of interest or bias?
5. Are faculty, staff, and students compensated accurately for time spent on these cases (release time, credit toward tenure, academic credit for training, etc.)?

### **Training**

1. What level of training can be provided on campus?
2. What training should be obtained through national or local resources to fill the gaps?
3. Are there resources to ensure that all members of hearing boards are adequately trained on an ongoing basis?
4. How is turnover in investigators, adjudicators, or appellate boards addressed?
5. Are panels/hearing officers active enough to practice what they learned in training or can ways be created for them to practice the training through in-service or continuing education?

### **Resources and Funding**

1. Are participants in the administration of the process adequately compensated?
2. What money is set aside for annual training, Association membership, and conference attendance to ensure that the campus is up to date on best practices?
3. Is there release time offered to investigators/adjudicators as needed?
4. What kind of support is available to staff members who investigate or hear these cases?
5. What are the relationships with local law enforcement agencies?

## **Section V. Conclusion and Next Steps**

Given the recent attention to how colleges address incidents of sexual violence on campus, student conduct professionals are in the spotlight as never before. This presents an opportunity for ASCA to advance the profession to promote safer campuses for students. Student conduct professionals who are working at an institution with an antiquated process or an overly legalistic policy must work to change this. All conduct professionals have a responsibility to students and the profession to correct those who are not doing this work well. We are the ones who talk with students, who know how to write policies that fit our institutional culture and uphold professional standards, who facilitate procedures that are equitable and respectful for all of our students involved; we are the experts on this. As practitioners and as a profession, we must do a better job of describing the nature of student conduct, articulating how sound practices correlate to the educational mission of our campuses, and demonstrating effectiveness in transforming student behavior. ASCA has an interest in ensuring that each and every colleague does this well because the profession has an obligation to students and to the field of higher education. ASCA is committed to setting the “gold standard” for addressing sexual misconduct effectively through student conduct practices. Immediate steps toward this goal include the following:

- Distributing this white paper freely to promote transparency and understanding of the role of student conduct personnel in addressing sexual violence and harassment
- Developing for ASCA members a collection of proven practices, templates, sample policies, training materials, and other items through Sexual Misconduct/Title IX Community of Practice
- Providing timely information to ensure that members have up-to-date information about issues affecting their work
- Collecting data on current practices and trends to understand the national climate surrounding sexual misconduct cases and how to influence it through the Association
- Releasing follow-up white papers on leading practices, including how student conduct staff and campus security/law enforcement work together to address sexual misconduct on campuses, as well as recommended practices for transcript notations and evaluation of notations
- Continuing to provide effective initial and ongoing training through the ASCA Gehring Academy, annual conference, regional/state meetings, and webinars
- Strengthening relationships with external entities such as the White House, OCR, Congress, and other higher education associations, including a presentation on student conduct resolution procedures to the OCR Sexual Harassment Network in August 2014
- Continuing to challenge entities that seek to undermine the educational mission (including state governments, attorneys, and sometimes institutional stakeholders) by advocating for sound practices, equitable procedures, and productive legislation

This paper is intended to be a catalyst for action. We agree with President Obama’s introductory quotation in the *Not Alone* report: Sexual violence is a threat to campus communities and “we have the power to do something about it.” We invite you to join us in being part of the solution to addressing the societal problem of sexual violence as it affects our campuses.

*\*\*ASCA would like to acknowledge the following additional abbreviated resources: ATIXA One Policy, One Process (2013); NCHERM Group Wiki Model Code Project (2013); Reframing Campus Conflict by Schrage and Giacomini (2009); Student Conduct Practice by Lancaster & Waryold (2008); The Little Book of Restorative Justice by Karp (2013)*

## **Appendix A: Resources**

### ***Influential Guidance:***

- Guidance: *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (1997)
- Pamphlet: *Title IX and Sex Discrimination* (Revised 1998)
- Guidance: *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001)
- Pamphlet: *Sexual Harassment: It's Not Academic* (Revised September 2008)
- *Dear Colleague Letter on Harassment and Bullying* (October 26, 2010)
- *Dear Colleague Letter on Sexual Violence* (April 4 2011)
- *Dear Colleague Letter on Retaliation* (April 24, 2013)
- *Questions and Answers About Title IX and Sexual Violence* (April 29, 2014)

### ***Relevant and Notable Court Cases/Judicial Guidance:***

- *Dixon v Alabama*, 294 F. 2d 150 (5th Cir. 1961)
- *Goss v Lopez*, 419 U.S. 565 (1975)
- *Gebser v Lago Vista Independent School District*, 524 U.S. 274 (1998)
- *Davis v Monroe County Board of Education*, 526 U.S. 629 (1999)
- *General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax-Supported Institutions of Higher Education*, 45 F.R.D. 133 C.F.R. (1968)

### ***Additional Governmental Influences:***

The following documents provide practical examples of application of the OCR guidance, which campuses should consider as advisory:

- *Eastern Michigan Resolution Agreement* (November 2010)
- *Notre Dame College Resolution Agreement* (June 2011)
- *University of Montana Resolution Agreement* (May 2013)
- *SUNY Resolution Agreement* (September 2013)
- *Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault* (April 2014)

### ***ASCA Resources:***

Laura Bennett, D. Matthew Gregory, and Gary Pavela, *ASCA Law and Policy Report No. 487*. The Association for Student Conduct Administration (1 May 2014). Available online at <http://theasca.org>.

Daisy M. Waryold & James M. Lancaster, *The State of Student Conduct Current Forces and Future Challenges: Revisited*. Association for Student Conduct Administration, 2013.

Sophie W. Penney, Lawrence Tucker, and John Wesley Lowery, *National Baseline Study on Campus Sexual Assault: Adjudication of Sexual Assault Cases* (A Study by the Inter-Association Task Force of the Association for Student Judicial Affairs). Association for Student Judicial Affairs: 2008.

Edward N. Stoner II and John Wesley Lowery, "Navigating Past the 'Spirit of Insubordination': A Twenty-First Century Model Student Code of Conduct With a Model Hearing Script," *Journal of College and University Law*, 31(1) (2004).

## **Appendix B: Key Elements for Sexual Misconduct Policies and Procedures**

The following key elements provide a guide for developing a gold standard sexual misconduct policy and procedure. They have been compiled from the April 2014 Q & A Guidance, prior OCR guidance, the resources released at <http://notalone.gov>, and OCR resolution agreements. (Appendix A contains more information on these sources.) As the Clery Act overlaps Title IX with some compliance requirements for institutional responses to reported incidents of sexual violence, some Clery Act requirements (including some anticipated as a result of the current negotiated rulemaking process) pertaining to behavioral expectations (i.e., policy) and resolution procedures have been included in this guide to streamline institutional communications and promote compliance with Clery. Note that this guide is focused on institutional policy and resolution procedures; it does not include requirements such as education, risk reduction, or crime statistic reporting, which must be addressed in the campus's annual security report.

Institutions should review and carefully consider implementation of the elements in this guide, as many of them have implications for practice and may vary based on the institution's needs. In addition, if the institution has a separate or different process for addressing *employee* behaviors, the same information about process, outcomes, should be communicated. Institutions are encouraged to make it as easy as possible to communicate and understand the process, regardless of who is victimized and who is the alleged harming party—student, employee, community member, or someone else.

NOTE: At the time of this publication, the public comment period pertaining to changes to the Clery Act as a result of the Violence Against Women Reauthorization Act of 2013 (VAWA) is occurring, and there are more than 60 active OCR investigations. As a result, this guide is subject to change and will be submitted to the ASCA Sexual Misconduct/Title IX Community of Practice to update and maintain for members of ASCA, as further guidance and legislation is finalized.

### **Introduction**

- Statement of the prohibition against sex discrimination and all forms of sexual misconduct as defined by the institution, which includes behaviors that may also be criminal in nature, such as dating violence, domestic violence, sexual assault, and stalking
- Statement of the institution's commitment to address sexual misconduct
- Assurance that the institution will take steps to prevent recurrence and remedy effects
- Reference to the institution's core values, if relevant
- Statement that this guide explains the rights and options of (student/employee) victims of sexual misconduct, regardless of whether the act occurred on or off campus

### **Scope of Policy/Jurisdiction**

- Identify the persons, conduct, locations, programs, activities, and relationships covered by the policy, including:
  - Application to complaints filed by students or on their behalf alleging sexual violence carried out by employees, other students, or third parties
  - Off-campus conduct affecting the campus or the access to education of another student
  - Application to all students and employees, regardless of gender identity or sexual orientation
  - Application to third parties also
  - Application to online behavior and social media that may affect the educational experience
- State that the institution may initiate a complaint

- Explain that there is no time frame for submitting a complaint, with encouragement to report quickly to maximize the institution's opportunity to respond and investigate
- Explain that this policy is not a substitute for law, that the procedure may apply to situations that are also subject to criminal action, and that the institution supports individuals in reporting criminal activity to appropriate law enforcement entities
- Explain the institution's amnesty policy or other such statement to encourage reporting of sexual misconduct even if other violations (such as alcohol/drug use) may have occurred

### Options for Initial Assistance

- Address immediate concerns:
  - Resources on and off campus, including contact information for trained advocates who can provide crisis response
  - Emergency numbers for on- and off-campus law enforcement/campus safety, and how the institution can assist in notifying law enforcement if desired
  - Health care options on and off campus
  - Institution-specific sexual assault response resources
  - Surrounding community sexual assault response resources
  - How to seek care for injuries, STI testing, etc.
  - Importance of and explanation of how to preserve evidence in case the behavior is also a potential criminal act
  - Encouragement of prompt reporting of all crimes to the appropriate law enforcement agency, paired with a commitment from the institution that appropriate support will be offered in any case
  - Where to get a rape kit/SANE examination
  - Institutional resources pertaining to visa/immigrant status
  - The victim's rights and institutional support to assist in attempts to obtain orders of protection
- Address Counseling, Advocacy, and Support
  - Counseling and support options regardless of participation in conduct or criminal processes
  - Options and how to report confidentially on and off campus to counselors, medical personnel, or other such resources
  - Other support options during conduct or criminal process (designate whether they are confidential or not)
    - Explain that individuals may have a support person of their choosing present during any "proceedings" and what role(s) that person may have
  - A reference or link to the section on Reporting Options to learn more about confidential resources and who at the institution has a responsibility to report or act on the information
- Explain Interim Measures
  - Describe the range of measures that can be offered, including:
    - Potential immediate steps that can be taken by the institution to ensure safety/well-being of the victim (changing residence halls or class schedules, work schedules/situations, transportation assistance, withdrawal from a class without penalty, tutoring support, etc). Inform that the institution will make these accommodations if they are requested and reasonably available, regardless of whether the victim reports a crime to law enforcement.



- Additional possible steps that can be taken while an investigation is pending, such as campus no-contact orders, changing the accused student’s schedule, etc.)
- State that interim measures will be imposed in a way that minimizes the burden on the victim to the extent possible while balancing the rights of the accused.
- Explain differences between a campus no-contact order and a civil order of protection. Explain how to obtain a civil order of protection, including who from the campus can assist in obtaining one.
- State that information will be maintained as private as long as it does not hinder the institution’s ability to provide interim measures.
- State that retaliation is not tolerated by Title IX or the institution, and explain how the campus will protect against retaliation.
- Describe how the college values the opportunity to address incidents of sexual misconduct and assure that any violation of alcohol, drug, or other such policies may be addressed outside of this process but should not be a reason not to report.

### Definitions

- Provide adequate definitions of sexual misconduct include the following:
  - Discrimination and sexual harassment, including hostile environment caused by sexual harassment
  - Sexual assault, including rape, sodomy, sexual assault with an object, forced fondling, incest, and statutory rape
  - Sexual violence, including dating violence, domestic violence, and stalking
  - Other forms of nonconsensual sexual contact
  - Sexual exploitation
  - Retaliation
  - Any other gender-based misconduct such as intimidation, bullying, or other nonconsensual sexual conduct
- Ensure that definitions are the same, no matter who engages in the behavior—employees, students, or nonstudents.
- Explain that violations of the policy may occur between individuals or groups of any sexual orientation or actual or perceived gender identity.
- Identify the criteria for determining whether a relationship is intimate, domestic, dating, etc.
- Provide examples of behaviors that constitute violations of each type of sexual misconduct.
- Define *consent* and *incapacitation*, in compliance with relevant state laws; explain the difference between *drunk*, *intoxicated*, and *incapacitated*
- Include definitions of *proceeding* (all activities related to the institutional resolution of a complaint, including investigations, meetings, and hearings) and *result* (initial, interim, or final decision made by an entity authorized to resolve disciplinary matters, including both findings/sanctions and rationales) for Clery purposes.

## Reporting Options and Confidentiality of Information

- State that an individual may reach a variety of decisions at any point as to how or whether to proceed, and that a complaint may be filed under Title IX, as well as in the criminal process.
- State that a victim has the option to report (or not) to law enforcement and that the institution will offer assistance in notifying law enforcement agencies.
- Explain what the college considers to be “notice.”
- Provide a reminder of confidential reporting options (referred to earlier in the policy).
- Distinguish formal reporting options
  - Criminal (may include on- and off-campus police)
  - Campus conduct process for student behavior, employee behavior, and unknown or third party behavior
  - Reporting to “responsible employees”
    - List these (consider what students might see as responsible or confidential employees).
    - Explain that responsible employees must report to the Title IX coordinator immediately if they receive a formal report or if they observe potential misconduct first hand or learn about it in another way.
  - Reporting to Title IX Coordinator
    - Include name and contact information.
- For all, describe how to file a complaint as well as an explanation of who will potentially be able to have access to what level of information once a report is filed, and what information is documented and retained
- Explain that the Title IX Coordinator(s)/supervisors will be kept informed and whether campus legal counsel may be consulted.
- Explain alternatives to formal reporting.
- Explain what happens if someone reports to a responsible employee but requests that his/her name be kept confidential or that no action be taken:
  - Identify who is responsible for evaluating requests for confidentiality.
  - Explain that the college’s ability to investigate may be limited, which can affect the kinds of things that may be done in those cases to remedy, end, or prevent recurrence without formal conduct process being initiated; provide examples of these.
- Describe any public recordkeeping obligations, including campus crime logs, reporting obligations under Clery and the annual reporting responsibilities of Campus Security Authorities (CSA), and the college’s obligation to issue timely warnings.
  - Provide examples of the kinds of information that could trigger a timely warning and give assurance that the complainant’s name or identifying information will not be released by the institution.
  - If CSAs are different from responsible parties defined earlier in the policy, explain that.
- Explain what happens with third-party and anonymous reporting, including that the college’s ability to respond may be limited.
- Reiterate that retaliation against anyone who files a complaint, a third-party report, or otherwise participates in a conduct process or investigation is prohibited and that the college will take strong responsive action if retaliation occurs.
- Explain that the privacy of student information is protected by FERPA, and that nothing in this policy or procedure constitutes a violation of FERPA.

### Investigation Procedures

- Describe the difference between an *investigation* that the college initiates when it has notice and the *Investigation* that is initiated when a formal complaint is received. Explain the difference between a law enforcement investigation and a campus investigation. Include relevant information from an MOU with law enforcement, as well as what may or may not be shared between the investigations.
- Explain that a concurrent criminal investigation may delay the campus investigation temporarily only until the fact-finding portion of the former is completed. Suggest that a reporting or responding party may wish to make an initial report to both police and campus conduct officials, with the understanding that the two procedures have different standards and outcomes.
- Identify who conducts investigations and what the investigations entail, including information about the annual training that investigators receive.
- Ensure a reasonably prompt time frame for completion of the investigation, and explain how it will be communicated if the timeframe must be extended; give examples of why this happens.
- Describe provisions for adequate, reliable, and impartial investigation of complaints, including the opportunity for both complainant and alleged perpetrator to present witnesses and evidence.
- State that interim measures are available during an investigation.
- State that the ability to investigate effectively may be limited if the complainant requests confidentiality.
- Explain the option for a support person to be present and what role(s) that person may play (i.e., silent support that does not interrupt the process), as well as prohibited conduct (such as advocating for, giving information on behalf of, or cross examining a participant).

### Resolution/Adjudication Procedures

- Describe all types of resolution procedures that may be used, including the steps, the anticipated timelines, the decision-making process, and how the institution determines which procedure will be used to resolve a complaint.
- Explain the process:
  - State that the preponderance of evidence standard will be used.
  - State that mediation will not be used in cases of sexual assault/violence.
  - Explain the nature of the process (i.e., hearing model):
    - who will have access to information and what decisions they will make
    - how they are trained, including annual training.
  - Explain how to address concerns about conflict of interest or bias, including a statement that in the rare case in which conflict of interest occurs, how that will be disclosed, and a reminder of available appeal options.
  - Describe the format of adjudication, including the option to participate without being in the same room with other parties.
- Describe the rights of the complainant and respondent:
  - Notice of hearing/adjudication process
  - Opportunity to present witnesses and information
  - What kinds of things will NOT be permitted, including direct cross examination:
    - Questions about the complainant's prior sexual conduct with anyone other than the perpetrator, and even in those cases, ONLY consider past sexual history if

there is a prior sexual relationship between the parties that is relevant to the issue of consent

- Clarify that evidence of a prior consensual relationship by itself does not imply consent or preclude a finding of sexual misconduct.
- Opportunity to have a support person (in addition to any person providing accommodations under ADA) and that individual's role(s) in process: specifically, to support the individual student, not to represent him/her
- Depending on the institution's practice, inform that, if an attorney is present during an institutional proceeding, the institution also reserves the right to have an attorney present.

### **Outcomes**

- Explain possible findings (responsible/not responsible).
- Explain all possible final sanctions.
- Explain possible remedies, including the range of protective measures offered for the complainant and for the campus community.
- Describe how the parties will be informed of the outcomes:
  - In writing, simultaneously
  - A rationale for the findings and any sanctions will be shared
  - The explanation of how to appeal
  - Assurance that the institution will not impose a nondisclosure agreement on either party
  - Resources/support options that are available to assist with processing the outcomes
- Describe the grounds for appeal, including deadlines and how to submit the appeal:
  - Explain the timeframe for processing the appeal.
  - Explain the process for an appeal, including who can see the information and make decisions.
  - Explain how the other party will be informed if an appeal is submitted and what information he/she can submit at that time.
  - Explain how parties will be informed of the outcome, including any changes and when the outcomes are final.
- Reiterate the time frame by which outcomes can be expected (generally 60 days from filing of report, exclusive of appeals).

### **Title IX Coordinator Contact**

- Reiterate the Title IX Coordinator's role and contact information.
- Include OCR contact information.

### **Appendix C: Training Competencies for Adjudicators and Hearing Board Members**

No matter what type of resolution is used, ensure that adequate, ongoing, and effective training is provided for participants. The following topics should be addressed to ensure that adjudicators and hearing board members understand the core competencies of the field.

- History of student conduct on campuses
- Students' rights and procedural protections
- Terminology used in student conduct
- The campus's Student Code of Conduct (as well as any policies on sexual misconduct if they are separate) and the role it plays on campus
- Overview of the campus conduct process, including appeals
- How campus processes differ from criminal or civil court
- Goals of the adjudication process
- Responsibilities and expectations of the hearing body
- Roles of the participants (complainant, respondent, witnesses, board, advisors, etc.)
- How to facilitate a hearing
- How to ask questions effectively and appropriately
- How to evaluate various types of evidence
- How to evaluate credibility
- How to analyze policy
- How to deliberate toward resolution
- The standard of proof (preponderance of evidence)
- Sanctions and how to determine appropriate ones
- FERPA and privacy of information
- Cultural competencies, including understanding of differences that may be exhibited during a hearing or investigation
- Common problems that may arise and how to address them

Additional topics should be covered with any entity that is involved with the resolution of complaints of sexual misconduct. The following list draws from the April 2014 OCR Q & A Guidance and recommendations from the Office of Violence Against Women, with additional suggestions that promote a fundamentally fair process for both complainant and respondent:

- Training or experience in handling sexual violence complaints
- Training or experience in the operation of the school's grievance procedures
- Information on working with and interviewing persons subjected to sexual violence
- Information on particular types of conduct that would constitute sexual violence, including same-sex sexual violence
- Information on consent and the possible role of drugs or alcohol in the ability to consent
- The importance of accountability for persons found to have committed sexual violence
- The need for remedial actions for the perpetrator, complainant, and school community
- The effects of trauma, including neurobiological change
- Cultural awareness training regarding how sexual violence may affect students differently, depending on their cultural backgrounds
- How both trauma and defense mechanisms can play out in a hearing
- Dispelling common misperceptions about sexual assault in society (e.g., "rape myths")



## **About the Authors**

### **Laura Bennett, President-Elect of ASCA**

Laura currently serves as the Student Conduct Officer at William Rainey Harper College, where she administers the student conduct process and chairs the campus threat assessment/behavioral intervention team. She conducts Title IX investigations for student-to-student misconduct and is in the process of drafting revisions to the campus's *Guide to Sexual and Gender-Based Misconduct*. Prior to her role in the community college setting, Laura served as the Assistant Director of the Center for Student Conduct and Community Standards at the University of California, Berkeley. There she experienced a hybrid adjudication model where she resolved cases informally and presented cases to boards on behalf of the University. Laura's foundational student conduct experience is from Colorado College, where she oversaw the student conduct procedures in the residential halls, implemented an investigation-based resolution model and served as the campus's lead investigator. Laura has advised a campus LGBT student organization, and a student organization devoted to sexual assault prevention with a 24-hour hotline offering response to victims/survivors. She has provided training to participants at all stages of the resolution process, including panel members, adjudicators, investigators, student advisors, and appellate boards at public, private, and community college campuses. Laura received a M.Ed. in College Student Services Administration with a minor in Gender Studies from Oregon State University and a B.G.S. in English from the University of Kansas. Her ASCA leadership experience includes serving as the 2012 Annual Conference Chair, the first Director of Community College, and faculty at the Gehring Academy.

### **D. Matt Gregory, President of ASCA**

Matt serves as the Associate Dean of Students and Director of Student Advocacy & Accountability at Louisiana State University (LSU) in Baton Rouge. Matt serves on the CARE Team, aids in threat assessment, and recently was involved in drafting the system policy addressing Title IX on system campuses. Prior to his role at LSU, Matt served as a lead conduct officer within Housing & Residence Life at the University of Southern Indiana (USI). During Matt's tenure at USI, he completed a doctoral degree in 2009; his dissertation focused on male advocacy against sexual violence on college campuses. Matt is a former law enforcement professional at both the campus and federal levels and is a certified Rape Aggression Defense (RAD) instructor. Prior to entering law enforcement, Matt had responsibility for addressing student behavior at Southern Illinois University, The College of William & Mary, and Western Kentucky University. Matt received a PhD in Education Administration from Southern Illinois University, a Master of Education degree with a concentration in counseling and student affairs from Western Kentucky University, and a Bachelors of Science degree in Biological Sciences from Southern Illinois University. Matt joined ASJA in 1996 and has since served ASCA in a variety of leadership capacities, including one term as the Association Secretary prior to serving as ASCA President.

### **Chris Loschiavo, Immediate Past President of ASCA**

Chris Loschiavo is Associate Dean of Students and Director of Student Conduct and Conflict Resolution at the University of Florida (UF). He is responsible for oversight of the campus response to student behavioral and honor code-related issues, including cheating and plagiarism, alcohol and other drug issues, and physical violence, dating violence, and sexual misconduct. He is Deputy Title IX Coordinator for students, serves on the institution's Behavioral Consultation Team, and teaches a conduct committee training class each spring semester for prospective conduct board members. Prior to coming to UF, Chris served as Director of Student Conduct and Community Standards at the University of Oregon (1999–2007). At both institutions, Chris has overseen major revisions to the Student Conduct



Code. Chris currently serves as Immediate Past President of ASCA and has served as a faculty member at the ASCA Gehring Academy for the past 4 years. He is known throughout the profession for his work with conflict resolution, particularly for his work with Restorative Justice. In 2012, Chris was awarded the ASCA Donald D. Gehring Award for lifetime contributions to the field. Under Chris's leadership, the UF Conflict Resolution Initiative was recognized with the ASCA Innovation Award, and Student Conduct and Conflict Resolution at UF was awarded by ASCA the Institutional Award of Excellence as the top conduct program in the country. Chris received both B.A. and J.D. degrees from the University of Florida.

**Jennifer Waller, Executive Director of ASCA**

Jennifer joined the organization in January 2012. She has worked in Residence Life at five institutions of higher education, including Texas A&M University, the University of Hawaii at Manoa, Texas Tech University, the University of Wisconsin–La Crosse, and Eastern Illinois University. She earned a doctorate in Higher Education Administration at Texas A&M University and holds Master's degrees from the University of Hawaii at Manoa and Eastern Illinois University and a Bachelor of Science degree from Eastern Illinois University. In 2014, Jennifer was awarded Dissertation of the Year recognition by ASCA for her research on student conduct administrators.

The Association for Student Conduct Administration (ASCA) supports and serves professionals who transform student behavior and address its impacts within higher education communities. For more information or to become a member, visit <http://theasca.org>.