

Model Code of Student Conduct

Foundation for Individual Rights in Education (FIRE)¹

¹ FIRE would like to thank the primary contributors to this Model Code, Catherine Sevckenko, Senior Counsel for the National Council for Incarcerated & Formerly Incarcerated Women & Girls, and formerly the Director of Litigation for FIRE, and Zach Greenberg, Program Officer for FIRE. FIRE would also like to thank FIRE staff who assisted in drafting this Code, as well as KC Johnson, Harvey Silverglate, and Robert Kamenshine for their invaluable help.

TABLE OF CONTENTS

| | |
|--|----|
| FOREWORD | 3 |
| DEFINITIONS..... | 4 |
| Section I. INTERPRETIVE PRINCIPLES..... | 7 |
| Section II. JURISDICTION | 8 |
| Section III. PROHIBITED CONDUCT | 11 |
| Section IV. STUDENT CONDUCT CODE ADMINISTRATIVE STRUCTURE..... | 19 |
| Section V. INTERIM MEASURES..... | 20 |
| Section VI. PROCEDURES FOR NON-TITLE IX ALLEGATIONS..... | 23 |
| Section VI.1 PRELIMINARY PROCEDURES | 23 |
| Section VI.2 MEDIATION..... | 28 |
| Section VI.3 STUDENTS' PROCEDURAL RIGHTS..... | 30 |
| Section VI.4 APPEALS | 40 |
| Section VII. PROCEDURES FOR TITLE IX ALLEGATIONS..... | 42 |
| Section VII.1 PRELIMINARY PROCEDURES..... | 42 |
| Section VII.2 MEDIATION | 47 |
| Section VII.3 STUDENTS' PROCEDURAL RIGHTS | 48 |
| Section VII.4 APPEALS..... | 53 |
| Section VIII. SANCTIONS | 56 |
| Section IX. CONFIDENTIALITY..... | 58 |

FOREWORD

This Model Code of Student Conduct is a guide for college and university administrations for governing student life. Inspired by Edward Stoner and John Lowery's influential and widely cited Model Student Conduct Code, published in 2004 in the *Journal of College and University Law*,² this is a practical document consisting of comprehensive policies and procedures. Our work attempts to further refine Stoner and Lowery's foundation, with a particular emphasis on student rights.

To that end, this Code is informed by the work of the Foundation for Individual Rights in Education (FIRE), a nonpartisan nonprofit organization that has defended student and faculty civil liberties since 1999. Its provisions are a distillation of FIRE's experience and expertise gained through over two decades of studying college and university disciplinary systems and responding to daily requests for assistance from students, faculty members, and administrators nationwide. We hope to have created a document that not only builds upon Stoner and Lowery's Model Student Conduct Code, but revisits and updates its recommendations based on FIRE's daily work defending student and faculty rights.

This Code strives for completeness and fundamental fairness through a structure that is intelligible to the entire campus community. We begin with a list of basic definitions to inform the rest of the discussion. Next, we move to the college's jurisdiction, answering the important question of who is covered under this Code, followed by provisions regarding prohibited conduct. We walk through the disciplinary process, starting with preliminary measures, then student conduct procedures, and concluding with the appeals process and confidentiality provisions. A deeper discussion of our rationale for each provision is found in the accompanying notes for each section.

Special attention should be given to Sections VI–VII, which describe procedures for adjudicating non-academic misconduct, including sexual assault. Our goal is to craft procedures that are responsive to government mandates while ensuring fundamental due process for all parties. Due to the changing nature of the law in this area, the notes following this section are of particular importance, as they discuss the principles underlying each procedure.

In sum, this Code is an embodiment of FIRE's belief that protecting student civil liberties is a necessary prerequisite for preparing our democracy's next generation for successful leadership and engaged citizenship. We look forward to discussing these principles, and we sincerely hope educational institutions will consider adopting its provisions.

² Edward N. Stoner II & John Wesley Lowery, *Navigating Past the "Spirit of Insubordination: A Twenty-First Century Model Student Conduct Code With a Model Hearing Script*, 31 J.C. & U.L. 1 (2004). We are very grateful to Dr. Lowery for his insightful comments on earlier drafts of this Code.

DEFINITIONS

All of the terms in this Student Code of Conduct (“Code”) have their common dictionary meanings unless otherwise specified. The following terms, however, should be interpreted to have the specific meanings listed below.

Academic Dishonesty: Any act that violates rules regarding academic work required to obtain an academic degree. Examples include but are not limited to cheating, plagiarism, receiving unauthorized assistance on coursework, and providing false information to receive an extension to complete work or to secure any other advantage.

Appellate Panel: An impartial body of no fewer than three members convened to consider an appeal from a Student Conduct Board’s finding that a Respondent has violated the Code.

Board: See Student Conduct Board.

Campus: All land, buildings, facilities, and other real property owned or leased by the College.

College: The college, university, community college, or professional school promulgating this Code.

College Official: Any non-student member of the College administration.

Complainant: Any member of the Educational Community who alleges that a student violated the Code.

Discriminatory Harassment: (1) A pattern of targeted, unwelcome conduct (2) directed at an individual (3) that is discriminatory on the basis of race, color, national origin, disability, religion, age, sex, sexual orientation, gender, gender identity, or other immutable status, and (4) that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the College’s educational programs or activities.

Educational Community: All persons affiliated with the College, including students, faculty, administrators, staff, and volunteers.

Free Speech Rights: The expressive rights protected by the First Amendment for students attending public colleges and their equivalent at private colleges that promise their students freedom of expression. If private universities promise their students free speech, then Free Speech Rights at private universities should be considered coextensive with those at public universities.

Hearing: See Student Conduct Board Hearing.

Interim Measures: College action taken on a temporary basis that limits the Respondent's access to Campus before the case can be heard in order to protect the physical health or safety of the Complainant or other members of the Educational Community.

Panel: See Appellate Panel.

Parties: The Complainant(s) and Respondent(s) in a Student Conduct Code case.

President: The chief executive officer of the College, which includes similar titles such as Chancellor or Dean (if the head of an independent subdivision, such as a law or medical school).

Supportive Measures: Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the Complainant or the Respondent before or after the filing of a formal complaint or where no formal complaint has been filed.³

Respondent: Any student accused of violating this Code.

Responsible Student: A Respondent determined to have violated the Student Conduct Code.

Sexual Assault: An offense that either: 1) meets the definition of rape, fondling, incest, statutory rape, dating violence, domestic violence, or stalking as defined in the Clery Act; or 2) violates the sexual assault laws of the state in which the College sits.⁴

Sexual Harassment: See Discriminatory Harassment.

Sexual Misconduct: Any violation of this Code or criminal law involving non-consensual conduct of a sexual nature.

Student: Any person taking courses at the College, full-time or part-time, or pursuing any course of study. This includes students who withdraw while disciplinary charges are pending, who are taking a leave of absence, who have matriculated, or who are living in College residence halls or other housing provided by the institution.

Student Conduct Administrator: A College employee who is responsible for the implementation of this Code, including Title IX coordinators, investigators, and decision-makers.

³ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30574 (2020) (to be codified at 34 C.F.R. § 106.30) (hereinafter "Title IX Regulations").

⁴ 34 C.F.R. § 668.46(a) (2019) (definitions); Title IX Regulations, *supra* note 3, at §106.30.

Student Conduct Board: An impartial body of no fewer than three members with an additional non-voting presiding member authorized by the President of the College to determine whether a student has violated the Code and, upon a finding of such a violation, to impose appropriate sanctions.

Student Conduct Board Hearing: The formal forum attended by Parties in which evidence is presented, witnesses are heard, and decisions concerning responsibility and sanctions, if applicable, are made.

Student Organization: Any number of persons who have as a group engaged in a particular activity that has complied with the formal requirements for official College recognition.

NOTES

This Code should be understood as a normative guide to ensuring fundamental fairness rather than an assertion of positive law. Private colleges are not bound by the Constitution, which regulates only government actors. However, if private colleges promise their Students civil liberties in codes of conduct and other documents, as the vast majority do, they are morally (and, in some states, legally) obligated to honor their commitments.⁵ In California, the “Leonard Law” provides explicit protection to Student speech rights at private colleges.⁶

The Sexual Assault definition tracks the Federal Bureau of Investigation’s Uniform Crime Reporting definitions, which schools must adopt for crime reporting purposes under the Clery Act.⁷ This allows the College to use consistent definitions to address Campus crime and report crime statistics. The College must specify the definition being used when charging Students with Sexual Assault under this Code.

⁵ See, e.g., *Mangla v. Brown Univ.*, 135 F.3d 80, 83 (1st Cir. 1998) (“The student-college relationship is essentially contractual in nature.”); see also Kelly Sarabyn, *Free Speech at Private Universities*, 39 J.L. & EDUC. 145 (2010).

⁶ Cal. Educ. Code § 94367(a) (“No private postsecondary educational institution shall make or enforce a rule subjecting a student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that . . . is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution.”).

⁷ 34 C.F.R. § 668.46(a) (2019) (definitions).

Section I. INTERPRETIVE PRINCIPLES

Section I.1 The authority of the Code derives directly from the governing body of the College (such as a Board of Trustees). The President of the College is responsible for ensuring that this Code is implemented as written and is applied in an impartial and consistent manner.

Section I.2 Nothing in this Code shall be interpreted to abridge the constitutional or statutory rights of any Student or to contradict the College's promises and representations to Students.

Section I.3 All Respondents are presumed innocent until an authorized disciplinary Board finds them responsible for a violation of this Code after a prompt, fair, and impartial Hearing.

Section I.4 A sound decision may be achieved only by a fundamentally fair adjudicatory process. This Code should therefore be interpreted consistently, regardless of the alleged Code violation. Those responsible for the disciplinary process shall implement it in a way that is transparent, credible, and rigorous, and that generates confidence in its determinations.

Section I.5 Examples of proscribed conduct in Section III are illustrative and should not be read as a comprehensive list. However, the College may punish Students under the Code only if their conduct is explicitly and lawfully prohibited by the Code or by law.

Section II. JURISDICTION

Section II.1 Students are required to follow the Code during the time they are enrolled in the College. The Code shall apply to a Student’s conduct while enrolled even if the Student withdraws from the College while a disciplinary matter is pending.

Section II.2 The Code shall apply to all conduct that occurs on the College’s Campus. The Code shall also apply to Academic Dishonesty regardless of location, even if the Academic Dishonesty is not discovered until after a degree is awarded.

Section II.3 With the exception of Academic Dishonesty, the Code shall not apply to off-campus conduct unless the conduct occurs during a semester in which the Respondent is registered for classes, and the off-campus conduct:

- a) Occurs in a context in which the College exercises substantial control over both the location and the Respondent; or
- b) Triggers the College’s responsibilities under federal, state, or local law.

Section II.4 If necessary to protect the rights and safety of the Educational Community, the College may suspend any Student charged with a felony in any jurisdiction until charges are dropped, the case is dismissed, or a judgment of conviction or acquittal is secured. The College must comport with the procedures of Sections VI–VII before taking this action.

Section II.5 If necessary to protect the rights and safety of the Educational Community, the College may expel any Student who has been convicted of a felony while enrolled. If the Student’s conviction is overturned on appeal, the College shall allow the Student to re-enroll. The College must comport with the procedures of Section VI–VII before taking this action.

NOTES

This Section aims to balance three competing interests: that of the College in maintaining a productive learning environment and its academic reputation, that of the Student to be free from unwarranted interference from the College, and the right of all Students to an environment in which they can partake of the educational opportunities that the College offers.⁸

⁸ Compare *Hill v. Bd. of Trs. of Mich. State Univ.*, 182 F. Supp. 2d 621, 627, n.2 (W.D. Mich. 2001) (stating that a school may take off-campus conduct into account if the perpetrator might commit the same harmful acts on campus) with *Roe v. St. Louis Univ.*, 746 F.3d 874, 884 (8th Cir. 2014) (finding university not liable under Title IX due to lack of sufficient control over sexual harassment at an off-campus party) and *Ostrander v. Duggan*, 341 F.3d 745, 750 (8th Cir. 2003) (finding university not liable under Title IX for actions at a fraternity house that it “did not own, possess, or control”); see also *Yeasin v. Univ. of Kan.*, 360 P.3d 423, 430 (Kan. Ct. App. 2015) (“It seems obvious that the only environment the University can control is on campus or at University sponsored or supervised events. After all, the University is not an agency of law enforcement but is rather an institution of learning.”).

Accordingly, the College's jurisdiction is broadest over actions that take place on its property or under its sponsorship off-campus. The College has an additional right to discipline a Student for Academic Dishonesty wherever it occurs because "there are distinct differences" between punishing a Student for academic reasons as opposed to acts of non-academic misconduct.⁹ Acts of Academic Dishonesty in particular have "significant ramifications on the discipline and rigor of the University's intellectual enterprise and, as a result, on the University's reputation in the broader academic and scientific community."¹⁰ Therefore, the College must have wide latitude to take action to maintain its academic integrity.

However, a university does not act *in loco parentis* over its Students.¹¹ As the United States Court of Appeals for the Third Circuit has explained:

[T]he pedagogical missions of public universities and public elementary and high schools are undeniably different. While both seek to impart knowledge, the former encourages inquiry and challenging a priori assumptions whereas the latter prioritizes the inculcation of societal values. Public universities encourage teachers and students to launch new inquiries into our understanding of the world. . . . The idea that public universities exercise strict control over students via an *in loco parentis* relationship has decayed to the point of irrelevance.¹²

The passage of the Twenty-Sixth Amendment, which reduced the voting age to 18, was tantamount to "declaring [18-year-olds] full citizens in the constitutional order, [and thus it] would permanently end the legitimacy of the paternalistic legal relationship between students and the university."¹³ Since then, the overwhelming majority of college Students are now adults and thus are generally free from a College's invasion of privacy or regulation of morality. The courts began recognizing over 60 years ago that "[c]ollege administrators no longer control the broad arena of general morals. . . . [T]oday students vigorously claim the right to define and regulate their own lives."¹⁴

In return, schools have a lower level of responsibility to supervise their Students. For example, "under New York law, colleges have no legal duty to shield students or their

⁹ Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 87 (1978); see, e.g., Hand v. Matchett, 957 F.2d 791, 794 (10th Cir. 1992) (holding that a college's wide-ranging power to punish academic dishonesty includes the ability to revoke a degree).

¹⁰ Pugel v. Bd. of Trs. of the Univ. of Ill., 378 F.3d 659, 668 (7th Cir. 2004) (applying First Amendment analysis in the enrollment and employment context to hold that the university did not violate a graduate student's free speech rights by terminating her employment as a teaching assistant and expelling her from the university when she presented false data at a conference).

¹¹ McCauley v. Univ. of the Virgin Islands, 618 F.3d 232, 243-44 (3d Cir. 2010).

¹² *Id.* at 243, 245.

¹³ Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split Over College Students' First Amendment Rights*, 14 TEX. J. C.L. & C.R. 27 (2008).

¹⁴ Bradshaw v. Rawlings, 612 F.2d 135,140 (3d Cir. 1979).

guests from the harmful off-campus activity of other students.”¹⁵ This Code recognizes that Students are adults and that the College’s ability to control Student behavior off-campus is limited to the authority needed to protect itself from liability.¹⁶ By restricting jurisdiction to situations where the College exercises substantial control over both the area and the Respondent, jurisdiction is limited to circumstances where the College exercises direct supervision, ownership, or rulemaking authority.¹⁷

Sections II.4–5 make clear, however, that a school may take appropriate action against a Student who is accused or convicted of a serious crime, especially one that involves allegations of violence, even if the event takes place off-campus.¹⁸ These provisions recognize that higher education administrators must be allowed ample leeway to preserve the safety of other Students.

¹⁵ *Guest v. Hansen*, 603 F.3d 15, 21 (2d Cir. 2010).

¹⁶ *Hartman v. Bethany Coll.*, 778 F. Supp. 286, 291 (N.D. W. Va. 1991) (stating it would not be consistent with the “settled expectations of students, parents or colleges” to require colleges to supervise student activities that take place off-campus and that are not sponsored by the college).

¹⁷ *Compare Davis v. Monroe County Board of Education*, 526 U.S. 629, 646 (1999) (finding that the school exercised substantial control over the alleged peer harassment because it occurred during school hours and on school grounds) *with* *Guest*, 603 F.3d at 22 (holding that the school did not exercise control over a snowmobile accident because the most of the dangerous activity occurred off campus).

¹⁸ *Krasnow v. Virginia Polytechnic Inst. & State Univ.*, 414 F. Supp. 55 (4th Cir. 1976) (finding no substantive due process violation in university’s use of disciplinary process to punish student on probation for alleged off-campus drug possession); *Furey v. Temple Univ.*, 884 F. Supp. 2d 223, 248 (E.D. Pa. 2012) (allowing university to take action against a student for an alleged off-campus attack on police officers).

Section III. PROHIBITED CONDUCT

Section III.1 Any Student under the College's jurisdiction found responsible for committing, or attempting to commit, the conduct prohibited in this Section is subject to disciplinary sanctions.

Section III.2 Cheating, plagiarism, or other forms of Academic Dishonesty, as determined by College faculty, are prohibited.

Section III.3 Deliberately and maliciously deceiving any College Official, faculty member, or administrative officer by knowingly providing false information in connection with the discharge of the Official's duties is prohibited.

Section III.4 Forgery of any College document, record, or form of identification is prohibited.

Section III.5 True threats are prohibited. A true threat is (1) a serious expression of intent to commit an act of unlawful violence against a particular individual or identifiable group, if (2) the individual or group would reasonably fear the threatened violence. This includes threats to self.

Section III.6 Intimidation is prohibited. Intimidation is physical conduct threatening specific individual(s) with the intent to place those individuals in fear of bodily harm or death.

Section III.7 Stalking is prohibited. Stalking is (1) a course of conduct committed with the intent to kill, injure, harass, or intimidate another person that (2) places that person in reasonable fear of the death of, or serious bodily injury to (3) that person, an immediate family member, a spouse, or an intimate partner of that person; or (4) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person listed above.

Section III.8 Substantially and materially disrupting the normal operations of the College, or inciting others to do so, is prohibited. Students shall not intentionally cause a substantial and material disruption to any of the following activities:

- a) Teaching or research;
- b) Administrative functions;
- c) Disciplinary proceedings;
- d) Other College-sponsored activities, on or off Campus; or
- e) Other authorized or permissible activities that take place on Campus.

Section III.9 Discriminatory harassment is prohibited. Discriminatory harassment is (1) a pattern of targeted, unwelcome conduct (2) directed at an individual (3) that is discriminatory on the basis of race, color, national origin, disability, religion, age, sex,

sexual orientation, gender, gender identity, or other immutable status, and (4) that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the College's educational programs or activities.

Section III.10 Sexual Misconduct is prohibited. Sexual Misconduct includes behaviors that have been determined to constitute discrimination under Title IX of the Education Amendments of 1972.¹⁹ These behaviors consist of:

(a) **Sexual Harassment**—Sexual Harassment takes two forms:

- 1) **Quid pro quo sexual harassment** occurs when a person in authority causes a Student to believe that he or she must submit to unwelcome sexual conduct in order to participate in a school program or activity. It can also occur when an employee causes a Student to believe that the employee will make an educational decision based on whether the Student submits to unwelcome sexual conduct.
- 2) **Hostile environment sexual harassment** is (1) a pattern of targeted, unwelcome conduct (2) directed at an individual (3) that is discriminatory on the basis of sex, sexual orientation, gender, gender identity, and (4) that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the College's educational programs or activities.

(b) **Sexual Assault**—Sexual Assault is nonconsensual physical sexual contact as defined by applicable criminal law and the Clery Act. A person is incapable of giving consent when incapacitated or under unlawful coercion or threat of violence. Students are subject to local, state, and federal laws that prohibit rape and Sexual Assault. Violation of these laws on Campus or at College-sponsored activities constitutes Sexual Misconduct.

Section III.11 The College's power to punish Students for violations of local, state, or federal law is limited to the following circumstances:

- (a) If necessary to protect the rights and safety of the Educational Community, the College may take any action up to suspension (under Section II.4) against a Student who has been charged with any felony and up to expulsion (under Section II.5) against a Student who has been convicted of any felony.
- (b) The College may punish Students for any criminal act bearing a substantial nexus to the College's property, programs, or Educational Community.
- (c) The College may punish Students for the violation of any law involving drugs or alcohol on its property or as part of its activities.

¹⁹ 20 U.S.C. § 1681 (1976).

Section III.12 Students shall not abuse their access to Campus by engaging in any of the following:

- (a) Unauthorized entry to, or use of, College facilities, property, or resources; or
- (b) Misuse of College or personal property to create a safety hazard, or unauthorized use of safety equipment.

Section III.13 Deliberately setting off a false fire alarm or knowingly giving a false report of a crime or emergency is prohibited.

Section III.14 Students shall comply with lawful directions of College Officials or law enforcement officers acting in the good faith performance of their duties and shall identify themselves to these persons when reasonably requested to do so. Nothing in this provision should be interpreted as abridging the Fifth Amendment privilege against self-incrimination or the First Amendment right to anonymous speech.

Section III.15 Unlawfully endangering the health, safety, or privacy of others is prohibited, including:

- (a) Illegal or unauthorized possession of firearms, explosives, other weapons, or dangerous chemicals;
- (b) Obstruction of the free flow of pedestrian or vehicular traffic;
- (c) Creation or publication of an audio or video recording without the subject's consent if that person has a reasonable expectation of privacy or if the recording is prohibited by state law; or
- (d) Physical assault of another person.

Section III.16 Theft, vandalism, and destruction of property own by the College or any other person or group are prohibited.

Section III.17 Hazing is prohibited. Hazing is conditioning new or continued membership in a group or organization upon any act that is in violation of the Code, or that recklessly endangers a person's mental health or physical safety.

Section III.18 Abuse of computer facilities and resources is prohibited, namely:

- (a) Unauthorized access or transfer of an electronic file or files;
- (b) Unauthorized use of another individual's identification or password;
- (c) Use of computing facilities and resources to materially interfere with the work of another Student, faculty member, or College Official;
- (d) Sending a large volume of unsolicited emails or other data with the intent to severely impair the functionality of the College's computer network;

- (e) Repeated use of the College network to send unsolicited emails with the primary purpose of proposing a commercial transaction;
- (f) Use of computing facilities and resources to knowingly share copyrighted materials in violation of state or federal law;
- (g) Use of computing facilities and resources to transmit unlawful obscenity; or
- (h) Use of computing facilities and resources to campaign for public office, or to perform official duties on behalf of an election campaign, or in any other manner that reasonably suggests the College itself is participating in political activity, campaigning, or fundraising, or attempting to influence legislation. Merely sharing or discussing personal political beliefs through the College’s computing facilities and resources is not a violation of this subsection.

Section III.19 This Code incorporates all other College rules regarding Student conduct, but only if:

- (a) The rule is published in hard copy or available electronically, and is readily available to Students; and
- (b) The rule does not conflict with this Code or with the rights of Students.

NOTES

Due process requires that prohibitions be articulated so that the average person can understand what conduct is not allowed. While the level of detail required for school codes of conduct is relaxed compared to criminal law, the requirement of clarity still applies.²⁰ For all incorporated rules, proper notice is required; no Student may be punished under a rule that is not readily accessible or is impermissibly vague.²¹ This bar is set particularly high where Free Speech Rights are implicated.²²

This list of proscribed conduct is divided into two categories: Academic Dishonesty and behavioral misconduct. A College has broad discretion in adjudicating allegations relating to academic matters. However, even in academic cases, schools must adhere to basic standards of fairness and cannot rely on allegations that are based on “either hearsay, anonymous notes or . . . sheer speculation.”²³ Accordingly, the prohibitions against Academic Dishonesty in this Code are designed to comport with due process yet leave the College the latitude necessary to maintain academic standards.

²⁰ See *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 686 (1986).

²¹ *Goss v. Lopez*, 419 U.S. 565, 581 (1975).

²² *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1309 (8th Cir. 1997) (noting “a proportionately greater level of scrutiny is required because the regulation reaches the exercise of free speech.”).

²³ See *Papelino v. Albany Coll. of Pharm. of Union Univ.*, 633 F.3d 81, 87 (2d Cir. 2011) (describing New York state appellate court decision to annul an expulsion based on an invalid “statistical compilation” purportedly showing that the plaintiffs cheated).

Sections III.8(d) and (e) prohibit substantially and materially disrupting an event via violence or other means to prevent a speaker from speaking, otherwise known as a “heckler’s veto.” This should not be construed to prevent Students from peacefully protesting and demonstrating against speakers at College-sponsored or other authorized events when those activities do not create a substantial or material disruption to the functions of the College, or a College-sponsored or other authorized event, or substantially or materially prevent others from exercising their Free Speech Rights.

In evaluating whether conduct is substantially and materially disruptive under Section III.8, the College must consider whether a person, with the intent to or knowledge of doing so, significantly hinders another person’s or group’s expressive activity, prevents the communication of a message, or prevents the transaction of the business of a lawful meeting, gathering, or procession. Such intent may be demonstrated by violence, seriously disruptive behavior, or physically blocking or hindering another person from attending, listening to, viewing, or otherwise participating in expressive activity. This prohibition does not include engaging in conduct that is protected under the First Amendment. For example, the College may not restrict lawful protests or counterprotests in the outdoor areas of campus generally accessible to the members of the public, except during times when those areas have been reserved in advance for other events. Nor may the College punish minor, brief, or fleeting nonviolent disruptions of events that are isolated and short in duration.

The harassment definitions found in Sections III.9–10 are adopted from *Davis v. Monroe County Board of Education*, which provides the standard for student-on-student (or peer) hostile environment harassment in the educational context under Title IX.²⁴ It is vital that the College refrain from using harassment policies to punish or investigate protected speech, and the College may protect the freedom of speech while prohibiting actionable harassment by tracking this Code’s definitions. Straying from these definitions may result in successful litigation against the College.²⁵

²⁴ 526 U.S. 629, 651 (1999); *see also* U.S. Dep’t of Educ, Office for Civil Rights, *Commentary on Title IX Regulations*, 449–529 (May 7, 2020), (describing how the *Davis* standard protects free speech while allowing educational institutions to address and prevent sexual harassment), available at <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf>.

²⁵ *See* *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 237 (3d Cir. 2010) (striking down university harassment policy prohibiting “any act which causes . . . mental harm or which . . . frightens, demeans, degrades or disgraces any person”); *DeJohn v. Temple Univ.*, 537 F.3d 301, 319 (3d Cir. 2008) (permanently enjoining university from enforcing overbroad sexual harassment policy that “provides no shelter for core protected speech”); *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1184 (6th Cir. 1995) (finding university racial harassment policy prohibiting “negative” and “offensive” speech unconstitutionally vague and overbroad); *Booher v. Bd. of Regents, N. Kentucky Univ.*, No. 2:96-CV-135, 1998 WL 35867183, at *9 (E.D. Ky. July 22, 1998) (finding university sexual harassment policy unconstitutionally vague because subjective language failed to give students notice of what was prohibited).

There are two main principles the College must keep in mind when enforcing harassment policies. First, Students cannot be punished solely on the basis of speech that third parties find subjectively offensive, as offensive speech is generally protected by the First Amendment.²⁶ The second principle is that the speech in question must be directed at an individual in order to constitute harassment.²⁷ This targeting requirement ensures that Students are not charged with harassment merely because third parties happen to overhear remarks they find subjectively offensive.²⁸ By faithfully following the Code's definition and declining to punish Students for "free-floating" offensive speech, the College will create an environment where Students may have robust discussions without fear of being charged with harassment for giving subjective offense.²⁹

Under Section III.11, the College has the power to punish criminal conduct not otherwise prohibited by this Code. Such jurisdiction is defined by state and federal law governing the legal obligations of institutions of higher education. To punish a Student under this Section, the College must prove every element of the criminal offense by clear and convincing evidence, including the substantial nexus to the College's property, programs, or educational programs under Section III.11(b). Due to limitations on resources and expertise, the Code assumes that the College will defer to law enforcement and the judicial system for the investigation and prosecution of criminal acts. Students should not be found responsible for violations of Section III based on factual findings fundamentally

²⁶ *E.g.*, *Papish v. Bd of Curators of the Univ. of Missouri*, 410 U.S. 667, 670 (1973) ("[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). Note that speech accompanied by non-consensual physical contact is more likely to constitute punishable harassment. *Compare* *Riccio v. New Haven Bd. of Educ.*, 467 F. Supp. 2d 219, 222 (D. Conn. 2006) (repeatedly being called "bitch," "dyke," "freak," "lesbian," "gothic," and other derogatory names was not severe or pervasive enough to amount to actionable harassment) *with* *Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 259 (6th Cir. 2000) (persistent requests for sexual favors combined with inappropriate touching and a physical attack constituted harassment) *and* *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 819–20 (C.D. Ill. 2008) (repeatedly "grabbing, twisting, and hitting" plaintiff's genitals, teasing him about the incidents, reprimanding him for complaining, and telling him to "stick up for himself" constituted harassment).

²⁷ *See* *Lyle v. Warner Bros. Television Prods.*, 132 P.3d 211, 223, 225 (Cal. 2006) (finding that "annoying or merely offensive comments" that "did not involve and were not aimed at plaintiff" did not constitute actionable workplace harassment).

²⁸ *See* *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000) ("Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists."); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992) (arguing that the targeting requirement helps distinguish harassment from protected speech).

²⁹ *See* *Healy v. James*, 408 U.S. 169, 180 (1972) ("The college classroom with its surrounding environs is peculiarly the marketplace of ideas . . .") (internal quotations omitted); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001) ("There is no categorical 'harassment exception' to the First Amendment's free speech clause.").

inconsistent with those established by the judicial system. Also, if the College takes Interim Measures (see Section V) against the Student, such as suspending her pending the outcome of her criminal proceeding, the College must lift these measures in the event of the dismissal of charges or an acquittal.

Example: After a fire in Student A’s dorm room, police investigate, and she is charged with arson. Her school may suspend Student A under Section II.4 while her trial is pending and may expel her under Section II.5 if she is convicted. If she is acquitted, the College must readmit Student A. It may, at its discretion, conduct a disciplinary Hearing under Section III.12(b) (unauthorized use of dangerous materials) or Section III.15 (endangerment). The disciplinary body may not find Student A responsible for unauthorized use of dangerous materials if the factfinder determined at trial that the fire was accidentally caused by an electrical spark. It may, however, find her responsible for endangerment if the spark resulted from an overload of the electrical system because Student A used more than the approved number of appliances in her room. If Student A is found responsible for a Section III violation, the College may sanction her under Section VIII.

Section III.11(c) incorporates local, state, and federal drug laws as required by the Drug Free Schools and Communities Act.³⁰ This act requires the College to provide its Students with information regarding the health, legal, and disciplinary consequences of illicit drug use.³¹

Section III.16 prohibits destroying or defacing any kind of expressive display owned by the College or another person or group on the grounds that it is offensive to the viewer.³² It is important for the Educational Community to understand that there is no right to a “heckler’s veto”; Students cannot suppress someone else’s speech because they find the speaker’s message offensive.³³

The stalking definition in Section III.7 is drawn from the federal anti-stalking law created by the Violence Against Women Act.³⁴ It also covers cyberstalking, which is stalking done through electronic communications such as social media. The intent requirement is intended to prevent the College from using this Section to punish Students for protected expression.³⁵

³⁰ 20 U.S.C. § 1011i (2017).

³¹ *Id.*

³² *See* Giebel v. Sylvester, 244 F.3d 1182 (9th Cir. 2001) (university tearing down fliers announcing a lecture violates the First Amendment).

³³ Forsyth Cty., Ga. v. Nationalist Movement, 505 U.S. 123, 134 (1992) (“Listeners’ reaction to speech is not a content-neutral basis for regulation.”).

³⁴ 18 U.S.C. § 2261A (2018).

³⁵ United States v. Sayer, 748 F.3d 425, 435 (1st Cir. 2014) (stalking statute “clearly targets conduct performed with serious criminal intent, not just speech that happens to cause annoyance or insult”); United States v. Petrovic, 701 F.3d 849, 856 (8th Cir. 2012) (stalking statute incorporates First Amendment concerns by requiring “both malicious intent on the part of the

defendant and substantial harm to the victim”); *United States v. Shepard*, No. CR 10-1032-TUC-CKJ, 2012 WL 113027, at *9 (D. Ariz. Jan. 13, 2012) (“[I]t is a defendant’s intent to kill, injure, or harass, etc. that precludes . . . [the stalking statute] from infringing on First Amendment rights when a person expresses him or herself without the intent proscribed by the statute.”); *United States v. Cassidy*, 814 F. Supp. 2d 574, 588 (D. Md. 2011) (holding stalking statute unconstitutional as applied for punishing online criticism of a religious leader).

Section IV. STUDENT CONDUCT CODE ADMINISTRATIVE STRUCTURE

[This Section is reserved for a description of the College's administrative structure for implementing this Code, including a description of personnel; oversight, selection, and training of Student Conduct Board and Appellate Panel members; and dissemination of information about the Code itself. In terms of the structure of the Board, it shall be no fewer than three members with an additional non-voting presiding member.³⁶]

³⁶ See *supra* Definitions, Student Conduct Board, 6.

Section V. INTERIM MEASURES

Section V.1 If a senior College Official authorized to impose Interim Measures determines that a Respondent poses a direct threat (a significant risk to the physical health or safety of the Complainant or other members of the Educational Community), that Official may impose Interim Measures while the case is being resolved.

Section V.2 Interim Measures may include, but are not limited to:

- (a) Relocating the Respondent to another residence hall or removing the Respondent from Campus housing or Campus entirely;
- (b) Restricting the Respondent's access to College common areas, such as a dining hall, gym, or library;
- (c) Adjusting the Respondent's course schedule to avoid contact with the other Party or others; and/or
- (d) Adjusting or prohibiting the Respondent's participation in non-academic College activities.

Section V.3 In cases involving a Student who poses a direct threat due to a mental health condition, the College's determination that Interim Measures are necessary shall be confirmed or rejected as soon as possible by a licensed mental health professional. The medical health professional must be qualified to make this determination by the laws of the state in which the College is located.

Section V.4 The determination of whether Interim Measures are warranted must be made on a case-by-case basis through an individualized and objective assessment of the Parties' needs and of the Respondent's alleged misconduct.

Section V.5 Imposing Interim Measures is an extraordinary remedy. Interim Measures cannot take effect until a College Official provides the Respondent with written notice, or actual notice followed within 24 hours by written notice, of the reasons for the limitations. Written notice must include a proposed time for an Interim Measures Hearing. The Interim Measures Hearing must take place within 72 hours of receipt of the written notice. The Respondent may, in writing, waive this Hearing or elect to have it at a date not to exceed fifteen business days from the receipt of notice.

Section V.6 The Interim Measures Hearing shall determine whether the Interim Measures shall remain in force pending the resolution of the disciplinary process.

Section V.7 Because the Respondent is presumed innocent, Interim Measures should place only those restrictions on the Respondent's access to Campus that are necessary to ensure the physical safety of the Educational Community in light of the complaint. The Respondent must be afforded the reasonable opportunity to prepare his or her defense and maintain his or her academic standing pending the resolution of the disciplinary process.

Section V.8 If the continued imposition of Interim Measures is established at the Interim Measures Hearing, the Respondent has two business days in which to appeal by submitting a request for review and reasons that the precautions are unnecessary in writing to a Senior College Official who did not impose the Interim Measures. The College must review and lift, alter, or confirm the Interim Measures in writing within five business days of this filing. During the pendency of the appeal, all or some of the Interim Measures may remain in place at the sole discretion of the College.

Section V.9 If the Respondent is found not responsible for the offense which he or she is charged, any Interim Measures in effect shall be immediately withdrawn and the College shall endeavor to restore the Respondent to the position he or she was in prior to the implementation of the Interim Measures. This shall include whatever measures are reasonable and necessary to ensure that the Respondent's academic career is not permanently damaged by the imposition of the Interim Measures.

NOTES

Suspending a Student without a Hearing is generally a violation of due process.³⁷ However, when Campus safety is at issue, the College may take immediate action to suspend a Student based upon reliable information that his or her presence on Campus could threaten physical safety, but “the necessary notice and rudimentary Hearing should follow as soon as practicable.”³⁸ Institutions must have this authority to ensure that Campus remains safe while conducting investigations and disciplinary processes. It is worth emphasizing that even in an emergency situation, the level of due process required depends on “a balancing of the different interests involved.”³⁹

The standards in this Code for determining whether a Student poses a danger are derived from the Americans with Disabilities Act.⁴⁰ Schools have an obligation to preserve the safety of all Students and therefore may take action against a Student who poses a “direct threat,” defined as “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures”⁴¹ According to the Department of Education's Office for Civil Rights (“OCR”), for a direct threat to exist, “there must be a high probability of substantial harm,” not just a “slightly increased or speculative risk,” and such a determination may only be made after “an individualized and objective assessment” of the Student's ability to remain safely on Campus.⁴² In

³⁷ *Wells v. Columbus Tech. Coll.*, 2013 U.S. App. LEXIS 4022, 5–6 (11th Cir. 2013) (citing *Castle v. Appalachian Tech. Coll.*, 631 F.3d 1194, 1200 (11th Cir. 2011)).

³⁸ *Goss v. Lopez*, 419 U.S. 565, 582–83 (1975); *Nguyen v. Univ. of Louisville*, 2006 U.S. Dist. LEXIS 20082 (W.D. Ky. Apr. 14, 2006).

³⁹ *Barnes v. Zaccari*, 669 F.3d 1295, 1306 (11th Cir. 2012) (citing *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976)).

⁴⁰ *See Bragdon v. Abbott*, 524 U.S. 624, 648–49 (1998) (interpreting the ADA).

⁴¹ 28 C.F.R. §35.104 (2016) (definitions).

⁴² *College Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987), *superseded by statute on as stated in* *Shiring v. Runyon*, 90 F.3d 827, 831 (3d Cir. 1996) (requiring individual assessment); *Ascani v. Hofstra Univ.*, No. 98-7756, 1999 U.S. App. LEXIS 7654 (2d Cir. 1999) (order); Letter

making this determination, the College must use “reasonable judgment” based on “the best available objective evidence to ascertain the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices or procedures . . . or services will mitigate the risk.”⁴³ This standard allows the College to make a concerted effort to provide a safe environment while preserving the presumption of innocence that due process requires for the Respondent.

Furthermore, Title II regulations define a direct threat as a “significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services.”⁴⁴ According to the National Association of College and University Administrators (“NACUA”), there has been no official guidance from OCR or the Department of Justice as to whether colleges may remove a Student or impose a medical withdrawal based on the threat a Student may pose to his or her own safety.⁴⁵ In light of the unsettled status of the law in this area, schools should adjust this Code to reflect future clarification from OCR and the courts.

Nothing in this Section shall limit the College’s ability to offer Students Supportive Measures, which the College must offer to Complainants alleging sexual misconduct under Title IX.⁴⁶ Such measures may be appropriate to restore or preserve a Student’s access to the College’s educational programs or activities.⁴⁷ The decision to provide Supportive Measures must be divorced from the Student’s decision whether to file a formal complaint, or any substantive analysis of the merits of Complainant’s accusation, as such measures are aimed at meeting the individual needs of Students. The College must maintain as confidential any Supportive Measures provided to Students to the extent that maintaining such confidentiality would not impair its ability to provide the measures.⁴⁸ Examples of Supportive Measures include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between Parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.⁴⁹

to Marietta College, OCR No. 15-04-2060 31 NDLR 23 (2005); Bowman-Snyder Findings Letter, Compl. # 15-04-2042 (Dec. 22, 2004).

⁴³ 28 C.F.R. §35.139(b) (2011).

⁴⁴ See 28 C.F.R. § 35.104 (2016) and § 35.139 (2011) (emphasis added).

⁴⁵ NACUA NOTES, NEW TITLE II REGULATIONS REGARDING DIRECT THREAT: DO THEY CHANGE HOW COLLEGES AND UNIVERSITIES SHOULD TREAT STUDENTS WHO ARE THREATS TO THEMSELVES?, Vol. 10, No. 1 (Nov. 2011); see Criswell-Bower Findings Letter, Compl. # 15-10-2098 (Dec. 16, 2010).

⁴⁶ Title IX Regulations, *supra* note 3, at §106.44(a).

⁴⁷ FIRE, Comment in Support of the Department of Education’s Proposed Regulations on Title IX Enforcement 3 (Jan 30., 2019), thefire.org/fires-comment-in-support-of-the-department-of-educations-proposed-regulations-on-title-ix-enforcement [hereinafter “FIRE Comment”].

⁴⁸ See Title IX Regulations, *supra* note 3, at § 106.30.

⁴⁹ See Title IX Regulations, *supra* note 3, at § 106.30.

Section VI. PROCEDURES FOR NON-TITLE IX ALLEGATIONS

The following procedures shall only apply to allegations that, if taken as true, would not constitute sexual misconduct under Title IX of the Education Amendments of 1972.

Section VI.1 PRELIMINARY PROCEDURES

Section VI.1.1 Any Student, faculty member, or College staff member may file a complaint against a Student with the Student Conduct Administrator for violations of this Code. Complaints submitted orally or submitted by the Student Conduct Administrator shall be memorialized at the time of submission.

Section VI.1.2 The complaint should be submitted as soon as practicable. Unreasonable filing delays could result in the dulling of memories and a loss of relevant evidence and witness testimony. Delays in filing shall not affect the Complainant's eligibility for Supportive Measures from the College.

Section VI.1.3 Because the College is bound by its obligation to provide a fundamentally fair process, anonymous complaints may be filed, but anonymity may limit the College's ability to respond and may preclude disciplinary action.

Section VI.1.4 Within seven business days of receiving a complaint, the Student Conduct Administrator must decide whether the factual allegations of the complaint, if taken as true, constitute a Code violation, and communicate this decision to Parties. The Student Conduct Administrator shall dismiss a formal complaint if the factual allegations of the complaint, if taken as true, either:

- (a) Fail to constitute a Code violation;
- (b) Occur outside the College's jurisdiction as defined in Section II; or
- (c) Constitute an exercise of a Student's Free Speech Rights

Section VI.1.5 If the Student Conduct Administrator decides that the factual allegations of the complaint, if taken as true, do not constitute a plausible Code violation or constitute an exercise of a Student's Free Speech Rights, the investigation will end immediately.

Section VI.1.6 If the Student Conduct Administrator decides that the factual allegations of the complaint, if taken as true, do constitute a plausible Code violation, the College must provide Parties with:

- (a) A written copy of the complaint as filed; or, if no written submission exists, as memorialized by the Student Conduct Administrator;
- (b) Written notice of the specific Sections of the Code that the Respondent is charged with violating and written notice of the specific actions alleged to have violated them, including the time, date, place, and people involved;

- (c) Instructions on procedures for responding;
- (d) Relevant procedural dates, including the Hearing date;
- (e) Deadlines for responding;
- (f) Contact information for the Student Conduct Administrator coordinating the Hearing;
- (g) Contact information for all Campus Student defenders groups;
- (h) Guidance regarding Interim Measures and Supportive Measures, if applicable; and
- (i) A statement of the rights and resources to which Parties are entitled, including:
 - i. Respondent's right to be presumed not responsible for the alleged conduct;
 - ii. Statement that a determination regarding responsibility is made at the conclusion of the grievance process;
 - iii. The right to an advisor of their choice, who may be an attorney; and
 - iv. The right to request to inspect and review evidence.
- (j) A warning that knowingly making false statements or knowingly submitting false information during the grievance process is prohibited.

Section VI.1.7 At least three days after the Student Conduct Administrator provides Parties with the all information detailed in Section VI.1.6, the Student Conduct Administrator shall promptly meet with the Complainant and Respondent separately to discuss the allegation and any informal resolution procedures, including voluntary alternative resolution procedures, for immediately resolving the dispute in a way Parties might agree upon, precluding the need for further action. The Student Conduct Administrator shall also explain the adjudication process and answer any questions Parties may have.

Section VI.1.8 After the preliminary meetings with Parties, the Student Conduct Administrator shall determine if the factual allegations of the complaint, if taken as true, constitute a Code violation, in which case the matter will go to the Board for adjudication. The Student Conduct Administrator shall diligently attempt to make this determination within five business days, but may take additional time if reasonably necessary. In the event of a delay, at the end of the five-day period, the Student Conduct Administrator will inform Parties in writing of the reason for the delay and the anticipated new decision date.

Section VI.1.9 In addition to meeting with Parties, the Student Conduct Administrator shall initiate an independent investigation, as necessary. If a law enforcement investigation has been initiated, the College will take reasonable measures to avoid undue interference with the law enforcement investigation.

Section VI.1.10 At least twenty business days before a Hearing, the Student Conduct Administrator shall ensure that Parties and their advisors have the right to access, review, and make copies of any and all information obtained by the Student Conduct Administrator related to the case. This shall include the identity of Parties and any witnesses, and both inculpatory and exculpatory evidence, regardless of whether the College intends to present such evidence in the Hearing. Parties shall have at least ten business days to submit to the Student Conduct Administrator leading the investigation a written response, which the investigator will consider prior completing the investigation.

Section VI.1.11 At least ten business days before a Hearing, the College shall send all evidence it has gathered to Parties and their advisors in an electronic format or a hard copy, including evidence the College does not intend to present or does not believe is relevant. Evidence not disclosed to Parties may not be used by the College in any disciplinary proceeding.

Section VI.1.12 Parties must be advised of their obligations to:

- (a) Respond to all notices to appear for a meeting or Hearing and requests for information;
- (b) Participate in the process in good faith; and
- (c) Provide true and accurate information to the best of their ability.

Section VI.1.13 Parties have the right to access, review, and make copies of any and all information obtained by the Student Conduct Administrator related to the case, including the identity of Parties and any witnesses. The Student Conduct Administrator shall ensure that all such information is made available to Parties at least five business days before the Hearing.

Section VI.1.14 Parties have the right to the advisor of their choosing, including legal counsel. The advisor may actively participate in all proceedings potentially resulting in criminal sanctions, expulsion, or a suspension of more than nine days, including preliminary meetings. In cases of Academic Dishonesty, the College may bar the active participation of legal counsel for Respondent so long as the right to test witness credibility is preserved. The College shall not be responsible for any Party's advising costs unless otherwise provided.

Section VI.1.15 At any time in the pre-hearing process, the Respondent may admit in writing to violating this Code. A Hearing will then be held to determine the appropriate sanction(s). The Respondent may bring an advisor of choice to

this Hearing or, at his or her informed option, waive such a Hearing and accept a punishment determined by the Student Conduct Administrator.

Section VI.1.16 While investigating the complaint, the College must:

- (a) Ensure that both the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the College and not on Parties;
- (b) Provide equal opportunity for Parties to present witnesses and other inculpatory and exculpatory evidence;
- (c) Warn Parties that statements made to College administrators may be used against them in civil or criminal proceedings;
- (d) Not restrict the ability of either Party to discuss the allegations under investigation or to gather and present relevant evidence;
- (e) Provide to the Party whose participation is invited or expected written notice of the date, time, location, participants, and purpose of all Hearings, investigative interviews, or other meetings with a Party, with sufficient time for the Party to prepare to participate; and
- (f) Provide Parties an equal opportunity to inspect and review all evidence obtained as part of the College's investigation, including the evidence the College does not intend to present or rely upon when determining responsibility.⁵⁰

NOTES

Although disciplinary Hearings are not legal proceedings, they require sufficient safeguards to ensure accuracy, fairness, and confidence in the result. Therefore, the timeliness of the claim is an important consideration. The Supreme Court has noted that statutes of limitations “are found and approved in all systems of enlightened jurisprudence.”⁵¹ Encouraging Complainants to present their claims within a reasonable time protects Respondents from having to respond under circumstances “in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.”⁵² This problem is particularly acute in the academic setting, in which Students are affiliated with the College only for a limited time and the academic calendar further limits the periods when Parties are on Campus and available to participate in a Hearing. Accordingly, this Code encourages Complainants (or the College) to initiate a

⁵⁰ *Id.* at 35–36 (discussing how requiring universities to disclose all evidence, as opposed to only evidence they intend to use, protects due process by preventing institutional conflicts of interest).

⁵¹ *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (citing *Wood v. Carpenter*, 101 U.S. 135, 139 (1879)).

⁵² *Id.*

complaint within six months of the alleged Code violation. By recommending that complaints be lodged approximately within a semester, the likelihood remains high that Parties, and Student witnesses, will still be enrolled at the College and able to attend a Hearing.⁵³

Anonymous complaints are in tension with the fundamental principle that the accused must be able to confront his or her accuser.⁵⁴ To ensure that no Student is wrongfully punished, a disciplinary body must be able to hear both sides of the story fully and ask clarifying questions.⁵⁵ Such a probing inquiry is not possible when the Complainant does not come forward.⁵⁶ Disciplinary Hearings should be presumed inappropriate when the anonymous nature of a complaint compromises a Respondent's ability to test the credibility of an accusation. The College should strive to develop identifying information from anonymous complaints in order to conduct a fair Hearing.

This Code also provides that Parties have the right to counsel in cases that do not involve Academic Dishonesty. Academic Dishonesty proceedings often involve the application of academic standards specific to the relevant field and are best handled by those most familiar with these standards. Courts have acknowledged academia's particular expertise in evaluating academic infractions, and have thus given broad deference to institutions' determinations in those cases.⁵⁷ However, a Student may opt for a non-attorney advocate in any kind of Hearing, including an Academic Dishonesty hearing.

To avoid turning disciplinary Hearings involving counsel into full-blown trials, the College and the attorney should come to a shared understanding that the institution may regulate the attorney's behavior during the process and that the formal rules of evidence shall not apply.⁵⁸ For guidance on the attorney's role, the College may refer attorneys to

⁵³ See *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 21 (D. Me. 2005) (listing cases where hearings were held within days to two weeks).

⁵⁴ See, e.g., *DeJesus v. Penberthy*, 344 F. Supp. 70, 75 (D. Conn. 1972) (describing the importance of in-person testimony, especially where expulsion is a possible penalty); In re *Kickertz v. New York Univ.*, 952 N.Y.S.2d 147, 154 (N.Y. App. Div. 2012) (criticizing university because the "petitioner was not afforded any, let alone a fair, opportunity to cross-examine the witnesses whose accusations were the basis of the charges lodged against her"), *aff'd as modified on other grounds*, 25 N.Y.3d 942 (2015).

⁵⁵ *DeJesus*, 344 F. Supp. at 75-76 (finding that "[t]he Board did not have an adequate opportunity to determine the facts" because the evidence at the hearing was given solely through the text of earlier interviews).

⁵⁶ *Goss v. Lopez*, 419 U.S. 565, 581 (1975) ("[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . .") (internal quotations omitted).

⁵⁷ See, e.g., *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 87-88 (1978).

⁵⁸ See BRETT SOKOLOW, *THE RIGHT TO COUNSEL IN COLLEGE DISCIPLINARY HEARINGS: HOW MUCH PROCESS IS DUE?*, National Center for Higher Education Risk Management monograph (2001) (describing safeguards that schools can take to preserve the procedural simplicity of college disciplinary hearings).

guidelines used by other institutions that have opted to allow a right to counsel.⁵⁹ Nothing in this Section shall limit a Student's right to have an attorney actively participate in disciplinary proceedings under Section VI.3.9.

Informal resolution procedures include mediation (discussed in Section VI.2) and other measures short of a full investigation and adjudication of the issues. Before engaging in these procedures, the College shall provide Parties with written notice of the allegations; the requirements of the informal resolution process, such as how it relates to the formal disciplinary process; and any potential consequence of the process, including any records that can be maintained or shared by the College. The College must also obtain Parties' voluntary, written consent to the informal resolution process.⁶⁰

The College may not make any negative inferences against a Party solely for their failure to participate in the student conduct process. This includes the Respondent's refusal to answer questions when meeting with College administrators. However, a Student's failure to participate does not preclude the College from conducting the disciplinary process in that Student's absence.

Section VI.2 MEDIATION

Section VI.2.1 Mediation is a non-adversarial process in which Parties exchange views to enhance mutual understanding and fashion a solution to the dispute that is developed by Parties themselves. The Student Conduct Administrator should determine if the dispute may potentially be resolved through mediation facilitated by a professional and independent mediator. If so, the Student Conduct Administrator should provide Parties with the opportunity to resolve their dispute through this mechanism. All mediators must adhere to the American Bar Association's Model Standards of Conduct for Mediators.

Section VI.2.2 Mediation may be used to resolve a dispute any time prior to reaching a determination regarding responsibility. Before undergoing mediation, the College must provide to Parties a written notice disclosing:

- (a) The allegations;
- (b) The requirements of the mediation process including the circumstances under which it precludes Parties from resuming a formal complaint arising from the same allegations, if any;
- (c) Whether records of the process will be maintained or could be shared; and

⁵⁹ See, e.g., RUTGERS UNIVERSITY, FREQUENTLY ASKED QUESTIONS FROM ATTORNEYS, studentconduct.rutgers.edu/frequently-asked-questions/frequently-asked-questions-for-attorneys; UNIVERSITY OF MICHIGAN, FAQs FOR PARENTS, FAMILY, ATTORNEYS, AND FRIENDS, oscr.umich.edu/article/faqs-parents-family-attorneys-and-friends.

⁶⁰ See Section VI.2.3.

- (d) Any consequences of the process, including a warning that Parties' statements during this process may be admissible against them in subsequent criminal proceedings.

Section VI.2.3 The College must obtain Parties' voluntary, written consent to mediation. Parties must agree to participate without coercion, pressure, or the use of incentives. The Student Conduct Administrator must make clear to Parties that they may withdraw from mediation at any time prior to a decision or agreement being reached, whereupon the formal Hearing process will begin.

Section VI.2.4 In order to encourage an open exchange of views and maximize the chances of agreement, mediation sessions shall be confidential and may not be recorded, unless Parties agree to a different arrangement. No statements in the mediation session may be used in any subsequent Hearing.

Section VI.2.5 Any mediated agreement shall be in writing and shall represent the final resolution of the case, unless one of Parties fails to adhere to the terms of the agreement.

Section VI.2.6 The mediator or his or her designee shall continue to be available to Parties to facilitate resolution of the implementation of any agreement through the graduation of all Parties.

Section VI.2.7 If Parties do not agree to mediation, the mediation is unsuccessful, or mediation is not appropriate due to the nature of the complaint, the formal Hearing process may begin.⁶¹

NOTES

Mediation plays an important role in resolving many of the disputes that most frequently occur on college campuses. It is most effective in situations where the Respondent acknowledges that his or her behavior overstepped a norm, such as a roommate conflict. It focuses on finding a shared solution developed by Parties rather than submitting the dispute to a disciplinary body. As long as mediation is truly voluntary and the mediator is trained and complies with the applicable professional standards, the process may be productive for all Parties.

It is critical that Parties understand that either side may withdraw from the process at any time before an agreement is signed. However, if Parties opt to mediate, they should understand that any agreement is binding just as if it was handed down from a disciplinary body. Also, confidentiality forbids any Party from disclosing statements made during mediation to unauthorized third parties such as disciplinary body members.

⁶¹ In addition to mediation, the College may utilize other restorative justice techniques with the consent of all Parties. *See, e.g.*, JUSTINE DARLING, RESTORATIVE JUSTICE IN HIGHER EDUCATION: A COMPILATION OF FORMATS AND BEST PRACTICES (2011) (unpublished M.A. thesis, University of San Diego), skidmore.edu/campusrj/documents/Darling-2011-campus-programs.pdf.

Finally, a Party may not be found responsible as the result of an unsuccessful mediation session.

Section VI.3 STUDENTS' PROCEDURAL RIGHTS

Section VI.3.1 The following guidelines should be followed by the College for all non-academic disciplinary proceedings, excluding sexual misconduct Hearings covered by Title IX. These guidelines are designed to protect due process for all Parties, and the College will help to ensure fair and accurate proceedings by adhering to the following principles.

Section VI.3.2 Meaningful Presumption of Innocence. Respondents shall be afforded a clearly stated presumption of innocence, including a statement that their silence shall not be held against them. The College has the burden of proof to establish each element of any Code violation with which the Respondent is charged.

Section VI.3.3 Timely and Adequate Written Notice. Adequate notice shall include the time and place of alleged policy violations, a specific statement of which policies were allegedly violated and by what actions, and a list of people allegedly involved in and affected by those actions.

Section VI.3.4 Adequate Time to Prepare. Students shall have adequate time to prepare for all phases of the disciplinary process and shall have access to all evidence to be used at the Hearing during that time.

- (a) College investigators shall preserve all evidence and, absent a compelling reason, record all interviews.
- (b) Newly discovered evidence shall be shared with Parties as soon as practicable. To comply with Section VI.3.4, this may require delaying the Hearing date.
- (c) A Hearing may be postponed if the Respondent can satisfactorily demonstrate that more time is necessary to secure exculpatory evidence.

Section VI.3.5 Right to Impartial Factfinders. There shall be a right to impartial factfinders, including the right to challenge factfinders for bias or any conflicts of interest with the potential to undermine the integrity of the disciplinary process. This challenge may not be heard by the factfinders themselves. Upon request, the College shall provide Parties with the contents of the factfinders' training materials.

Section VI.3.6 Right to a Meaningful Hearing Process. Cases shall be adjudicated by individuals distinct from those who conducted the investigation. Parties and the factfinder must be able to see and hear the presentation of all evidence, including testimony, in real time at a live Hearing.

- (a) At the request of either Party, the College must provide for the Complainant to testify in a separate room from the Respondent.
- (b) When conducting a live Hearing with Parties in separate rooms, the College must provide technology enabling the decisionmaker(s) and Parties to simultaneously see and hear the Party answering questions.
- (c) Live Hearings may be conducted with all Parties physically present in the same geographic location or, at the College's discretion, any or all Parties, witnesses, and other participants may appear at the live Hearing virtually, with technology enabling participants simultaneously to see and hear each other.
- (d) The College must create an audio or audiovisual recording, or transcript, of any live Hearing and make it available to Parties for inspection and review.

Section VI.3.7 Right to Present Relevant Evidence Directly to Adjudicators. Students may not be restricted to presenting evidence only through a third party, summary, or report. The investigator shall not control the scope of evidence that the Board may consider. A Hearing chair may limit the presentation of evidence only if it is not relevant; it may not limit evidence based on its own determination of credibility or set limits on the quantity of evidence presented.

Section VI.3.8 Right to Meaningful Cross-Examination. This includes the right to pose relevant questions to witnesses—including the Complainant—in real time and respond to another Party's version of events.

- (a) Questions may be relayed through a third party, such as a Student's advisor or the Board.
- (b) Questions may be limited by the Board only if they are irrelevant or repetitive.
- (c) Before a Party or witness answers a cross-examination question, the Board must determine whether the question is relevant and, if it refuses to allow a particular question, it must explain its decision to Parties and document the reasons for refusal on the record.
- (d) If a Party or witness does not submit to cross-examination at the Hearing, the Board must not rely on any statement of that Party or witness in reaching a determination regarding responsibility.

Section VI.3.9 Active Participation of Advisor or Advocate. Students shall have the right to the full active participation of an advisor or advocate of choice, such as an attorney (at the Student's sole discretion), at all proceedings potentially resulting in criminal sanctions, expulsion, or a suspension of more than nine days.

Section VI.3.10 Meaningful Right to Appeal. The Respondent has a right to appeal a finding or sanction.

- (a) Grounds for appeal shall include (1) any procedural irregularity that affected the outcome; (2) the discovery of new evidence that was not reasonably available when the determination of responsibility was made that could affect the outcome; (3) the College investigator or decision-maker had a conflict of interest or bias that affected the outcome; or (4) findings not supported by the record.
- (b) The appeal must go to a Panel that does not include the same investigator or Board members as the original Hearing.⁶²

Section VI.3.11 Expulsion By Unanimous Findings. The decision to expel a Student shall be made by a unanimous vote of the Student Conduct Board.

Section VI.3.12 Standard of Proof. Student Conduct Boards may not find a Respondent responsible for a Code violation unless that violation is proved by clear and convincing evidence.

Section VII.3.1 Written Decision. Parties must receive a written decision of the result of the Hearing, containing:

- (a) Identification of the section(s) of the Code alleged to have been violated;
- (b) A description of the procedural steps taken from the receipt of the complaint through the determination, including any notifications to Parties, interviews with Parties and witnesses, site visits, methods used to gather other evidence, and Hearings held;
- (c) Findings of fact supporting the determination;
- (d) Conclusions regarding the application of the Code to the facts;
- (e) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility;
- (f) Any sanctions the College imposes on the Respondent;
- (g) Any remedies provided to the Complainant designed to restore or preserve access to the College's education program or activity; and
- (h) The College's procedures and permissible bases for the Respondent to appeal.

NOTES

⁶² See Sections VI.4 and VII.4 Appeals.

The goal of these procedures is not to unnecessarily protect Students or unduly burden the College, but rather to ensure that disciplinary Hearings obtain results based on an accurate and impartial presentation of the facts. Above all, this truth-seeking function is the crux of why due process must be upheld regardless of the circumstances of the proceeding.⁶³

Although the College is encouraged to employ procedural protections in Academic Dishonesty proceedings, this Code is mindful of the Supreme Court's reluctance to mandate how schools make academic determinations.⁶⁴ Academic Dishonesty proceedings should be fundamentally fair but may be best governed by the standards of the relevant academic discipline rather than the procedures of this Section.

The presumption of innocence affords Students the right to remain silent during disciplinary proceedings and prevents the College from punishing Students for remaining silent or drawing adverse inferences from a Student's silence. Forcing Students to speak will make them less likely to participate in the proceeding, which can undermine the accuracy of the outcome.⁶⁵ Punishing Students for their silence implicitly equates silence with guilt. However, Students may wish to remain silent for any number of reasons unrelated to their guilt or innocence: poor speaking skills, shyness, intimidation, nervousness, lack of faith in the system, or advice from an attorney to remain silent if civil liability or criminal charges are pending or foreseeable.⁶⁶ The silence of either Party does not relieve the Board of its obligation to find responsibility only when such a finding is supported by the evidence.

The presumption of innocence also prevents the College from placing the burden of proof on the Respondent for any offense.⁶⁷ This is a bedrock principle of any fair system of adjudication, and is constitutionally mandated in all criminal and civil cases.⁶⁸ The

⁶³ See *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976) (“[D]ue process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions.”); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171 (1951) (Frankfurter, J., concurring) (“The validity and moral authority of a conclusion largely depend on the mode by which it was reached. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.”).

⁶⁴ *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 89–91 (1978) (discussing the harms of requiring the full array of procedural protections in academic proceedings).

⁶⁵ *Judicial Training Manual*, National Center for Higher Education Risk Management, at 17, ncherm.org/pdfs/Judicial_Training_Manual.pdf.

⁶⁶ *Id.* at 16.

⁶⁷ See François Quintard-Morénas, *The Presumption of Innocence in the French and Anglo-American Legal Traditions*, 58 AM. J. COMP. L. 107, 110 (2010) (“[A]n elementary principle of justice requires that plaintiffs prove their allegations and that the accused be considered innocent in the interval between accusation and judgment.”).

⁶⁸ See *In re Winship*, 397 U.S. 358, 361 (1970) (holding that the prosecution must prove every element of the crime for the court to find guilt); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (“[P]laintiffs bear the risk of failing to prove their claims.”); JOHN SASSOON, ANCIENT

presumption of innocence also prevents the College from enacting rules that shift the burden of proof to the Respondent, such as policies that require Respondents in sexual misconduct cases to prove they obtained consent.⁶⁹

Adequate notice is a hallmark of any adversarial system and is constitutionally required for public university Students facing serious disciplinary action.⁷⁰ Adequate notice will “apprise interested parties of the pendency of the action and afford them an opportunity to present their objection.”⁷¹ Considering the important liberty and property interests Students possess in their education,⁷² written notice fully explaining all charges must be given to Parties. In the interests of uniformity and fair play, adequate notice must be provided regardless of the severity of the alleged violation.

Adequate notice also ensures that Students have sufficient time to prepare for the proceeding. The College is encouraged to provide notice at least three business days prior to any meeting, including preliminary meetings, where the Student is questioned about their actions by a College Official. It is important that the information given to Parties be as specific as possible, especially the list of people allegedly involved in and affected by the violation. This allows Students to conduct the necessary investigations and present a factually accurate case to the Board.⁷³

In terms of the disciplinary body itself, a core component of due process is an impartial tribunal.⁷⁴ Impartiality generally requires the prohibition of conflicts of interest that have

LAWS AND MODERN PROBLEMS: THE BALANCE BETWEEN JUSTICE AND A LEGAL SYSTEM 42 (2001) (“[T]he burden of proof rested in the third millennium BC where it would rest today— with the accuser.”).

⁶⁹ See *State v. Lynch*, 309 P.3d 482, 488 (Wash. 2013) (finding that the overwhelming majority of courts have held that due process is violated when the defendant is required to prove any fact which negates an element of the offense charged); *Mock v. University of Tennessee at Chattanooga*, No. 14-1687-II (Tenn. Ch. Ct. Aug. 10, 2015), *available at* chronicle.com/items/biz/pdf/memorandum-mock.pdf (finding that university’s affirmative consent standard improperly shifted the burden of the proof to the accused student); Letter from Susan Kruth, Senior Program Officer, Legal and Pub. Advocacy, FIRE, to Catherine Lhamon, Assistant Sec’y for Civil Rights, Office for Civil Rights (Nov. 24, 2015), thefire.org/fire-letter-to-office-for-civil-rights-assistant-secretary-for-civil-rights-catherine-lhamon-november-24-2015 (arguing that affirmative consent policies violate the presumption of innocence by impermissibly shifting the burden of proof to the accused).

⁷⁰ *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (oral or written notice is required for students facing suspension); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (notice is “[a]n elementary and fundamental requirement of due process”).

⁷¹ *Mullane*, 339 U.S. at 314.

⁷² *Goss*, 419 U.S. at 576.

⁷³ See HARVEY A. SILVERGLATE & JOSH GEWOLB, FIRE’S GUIDE TO DUE PROCESS AND CAMPUS JUSTICE [hereafter FIRE GUIDE] 11–15, thefire.org/fire-guides/fires-guide-to-due-process-and-campus-justice.

⁷⁴ *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (“This requirement of neutrality in adjudicative proceedings . . . helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law.”); *Nash v. Auburn Univ.*,

the potential to undermine the integrity of the disciplinary body.⁷⁵ Due to the intimate context of the Educational Community, courts have found that factfinders may retain sufficient neutrality despite having some prior knowledge of the issues or acquaintance with Parties.⁷⁶

The roles of investigator, factfinder, and advocate should be kept as separate as possible. Separating these roles maximizes their ability to check one another to ensure a fundamentally fair proceeding.⁷⁷ When these roles are conflated, there is a greater chance that error or bias will skew the outcome, and courts have emphasized the serious due process concerns that arise as a result of such arrangements.⁷⁸

Specifically, individuals serving on Boards must abstain from serving on the Appellate Panel for that same incident, as those serving on the original Board are naturally likely to be predisposed to uphold their previous decision.⁷⁹ Likewise, Complainants should not be allowed or required to prosecute the violation on behalf of the College or serve as the College investigator or factfinder, as they have a vested stake in the outcome of the proceeding they helped initiate.⁸⁰ However, the College investigator may present the College's case to the Board, as the investigator's information-gathering function may put that individual in the best position to be an advocate for the College. To protect the rights of Respondents in this arrangement, however, the investigator must not have any factfinding power or any ability to unduly influence the Board. Finally, Parties must be able to challenge the impartiality of the body without fear of negative repercussions.

812 F.2d 655, 665 (11th Cir. 1987) (“An impartial decision-maker is an essential guarantee of due process.”) (internal citations omitted).

⁷⁵ See *Marshall*, 446 U.S. at 242 (impartiality “preserves both the appearance and reality of fairness . . . by ensuring that [each party] . . . may present his case with assurance that the arbiter is not predisposed to find against him”) (internal citations omitted).

⁷⁶ *Nash*, 812 F.2d at 666 (finding no due process violation when panelist knew of suspicions against the accused student and answered procedural questions from potential witnesses before the hearing).

⁷⁷ See James M. Picozzi, *University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 YALE L.J. 2132, 2142–43 (1987) (“By melding all of these roles in one person, these functions no longer check one another. Any administrator who initially decides a student should be charged naturally has a predisposition to find him guilty of that charge.”).

⁷⁸ *Smith v. Denton*, 895 S.W.2d 550, 555 (Ark. 1995) (finding due process concerns when one college administration served as the investigator, prosecutor, witness, and judge); *Doe v. Brandeis Univ.*, No. CV 15-11557-FDS, slip op. (D. Mass. Mar. 31, 2016), at 70 (“The dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review, are obvious. No matter how well-intentioned, such a person may have preconceptions and biases, may make mistakes, and may reach premature conclusions.”) (footnote omitted).

⁷⁹ *Marshall v. Maguire*, 424 N.Y.S.2d 89, 92 (N.Y. Sup. Ct. 1980) (vacating the expulsion of a student because the same individual served on both the hearing and appeals panels).

⁸⁰ See FIRE GUIDE, *supra* note 73, at 107.

To maximize the truth-finding ability of disciplinary proceedings, Parties must have the right to access relevant evidence prior to the Hearing. Obtaining such evidence ten business days before the Hearing provides Parties with the opportunity to conduct an investigation and present a comprehensive case to the disciplinary body.⁸¹ Examples of the types of the evidence to which the College should grant Parties access include “complainant statements, third-party witness statements, electronically stored information, written communications, social media posts, and demonstrative evidence.”⁸² Although the College lacks the power to compel witness attendance, the College and Parties should make every effort to ensure that witnesses with relevant information are present for the Hearing.

Concordant with the right to access relevant evidence is the right to present such evidence to the disciplinary body. The College may not limit the scope of material evidence presented or deny a Party the right to be heard, a “fundamental requirement of due process.”⁸³ As a critical safeguard against the wrongful punishment of innocent Students, courts have protected this right for Students facing suspension or expulsion.⁸⁴ The Code guarantees the right to be heard in order to build trust in the College’s adjudicatory system and to ensure that outcomes are based on all available evidence. The reputation of the College depends on both the perception and the reality of fair procedures and accurate results, the denial of which has been the basis of extensive litigation against colleges.⁸⁵ Accordingly, the protection of this right is in the best interest of both the College and Parties.

The right to meaningful cross-examination has been identified by the Supreme Court as the “greatest legal engine ever invented for the discovery of truth.”⁸⁶ Because of the

⁸¹ *See id.* at 11–15.

⁸² Safe Campus Act, H.R. 3406, 114th Cong. §164(a)(3) (2015).

⁸³ *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (“The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.”) (internal quotations and citations omitted). However, in sexual misconduct cases, the College may restrict the presentation of evidence regarding a Party’s past sexual behavior. The College is encouraged to defer to state rape shield laws in determining the admissibility of such evidence. *See generally* Harriett Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763 (1986) (discussing the rationale and history of rape shield laws); *see also* National Center for Prosecution of Child Abuse, *Rape Shield Statutes*, National District Attorney’s Association (2011), ndaa.org/wp-content/uploads/NCPCA-Rape-Shield-2011.pdf (compiling state rape shield laws).

⁸⁴ *Goss v. Lopez*, 419 U.S. 565, 581 (1975) (students facing suspension must be given “an opportunity to present his side of the story”); *Dixon v. Alabama State Bd. of Ed.*, 294 F.2d 150, 159 (5th Cir. 1961) (students have a right to present oral testimony or written affidavits of witnesses when facing expulsion).

⁸⁵ *See generally* Samantha Harris & KC Johnson, *Campus Courts in Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications*, 22 N.Y.U. J. LEGIS. & PUB. POL’Y 49 (2019) (compiling lawsuits against universities over alleged student due process violations).

⁸⁶ *California v. Green*, 399 U.S. 149, 158 (1970).

College's inability to subpoena information, cross-examination is all the more essential to eliciting truth in college disciplinary proceedings where evidence is often scarce and may consist primarily of witness testimony.⁸⁷ Following several lower court rulings establishing this right in certain circumstances, the Code guarantees this right for all non-academic misconduct proceedings.⁸⁸ The criteria for restricting cross-examination are drawn from the Federal Rules of Evidence and should be interpreted narrowly.⁸⁹

Maximizing the truth-seeking potential of cross-examination is one reason why the right to the active participation of an attorney is crucial in university disciplinary proceedings. In any adversarial system, it is an "obvious truth" that lawyers are "necessities, not luxuries," and that the right to counsel is "fundamental and essential to a fair trial."⁹⁰ Thus, under this Code, Students are afforded the right to the active assistance of an advisor or advocate of choice in all non-academic disciplinary proceedings that may result in criminal charges, expulsion, or a suspension of more than nine days. Such proceedings typically involve accusations of violent acts or sexual misconduct which, if taken as true, could end the Student's academic career, brand the Student as a violent criminal or sexual predator, and cost the Student tens of thousands of dollars in lost tuition.⁹¹ Considering the severe consequences and complicated nature of these proceedings, Students should be allowed an advisor or advocate of their choice, including an attorney, to actively represent them.⁹²

The importance of active assistance of counsel becomes more pronounced when the Respondent faces concurrent or potential criminal charges. There have been cases in which university tribunals were used to circumvent the due process protections of the criminally accused, most prominently in the context of Title IX sexual misconduct proceedings.⁹³ Since the transcripts of college disciplinary Hearings are generally

⁸⁷ See *Maryland v. Craig*, 497 U.S. 836, 846 (1990) ("[F]ace-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person."); *Davis v. Alaska*, 415 U.S. 308, 316 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.").

⁸⁸ *Winnick v. Manning*, 460 F.2d 545, 550 (2d Cir. 1972) (finding a right to cross-examine witness when the hearing turns on witness credibility); *Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D.N.Y. 1997) (accused student had a right to cross-examine alleged victim when the only evidence of alleged rape was victim's testimony).

⁸⁹ FED. R. EVID. 611.

⁹⁰ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

⁹¹ *Albert v. Carovano*, 824 F.2d 1333, 1339 (2d Cir.) (finding that there is a stigma attached to suspension for disciplinary reasons), *modified on reh'g*, 839 F.2d 871 (2d Cir. 1987), *on reh'g en banc*, 851 F.2d 561 (2d Cir. 1988).

⁹² See *Herring v. New York*, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.").

⁹³ Susan Riseling, the chief of police and associate vice chancellor at the University of Wisconsin-Madison, told the International Association of College Law Enforcement Administrators in 2015 that she was able to circumvent due process and secure a criminal conviction of a student by using his campus tribunal statements against him in his criminal trial.

admissible against Students in criminal proceedings, attorney participation is essential to protecting Respondents' right against compelled self-incrimination.⁹⁴

The College is free to create its own rules regarding a Student's right to an advisor or advocate for violations carrying lesser punishments. When charging Students under this Code, the College is expected to clearly state whether the right to active assistance of counsel is triggered. In such circumstances, the College must allow counsel to speak directly to the disciplinary body, make closing and opening statements, cross-examine witnesses, and provide the Student with support, guidance, and advice.⁹⁵

The importance of upholding the meaningful right to appeal is discussed in the notes following Section VI.4.

Expulsion is the most severe penalty the College may impose upon a Student and thus requires a unanimous vote of the Board. Expulsion leaves a permanent mark on a Student's academic transcript and greatly limits a Student's ability to complete his or her formal education.⁹⁶ Such a penalty has far-reaching consequences that extend beyond academia, especially when the violation involves violence, fraud, or sexual misconduct.⁹⁷ By abruptly ending a Student's educational career at one institution and making it extremely difficult to enroll at another, expulsion effectively denies a Student the ability to obtain an education.⁹⁸ In order to reserve this penalty for situations where it is most

She told her audience, "It's Title IX, not Miranda. Use what you can." Jake New, *Making Title IX Work*, INSIDE HIGHER ED (July 6, 2015), insidehighered.com/news/2015/07/06/college-law-enforcement-administrators-hear-approach-make-title-ix-more-effective.

⁹⁴ See, e.g., *Gabrilowitz v. Newman*, 582 F.2d 100, 103 (1st Cir. 1978) (analyzing whether a state college student facing criminal charges and expulsion would effectively be compelled to testify during a disciplinary hearing); *Hart v. Ferris State Coll.*, 557 F. Supp. 1379, 1385 (W.D. Mich. 1983) (applying the Fifth Amendment right against compelled self-incrimination to a state college student facing a disciplinary hearing and criminal charges).

⁹⁵ Several states already guarantee Students the right to active assistance of counsel in certain circumstances. Ark. Code Ann. § 6-60-109 (appeals of 10-day suspension or expulsion rulings); N.C. Gen. Stat. Ann. § 116-40.11 (all proceedings except academic dishonesty and "Student Honor Court" violations); N.D. Cent. Code Ann. § 15-10-56 (all non-academic misconduct violations that could result in suspension or expulsion). Other states establish this right for students for all disciplinary procedures under their administrative procedures acts. Tenn. Code Ann. § 4-5-305; Or. Rev. Stat. Ann. § 183.417.

⁹⁶ *Donohue v. Baker*, 976 F. Supp. 136, 145 (N.D.N.Y. 1997) ("It is well settled that an expulsion from college is a stigmatizing event which implicates a student's protected liberty interest").

⁹⁷ See *Gonzales v. McEuen*, 435 F. Supp. 460, 471 (C.D. Cal. 1977) ("There is no question that a high school student who is punished by expulsion might well suffer more injury than one convicted of a criminal offense.").

⁹⁸ See *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483, 493 (1954) (emphasizing the "importance of education to our democratic society" as "[i]t is required in the performance of our most basic public responsibilities" and is "the very foundation of good citizenship"); *Dixon v. Alabama State Bd. of Ed.*, 294 F.2d 150, 157 (5th Cir. 1961) ("It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the

warranted, every member of the Board must agree on the decision to expel a Responsible Student.

Regardless of the seriousness of an alleged offense, a Respondent may not be punished under a preponderance of the evidence standard or any other standard of proof lower than clear and convincing evidence. A higher standard of proof offers greater protection for Respondents by requiring more certainty before a Student is found responsible for even minor offenses, which can impact a Student's educational career and employment prospects.⁹⁹

plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens.”).

⁹⁹ FIRE Comment, *supra* note 47, at 37–39.

Section VI.4 APPEALS

Section VI.4.1 In all cases, a Responsible Student may appeal an adverse decision or sanction by submitting a written notice stating the intent to appeal to the Student Conduct Administrator within seven business days of receiving the Board's written decision and sanction. The College shall notify the Complainant of the notice of appeal no later than one business day after it is received.

Section VI.4.2 The Student Conduct Administrator will convene a three-member Appellate Panel of faculty and/or administrators to review the Board's decision. The composition of the Panel shall be impartial to avoid prejudice. The Panel shall be convened no sooner than seven business days after the submission of an intent to appeal and no later than thirty days after such a submission.

Section VI.4.3 Parties have the right to challenge the Panel for bias or any conflicts of interest with the potential to undermine the integrity of the appellate process. This challenge may not be heard by the Panel itself, although Panel members shall recuse themselves from a case if they have a conflict of interest or if they cannot perform their duties in an unbiased manner for whatever reason. Neither the Student Conduct Administrator nor any member of the Board may serve on the Panel for a case in which they were previously involved.

Section VI.4.4 The Responsible Student must submit a written statement to the Panel no later than five business days in advance of its meeting explaining why the Board's decision should be changed. The Panel shall forward this statement to the Complainant no later than one business day after it is received. The Complainant and third Parties may submit statements to the Panel, but are not required to do so.

Section VI.4.5 Either Party or their representative may choose to address the Panel directly in a short oral statement. If one Party chooses to address the Panel, the other Party shall then be offered the same opportunity. The Panel, in its discretion, may ask either Party questions within the scope of the appeal.

Section VI.4.6 The Panel's review will be limited to determining whether:

- (a) Established procedures were followed;
- (b) Parties were treated equitably;
- (c) Parties had a reasonable opportunity to prepare and present material information;
- (d) The Board's factual determinations are free from obvious error or failure to consider any material evidence;
- (e) The Board's decision was based on substantial information in the record and is rational;

- (f) The Board's reasoning is clear from its letter explaining its decision;
- (g) No new, previously unavailable evidence has emerged that would materially affect the outcome of the case;
- (h) The sanction levied is proportional to the violation(s) committed;
- (i) The Responsible Student's conduct was prohibited by the Code; and
- (j) The Board's determination was consistent with higher controlling law.

Section VI.4.7 If the Panel finds reason for concern about any of the issues listed in Section VI.4.6, then it must consider whether the error, or newly-discovered evidence, could have affected the outcome of the Hearing. If the shortcoming was inconsequential, or the new evidence is irrelevant, then the decision may be affirmed. If, however, there is a reasonable possibility that the outcome might have been different, or that the sanction was disproportionate, the Board's decision must be modified accordingly or the case must be sent back for a rehearing.

Section VI.4.8 Appeals may not result in increased sanctions.

Section VI.4.9 The Panel will promptly inform Parties of its conclusions and the reasons for those conclusions in writing.

Section VI.4.10 In cases resulting in suspension or expulsion, if the Board's decision is upheld, the Responsible Student may appeal to the President of the College within seven business days of receiving the Board's written decision and sanction. If no such appeals are made, the matter is closed. Decisions of the President in disciplinary appeals shall be final unless otherwise required by law or regulation.

Section VI.4.11 A notice of appeal may be submitted after the deadline if the Responsible Student shows that that new, previously unavailable evidence came to light or that there is a compelling reason for the delay.

NOTES

The appeals process is not intended to undermine the original factfinders or undertake an entirely new investigation. Rather, the reviewing body should focus on identifying flaws in the initial Hearing that may have compromised the result, such as a lack of impartiality or the insufficiency of supporting evidence. This requires the College to provide a reliable record of what was said at the Hearing, including transcripts of any Hearing for violations punishable by expulsion.¹⁰⁰ Also, like the initial disciplinary Hearing, the

¹⁰⁰ Gorman v. Univ. of Rhode Island, 837 F.2d 7, 15 (1st Cir. 1988) (noting that several courts have required colleges to provide a record of disciplinary proceedings).

appeals process must comport with requirements of due process.¹⁰¹ Departing from the procedures outlined in the College’s Student handbook may itself constitute a due process violation.¹⁰²

Section VII. PROCEDURES FOR TITLE IX ALLEGATIONS

The following procedures shall only apply to allegations of sexual misconduct addressed by the College per its obligations under Title IX of the Education Amendments of 1972. These procedures incorporate the regulations governing educational institutions’ Title IX obligations, as promulgated by the Department of Education’s Office for Civil Rights.

Section VII.1 PRELIMINARY PROCEDURES

Section VII.1.1 Any Student, faculty member, or College staff member may file a complaint against a Student with the Student Conduct Administrator for violations of this Code. Complaints submitted orally or submitted by the Student Conduct Administrator shall be memorialized at the time of submission.

Section VII.1.2 The complaint should be submitted as soon as practicable. Unreasonable filing delays could result in the dulling of memories and a loss of relevant evidence and witness testimony. Delays in filing shall not affect the Complainant’s eligibility for Supportive Measures from the College.

Section VII.1.3 Because the College is bound by its obligation to provide a fundamentally fair process, anonymous complaints may be filed, but anonymity may limit the College’s ability to respond and may preclude disciplinary action.

Section VII.1.4 Upon receipt of a formal complaint, the College must provide written notice to the Complainant and the Respondent. This notice shall include:

- (a) Parties involved in the incident;
- (b) Specific section(s) of the Code allegedly violated;
- (c) Conduct allegedly constituting sexual misconduct under Title IX;
- (d) Date and location of alleged incident;
- (e) Respondent’s right to be presumed not responsible for the alleged conduct;

¹⁰¹ See *Furey v. Temple Univ.*, 884 F. Supp. 2d 223 (E.D. Pa. 2012) (finding the appeal failed to satisfy due process in part because the decision maker had an *ex parte* conversation with an eyewitness); *Silva v. Univ. of New Hampshire*, 888 F. Supp. 293 (D.N.H. 1994) (finding that the bias of the appeals board members violated the student’s due process rights).

¹⁰² *Matter of Hyman v Cornell Univ.*, 918 N.Y.S.2d 226, 228 (N.Y. App. Div. 2011) (“When a university has not substantially complied with its own guidelines or its determination is not rationally based upon the evidence, the determination will be annulled as arbitrary and capricious . . .”); *Furey*, 884 F. Supp. at 258 (finding that the final decision-maker “was obligated under the Code to give presumptive weight to the Review Board’s finding” but did not, thereby compromising fundamental fairness).

- (f) Statement that a determination regarding responsibility is made at the conclusion of the grievance process;
- (g) The right to an advisor of their choice, who may be an attorney;
- (h) The right to request to inspect and review evidence; and
- (i) A warning that knowingly making false statements or knowingly submitting false information during the grievance process is prohibited.¹⁰³

Section VII.1.5 Within seven business days of receiving a complaint, the Student Conduct administrator must decide whether the factual allegations of the complaint, if taken as true, constitute sexual misconduct under Title IX, and communicate this decision to Parties. The Student Conduct Administrator shall dismiss a formal complaint if the factual allegations of the complaint, if taken as true, either:

- (a) Fail to constitute sexual misconduct under Title IX;
- (b) Occur outside the College's jurisdiction as defined in Section II; or
- (c) Constitute an exercise of a Student's Free Speech Rights.¹⁰⁴

Section VII.1.6 If the Student Conduct Administrator decides that the factual allegations of the complaint, if taken as true, constitute sexual misconduct under Title IX, the College must provide Parties with:

- (a) A written copy of the complaint as filed; or, if no written submission exists, as memorialized by the Student Conduct Administrator;
- (b) Written notice of the specific Sections of the Code that the Respondent is charged with violating and written notice of the specific actions alleged to have violated them, including the time, date, place, and people involved;
- (c) Instructions on procedures for responding;
- (d) Relevant procedural dates, including the Hearing date;
- (e) Deadlines for responding;
- (f) Contact information for the Student Conduct Administrator coordinating the Hearing;
- (g) Contact information for all Campus Student defenders groups;
- (h) Guidance regarding Interim Measures and Supportive Measures, if applicable; and

¹⁰³ Title IX Regulations, *supra* note 3, at § 106.45(b)(2)(B).

¹⁰⁴ Title IX Regulations, *supra* note 3, at § 106.45(b)(3).

- (i) A statement of the rights and resources to which Parties are entitled.

Section VII.1.7 At least three days after the Student Conduct Administrator provides Parties with the all information detailed in Section VII.1.6, the Student Conduct Administrator shall promptly meet with the Complainant and Respondent separately to discuss the allegation and any informal resolution procedures, including voluntary alternative resolution procedures, for immediately resolving the dispute in a way Parties might agree upon, precluding the need for further action.¹⁰⁵ The Student Conduct Administrator shall also explain the adjudication process and answer any questions Parties may have.

Section VII.1.8 After the preliminary meetings with Parties, the Student Conduct Administrator shall determine if the factual allegations of the complaint, if taken as true, constitute sexual misconduct under Title IX, in which case the matter will go to the Board for adjudication. The Student Conduct Administrator shall diligently attempt to make this determination within five business days, but may take additional time if reasonably necessary. In the event of a delay, at the end of the five-day period, the Student Conduct Administrator will inform Parties in writing of the reason for the delay and the anticipated new decision date.

Section VII.1.9 In addition to meeting with Parties, the Student Conduct Administrator shall initiate an independent investigation, as necessary. If a law enforcement investigation has been initiated, the College will take reasonable measures to avoid undue interference with the law enforcement investigation.

Section VII.1.10 At least twenty business days before a Hearing, the Student Conduct Administrator shall ensure that Parties and their advisors have the right to access, review, and make copies of any and all information obtained by the Student Conduct Administrator related to the case. This shall include the identity of Parties and any witnesses, and both inculpatory and exculpatory evidence, regardless of whether the College intends to present such evidence in the Hearing¹⁰⁶

Section VII.1.11 At least ten business days before a Hearing, the College must share with Parties and their advisors an investigative report that fairly summarizes relevant evidence.¹⁰⁷ Parties shall have at least ten business days to submit to the Student Conduct Administrator leading the investigation a written response, which the investigator will consider prior completing the investigation.¹⁰⁸

Section VII.1.12 At least ten business days before a Hearing, the College shall send all evidence it has gathered to Parties and their advisors in an electronic format or a hard copy, including evidence the College does not intend to present

¹⁰⁵ See Section VI.2 Mediation.

¹⁰⁶ Title IX Regulations, *supra* note 3, at § 106.45(b)(5)(vi–vii).

¹⁰⁷ Title IX Regulations, *supra* note 3, at § 106.45(b)(5)(vii).

¹⁰⁸ Title IX Regulations, *supra* note 3, at § 106.45(b)(5)(vi–vii).

or does not believe is relevant. Evidence not disclosed to Parties may not be used by the College in any disciplinary proceeding.¹⁰⁹

Section VII.1.13 Parties must be advised of their obligations to:

- (a) Respond to all notices to appear for a meeting or Hearing and requests for information;
- (b) Participate in the process in good faith; and
- (c) Provide true and accurate information to the best of their ability.

Section VII.1.14 Parties have the right to the advisor of their choosing, including legal counsel. The advisor may actively participate in all proceedings, including preliminary meetings. The College shall not be responsible for any Party's advising costs unless otherwise provided.

Section VII.1.15 At any time in the pre-hearing process, the Respondent may admit in writing to violating this Code. A Hearing will then be held to determine the appropriate sanction(s). The Respondent may bring an advisor of choice to this Hearing or, at his or her informed option, waive such a Hearing and accept a punishment determined by the Student Conduct Administrator.

Section VII.1.16 While investigating the complaint, the College must:

- (a) Ensure that both the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the College and not on Parties;
- (b) Provide equal opportunity for Parties to present witnesses and other inculpatory and exculpatory evidence;
- (c) Warn Parties that statements made to College administrators may be used against them in civil or criminal proceedings;
- (d) Not restrict the ability of either Party to discuss the allegations under investigation or to gather and present relevant evidence;
- (e) Allow the active participation of a Party's advisors, including attorneys, at all stages of the disciplinary process and related meetings;¹¹⁰
- (f) Provide to the Party whose participation is invited or expected written notice of the date, time, location, participants, and purpose of all Hearings, investigative interviews, or other meetings with a Party, with sufficient time for the Party to prepare to participate; and

¹⁰⁹ Title IX Regulations, *supra* note 3, at § 106.45(b)(5)(vi).

¹¹⁰ FIRE Comment, *supra* note 47, at 30-33 (discussing the importance of allowing the active participation of counsel in Title IX proceedings).

- (g) Provide Parties an equal opportunity to inspect and review all evidence obtained as part of the College’s investigation, including the evidence the College does not intend to present or rely upon when determining responsibility.¹¹¹

NOTES

The College’s obligation to address sexual misconduct under Title IX extends only to conduct occurring under its educational programs or activities.¹¹² This encompasses locations, events, or circumstances in which the College exercised substantial control over both the Respondent and the context in which the misconduct occurred, including any building owned or controlled by a student organization that is officially recognized by the College.¹¹³ This limitation is designed, at least in part, to prevent the College from unduly interfering with local law enforcement authorities, which have greater expertise in addressing unlawful sexual misconduct occurring outside the College’s jurisdiction.¹¹⁴

In order to preserve Students’ due process rights and avoid hindering law enforcement, the College should delay interviewing witnesses until law enforcement has had the opportunity to do so. The College shall avoid scheduling meetings that conflict with a Student’s concurrent criminal proceedings, and shall not use the disciplinary process to circumvent Students’ Fifth Amendment rights.¹¹⁵

When investigating a Title IX complaint, the College must conduct an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence—and ensure that credibility determinations are not based on a person’s status as a Complainant, Respondent, or witness.¹¹⁶ As the College conducts an investigation, it has a continuing obligation to provide newly discovered evidence to the Respondent, as required under Section VII.1.12.

To protect Students’ privacy during the disciplinary process, the College cannot access, consider, disclose, or otherwise use a Party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment to the Party, unless the College obtains that Party’s voluntary, written consent.¹¹⁷

Any materials used to train Student Conduct Administrators must not rely on sex stereotypes, and must instead promote impartial investigations and adjudications of

¹¹¹ *Id.* at 35–36 (discussing how requiring universities to disclose all evidence, as opposed to only evidence they intend to use, protects due process by preventing institutional conflicts of interest).

¹¹² 20 U.S.C. 1681 (1976).

¹¹³ Title IX Regulations, *supra* note 3, at § 106.44(a).

¹¹⁴ *See* FIRE Comment, *supra* note 47, at 11–14.

¹¹⁵ New, *supra* note 94.

¹¹⁶ Title IX Regulations, *supra* note 3, at § 106.45(b)(1)(ii).

¹¹⁷ Title IX Regulations, *supra* note 3, at § 106.45(b)(5)(i).

sexual misconduct.¹¹⁸

At any stage in the disciplinary proceeding, the College must allow for the limited extension of timeframes for good cause, so long as it gives written notice to Parties of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of Parties or witnesses, concurrent law enforcement activity, the need for language assistance, or the accommodation of disabilities.¹¹⁹

The College may establish rules for how advisors conduct themselves when participating in the Student disciplinary process, so long as those rules apply equally to Parties. These rules may not restrict an advisor's ability to actively participate in every stage of the Title IX process.

Section VII.2 MEDIATION

Section VI.2.8 Mediation is a non-adversarial process in which Parties exchange views to enhance mutual understanding and fashion a solution to the dispute developed by Parties themselves. The Student Conduct Administrator should determine if the dispute may potentially be resolved through mediation facilitated by a professional and independent mediator. If so, the Student Conduct Administrator should provide Parties with the opportunity to resolve their dispute through this mechanism. All mediators must adhere to the American Bar Association's Model Standards of Conduct for Mediators.

Section VI.2.9 Mediation may be used to resolve a dispute any time prior to reaching a determination regarding responsibility. Before undergoing mediation, the College must provide to Parties a written notice disclosing:

- (e) The allegations;
- (f) The requirements of the mediation process including the circumstances under which it precludes Parties from resuming a formal complaint arising from the same allegations, if any;
- (g) Whether records of the process will be maintained or could be shared; and
- (h) Any consequences of the process, including a warning that Parties' statements during this process may be admissible against them in subsequent criminal proceedings.¹²⁰

Section VI.2.10 The College must obtain Parties' voluntary, written consent to mediation.¹²¹ Parties must agree to participate without coercion, pressure, or the use of incentives. The Student Conduct Administrator must make clear to Parties

¹¹⁸ Title IX Regulations, *supra* note 3, at § 106.45(b)(1)(iii).

¹¹⁹ Title IX Regulations, *supra* note 3, at § 106.45(b)(1)(v).

¹²⁰ Title IX Regulations, *supra* note 3, at § 106.45(b)(9)(i).

¹²¹ Title IX Regulations, *supra* note 3, at § 106.45(b)(9)(ii).

that they may withdraw from mediation at any time prior to a decision or agreement being reached, whereupon the formal Hearing process will begin.

Section VI.2.11 In order to encourage an open exchange of views and maximize the chances of agreement, mediation sessions shall be confidential and may not be recorded. No statements in the mediation session may be used in any subsequent Hearing.

Section VI.2.12 Any mediated agreement shall be in writing and shall represent the final resolution of the case, unless one of Parties fails to adhere to the terms of the agreement.

Section VI.2.13 The mediator or his or her designee shall continue to be available to Parties to facilitate resolution of the implementation of any agreement through graduation of all Parties.

Section VI.2.14 If Parties do not agree to mediation, the mediation is unsuccessful, or mediation is not appropriate due to the nature of the complaint, the formal Hearing process may begin.

NOTES

Alternative dispute resolution, such as mediation, is allowed so long as all Parties make a voluntary, informed decision to engage in such procedures. Under no circumstance may the College require or in any way pressure Students to go through the informal resolution process.¹²² The College must use professional, certified, and experienced mediators for this process.

Section VII.3 STUDENTS' PROCEDURAL RIGHTS

Section VII.3.2 The following guidelines should be followed by the College for all Title IX proceedings. These guidelines are designed to protect due process for all Parties, and the College will help to ensure fair and accurate proceedings by adhering to the following principles.

Section VII.3.3 Meaningful Presumption of Innocence. Respondents shall be afforded a clearly stated presumption of innocence, including a statement that their silence shall not be held against them. The College has the burden of proof to establish each element of any Code violation with which the Respondent is charged.

Section VII.3.4 Timely and Adequate Written Notice. Adequate notice shall include the time and place of alleged policy violations, a specific statement of which policies were allegedly violated and by what actions, and a list of people allegedly involved in and affected by those actions.

¹²² FIRE Comment, *supra* note 47, at 41–44.

Section VII.3.5 Adequate Time to Prepare. Students shall have adequate time to prepare for all phases of the disciplinary process and shall have access to all evidence to be used at the Hearing during that time.

- (a) College investigators shall preserve all evidence and, absent a compelling reason, record all interviews.
- (b) Newly discovered evidence shall be shared with Parties as soon as practicable. To comply with Section VII.3.4, this may require delaying the Hearing date.
- (c) A Hearing may be postponed if Respondent can satisfactorily demonstrate that more time is necessary to secure exculpatory evidence.

Section VII.3.6 Right to Impartial Factfinders. There shall be a right to impartial factfinders, including the right to challenge factfinders for bias or any conflicts of interest with the potential to undermine the integrity of the disciplinary process. This challenge may not be heard by the factfinders themselves. Upon request, the College shall provide Parties with the contents of the factfinders' training materials.¹²³

Section VII.3.7 Right to a Meaningful Hearing Process. Cases shall be adjudicated by individuals distinct from those who conducted the investigation.

- (e) At the request of either Party, the College must provide for the Complainant to testify in a separate room from the Respondent.¹²⁴
- (f) When conducting a live Hearing with the Complainant and the Respondent in separate rooms, the College must provide technology enabling the decisionmaker(s) and Parties to simultaneously see and hear the Party answering questions.¹²⁵
- (g) Live Hearings may be conducted with all Parties physically present in the same geographic location or, at the College's discretion, any or all Parties, witnesses, and other participants may appear at the live Hearing virtually, with technology enabling participants simultaneously to see and hear each other.¹²⁶
- (h) The College must create an audio or audiovisual recording, or transcript, of any live Hearing and make it available to Parties for inspection and review.¹²⁷

¹²³ The College must publish on its website all training materials for individuals conducting Title IX proceedings. Title IX Regulations, *supra* note 3, § 106.45(b)(10)(i)(D).

¹²⁴ Title IX Regulations, *supra* note 3, at § 106.45(b)(6)(i).

¹²⁵ Title IX Regulations, *supra* note 3, at § 106.45(b)(6)(i).

¹²⁶ Title IX Regulations, *supra* note 3, at § 106.45(b)(6)(i).

¹²⁷ Title IX Regulations, *supra* note 3, at § 106.45(b)(6)(i).

Section VII.3.8 Parties and the factfinder must be able to see and hear the presentation of all evidence, including testimony, in real time at a live Hearing.¹²⁸

Section VII.3.9 Right to Present Relevant Evidence Directly to Adjudicators. Students may not be restricted to presenting evidence only through a third party, summary, or report. The investigator shall not control the scope of evidence that the Board may consider. A Hearing chair may limit the presentation evidence only if it is not relevant; it may not limit evidence based on its own determination of credibility or set limits on the quantity of evidence presented.

Section VII.3.10 Right to Meaningful Cross-Examination. This includes the right to pose relevant questions to witnesses—including the Complainant—in real time and respond to another Party’s version of events.

- (e) Questions must be asked by a Party’s advisor directly, orally, and in real-time and may not be conducted by that Party or relayed through a third party, such as the Board.¹²⁹
- (f) If a Party does not have an advisor present at the Hearing, the College must provide that Party with an advisor, without fee or charge, to conduct cross-examination on behalf of that Party.¹³⁰
- (g) Questions may be limited by the Board only if they are irrelevant or repetitive.
- (h) Questions and evidence about the Complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the Complainant’s prior sexual behavior are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or if the questions and evidence concern specific incidents of the Complainant’s prior sexual behavior with respect to the Respondent and are offered to prove consent.¹³¹
- (i) Before a Party or witness answers a cross-examination question, the Board must determine whether the question is relevant and, if it refuses to allow a particular question, it must explain its decision to Parties and document the reasons for refusal on the record.¹³²

¹²⁸ Title IX Regulations, *supra* note 3, at § 106.45(b)(6)(i).

¹²⁹ Title IX Regulations, *supra* note 3, at § 106.45(b)(6)(i).

¹³⁰ Title IX Regulations, *supra* note 3, at § 106.45(b)(6)(i).

¹³¹ Title IX Regulations, *supra* note 3, at § 106.45(b)(6)(i–ii) (incorporating language from Federal Rules of Evidence rape shield provision).

¹³² Title IX Regulations, *supra* note 3, at § 106.45(b)(6)(i).

- (j) If a Party or witness does not submit to cross-examination at the Hearing, the Board must not rely on any statement of that Party or witness in reaching a determination regarding responsibility.¹³³

Section VII.3.11 Active Participation of Advisor or Advocate. Students shall have the right to the full active participation of an advisor or advocate of choice, such as an attorney (at the Student's sole discretion), at all proceedings potentially resulting in criminal sanctions, expulsion, or a suspension of more than nine days.

Section VII.3.12 Meaningful Right to Appeal. Parties have a right to appeal a finding or sanction.¹³⁴

- (c) Grounds for appeal shall include (1) any procedural irregularity that affected the outcome; (2) the discovery of new evidence that was not reasonably available when the determination of responsibility was made that could affect the outcome; (3) the College investigator or decision-maker had a conflict of interest or bias that affected the outcome; or (4) findings not supported by the record.¹³⁵
- (d) The appeal must go to a Panel that does not include the same investigator or Board members.¹³⁶

Section VII.3.13 Expulsion By Unanimous Findings. The decision to expel a Student shall be made by a unanimous vote of the Student Conduct Board.

Section VII.3.14 Standard of Proof. Student Conduct Boards may not find a Respondent responsible for a Code violation unless that violation is proved by clear and convincing evidence.¹³⁷

Section VII.3.15 Written Decision. Parties must receive a written decision of the result of the Hearing, containing:

- (i) Identification of the section(s) of the Code alleged to have been violated;
- (j) A description of the procedural steps taken from the receipt of the complaint through the determination, including any notifications to Parties, interviews with Parties and witnesses, site visits, methods used to gather other evidence, and Hearings held;
- (k) Findings of fact supporting the determination;

¹³³ Title IX Regulations, *supra* note 3, at § 106.45(b)(6)(i).

¹³⁴ Title IX Regulations, *supra* note 3, at § 106.45(b)(8).

¹³⁵ Title IX Regulations, *supra* note 3, at § 106.45(b)(8).

¹³⁶ See Section VII.4 Appeals.

¹³⁷ See Title IX Regulations, *supra* note 3, at § 106.45(b)(1)(vii) and § 106.45(b)(7)(i) (allowing educational institutions to use the clear and convincing evidence standard for adjudicating alleged sexual misconduct under Title IX).

- (l) Conclusions regarding the application of the Code to the facts;
- (m) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility;
- (n) Any sanctions the College imposes on the Respondent;
- (o) Any remedies provided to the Complainant designed to restore or preserve access to the College’s education program or activity; and
- (p) The College’s procedures and permissible bases for Parties to appeal.¹³⁸

NOTES

Due to OCR’s mandate that colleges receiving federal funds must investigate and address Students’ allegations of sexual misconduct,¹³⁹ colleges (the vast majority of which receive federal funds) adjudicate an increasingly wide range of felony-level offenses such as Sexual Assault.¹⁴⁰ Considering that universities lack the institutional expertise and resources of the criminal justice system,¹⁴¹ the best way the College can establish fundamentally fair adjudications is by upholding the principles of due process espoused in this Code.

Due to the emotionally charged nature of sexual misconduct proceedings, allowing the Respondent to personally cross-examine the Complainant may prove to be problematic.¹⁴² In such cases, the College must allow questions to be posed by the Party’s advocate of choice. In order to maximize the effectiveness of cross-examination and encourage full witness participation, the College should encourage Parties to retain a skilled attorney who is professional, courteous, and, if possible, familiar with the unique nature of university sexual misconduct proceedings. Considering that these proceedings may result in suspension or expulsion, Respondents should be encouraged to utilize an experienced attorney rather than rely on the Board or conduct cross-examination themselves.

¹³⁸ Title IX Regulations, *supra* note 3, at § 106.45(b)(7)(F).

¹³⁹ Dep’t of Educ., Office for Civil Rights, *Q&A on Campus Sexual Misconduct*, Sept. 22, 2017, <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> (last visited Nov. 30, 2017)); *see* 20 U.S.C. § 1681 (1976); *see also* Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CAL. L. REV. (2016) (discussing evolution of Title IX requirements).

¹⁴⁰ *See* Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 81–82 (2013) (arguing that universities are severely ill-equipped to handle sexual misconduct cases).

¹⁴¹ *See* Picozzi, *supra* note 77, at 2141 (university administrators “fill all the roles of police (enforcing rules and identifying those who break them), prosecutor (deciding who should be charged for breaking the rules), judge (agreeing who should be charged for breaking the rules and deciding on factfinding procedures) and jury (deciding if the individual is guilty as charged)”).

¹⁴² *See* *Coy v. Iowa*, 487 U.S. 1012, 1024 (1988) (O’Connor, J., concurring) (the preference for face-to-face cross-examination may be overcome by competing interests in particular cases).

When the College limits a Respondent's right to cross-examine witnesses under Section VI.3.10, the College must be wary of excluding relevant evidence and violating the constitutional rights of the Respondent. As such, cross-examination should only be limited to prevent manifest injustice.

The full and active participation of an advisor, including counsel, is allowed at all stages of the process.¹⁴³ This is to ensure fundamental fairness, maximize the truth-finding function of this process, and to protect the rights of Respondents, who may be facing concurrent or subsequent criminal charges.¹⁴⁴

Considering the severe consequences of a finding of responsibility for sexual misconduct under Title IX, the College is required to prove its case by clear and convincing evidence.¹⁴⁵ By requiring this high standard of proof, the College can avoid erroneous outcomes and better protect Respondents from being unfairly labeled as sex offenders. The drastic educational and societal consequences of a finding of responsibility for sexual misconduct warrant a greater degree of certainty before making this determination.¹⁴⁶

Section VII.4 APPEALS

Section VII.4.1 Either Party may appeal an adverse decision or sanction by submitting a written notice stating the intent to appeal to the Student Conduct Administrator within seven business days of receiving the Board's written decision and sanction.¹⁴⁷ The College shall notify the other Party of the notice of appeal no later than one business day after it is received.

Section VII.4.2 The Student Conduct Administrator will convene a three-member Appellate Panel of faculty and/or administrators to review the Board's decision. The composition of the Panel shall be impartial to avoid prejudice. The Panel shall be convened no sooner than seven business days after the submission of an intent to appeal and no later than thirty days after such a submission.

Section VII.4.3 Parties have the right to challenge the Panel for bias or any conflicts of interest with the potential to undermine the integrity of the appellate process. This challenge may not be heard by the Panel itself, although Panel members shall recuse themselves from a case if they have a conflict of interest or if they cannot perform their duties in an unbiased manner for whatever reason.

¹⁴³ Title IX Regulations, *supra* note 3, at § 106.45(b)(5)(iv).

¹⁴⁴ See FIRE Comment, *supra* note 47, at 30–33.

¹⁴⁵ See *id.* at 37–39.

¹⁴⁶ See *id.* at 37–38 (discussing how the clear and convincing evidence standard protects due process).

¹⁴⁷ For Complainants, this includes the College's dismissal of a formal complaint or any allegations therein. Title IX Regulations, *supra* note 3, at § 106.45(b)(8).

Neither the Student Conduct Administrator nor any member of the Board may serve on the Panel for a case in which they were previously involved.

Section VII.4.4 The appealing Party must submit a written statement to the Panel no later than five business days in advance of its meeting explaining why the Board's decision should be changed. The Panel shall forward this statement to the other Party no later than one business day after it is received. The other Party and third Parties may submit statements to the Panel but are not required to do so.

Section VII.4.5 Either Party or their representative may choose to address the Panel directly in a short oral statement. If one Party chooses to address the Panel, the other Party shall then be offered the same opportunity. The Panel, in its discretion, may ask either Party questions within the scope of the appeal.

Section VII.4.6 The Panel's review will be limited to determining whether:

- (a) Established procedures were followed;
- (b) Parties were treated equitably;
- (c) Parties had a reasonable opportunity to prepare and present material information;
- (d) The Board's factual determinations are free from obvious error or failure to consider any material evidence;
- (e) The Board's decision was based on substantial information in the record and is rational;
- (f) The Board's reasoning is clear from its letter explaining its decision;
- (g) No new, previously unavailable evidence has emerged that would materially affect the outcome of the case;
- (h) The sanction levied is proportional to the violation(s) committed;
- (i) The Responsible Student's conduct was prohibited by the Code; and
- (j) The Board's determination was consistent with higher controlling law.¹⁴⁸

Section VII.4.7 If the Panel finds reason for concern about any of the issues listed in Section VII.4.6, then it must consider whether the error, or newly-discovered evidence, could have affected the outcome of the Hearing. If the shortcoming was inconsequential, or the new evidence is irrelevant, then the decision may be affirmed. If, however, there is a reasonable possibility that the outcome might have been different, or that the sanction was disproportionate, the Board's decision must be modified accordingly or the case must be sent back for a rehearing.

¹⁴⁸ Title IX Regulations, *supra* note 3, at § 106.45(b)(8) (listing grounds for appeal).

Section VII.4.8 Appeals from the Respondent may not result in increased sanctions.

Section VII.4.9 The Panel will promptly inform Parties of its conclusions and the reasons for those conclusions in writing.

Section VII.4.10 Either Party may appeal the Panel’s decision to the President of the College within seven business days of receiving the decision. If no such appeals are made, the matter is closed. Decisions of the President in disciplinary appeals shall be final unless otherwise required by law or regulation.

Section VII.4.11 A notice of appeal may be submitted after the deadline if the appealing Party shows that that new, previously unavailable evidence came to light or that there is a compelling reason for the delay.

NOTES

Under Title IX, the College is required to allow Complainants to appeal an adverse decision or sanction.¹⁴⁹ However, there are serious due process concerns with repeatedly subjecting the Respondent to disciplinary proceedings after he or she is found not responsible for the alleged act.¹⁵⁰ The Fifth Amendment prohibition against double jeopardy is a core principle of any system that respects due process such as the one proposed by this Code.¹⁵¹ For the same reasons of fundamental fairness that our criminal justice system forbids double jeopardy, there are significant issues with allowing the Complainant to appeal.¹⁵²

[The following Sections apply to both Title IX and non-Title IX allegations.]

¹⁴⁹ Title IX Regulations, *supra* note 3, at § 106.45(b)(8).

¹⁵⁰ *See Doe v. Alger*, 2016 U.S. Dist. LEXIS 178017, at *42 (W.D. Va. Dec. 23, 2016); *Doe v. Rector & Visitors of George Mason Univ.*, 149 F. Supp. 3d 602 (E.D. Va. 2016) (discussing the many due process violations that can occur when the accuser is allowed to appeal, such as subjecting the accused to new charges on appeal, lack of notice of new charges, denial of a meaningful opportunity to be heard, and appellate panel bias or prejudice against the accused).

¹⁵¹ *Ashe v. Swenson*, 397 U.S. 436, 445–46 (1970) (“For whatever else that constitutional guarantee may embrace, it surely protects a man who has been acquitted from having to ‘run the gantlet’ a second time”) (internal citations omitted); *see FIRE Comment, supra* note 47, at 26–27 (describing issues with allowing complainants to appeal adverse rulings).

¹⁵² *See, e.g., Wendy Kaminer, What’s Wrong With the Violence Against Women Act*, THE ATLANTIC (Mar. 19, 2012), theatlantic.com/national/archive/2012/03/whats-wrong-with-the-violence-against-women-act/254678 (“[Y]ou’d have to regard the protection against double jeopardy as a mere constitutional technicality to believe that schools should dispense with it. Or you’d have to assume that, as a general rule, fairness requires convictions and provides multiple opportunities to obtain them.”).

Section VIII. SANCTIONS

Section VIII.1 Sanctions must be reasonable and proportionate to the seriousness of the violation. The Student Conduct Administrator must accurately advise the disciplinary body of sanctions that have been imposed for similar violations in the past in order to ensure consistency and equity across time.

Section VIII.2 Any sanction imposed on a Respondent will take one or more of the following forms:

- (a) Verbal warning;
- (b) Written reprimand;
- (c) Probation and/or suspension in abeyance;
- (d) Loss of privileges for a specific period of time;
- (e) Restitution through community service or fine;
- (f) Research assignments, training programs, or community service;
- (g) Residence hall suspension, including terms for readmission;
- (h) Residence hall expulsion;
- (i) Suspension from the College, including terms for readmission; and/or
- (j) Expulsion.

Section VIII.3 The College may withhold a Respondent's degree for a reasonable amount of time to resolve any pending charges under this Code and to make sure any related sanctions are satisfied. The College may also revoke a degree if it is shown by clear and convincing evidence that it was obtained by any form of Academic Dishonesty.

Section VIII.4 Student organizations and their officers and members, in their capacity as such, are subject to the sanctions in Section VIII.2, as applicable, only upon a clear and convincing showing of actual participation in, or actual authorization or ratification of, a violation of the Code. In making this determination, the College shall consider whether the organization's members were acting in accord with its practices and policies, or with the knowledge or approval of a substantial number of its members or leadership.

NOTES

Courts may review the constitutionality of not only the procedures employed in disciplinary proceedings but also any resulting sanctions. For instance, punishments found "arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning" may run afoul of substantive due

process rights.¹⁵³ *In re Kickertz* offers several other potential bases for invalidating particular sanctions: if the sanction was too harsh for the offense,¹⁵⁴ if the sanction imposed an unreasonable cost on the Student,¹⁵⁵ if the disciplinary body failed to consider extenuating circumstances,¹⁵⁶ or if the sanction raised equal protection issues.¹⁵⁷ Mandatory apologies or essays demonstrating increased “awareness” or “sensitivity” raise concerns under the First Amendment and are therefore discouraged.¹⁵⁸ As with censorship of Student speech, a court is less likely to find compelled speech lawful in a higher education setting than in a secondary school.¹⁵⁹ Apologies and other mandated written or oral expression regarding “lessons learned” may be acceptable as part of a mediated settlement, provided that the agreement is truly voluntary. Sanctions consisting of pedagogical assignments should be overseen by a faculty member in a related field.

Section VIII.4 regarding the standard by which the College may punish Student groups is drawn from federal labor law.¹⁶⁰ The standard incorporates the basic First Amendment principle that mere membership in a group should not by itself make a Student responsible for the group’s misconduct.¹⁶¹

¹⁵³ *Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075, 1081 (5th Cir. 1995).

¹⁵⁴ 952 N.Y.S.2d 147, 155–56 (N.Y. App. Div. 2012) (finding that relative severity of expulsion “shock[ed] one’s sense of fairness”) (internal citations omitted), *aff’d as modified on other grounds*, 25 N.Y.3d 942 (2015).

¹⁵⁵ *Id.* at 156. (noting the amount of money plaintiff had expended on her education).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 157 (“Further, the punishment that NYU meted out to petitioner is allegedly harsher than the punishment it has given to similarly situated students.”).

¹⁵⁸ *Corder v. Lewis Palmer Sch. Dist.* No. 38, 566 F.3d 1219, 1231 (10th Cir. 2009).

¹⁵⁹ *Cf. Kicklighter v. Evans County Sch. Dist.*, 968 F. Supp. 712, 720 (S.D. Ga. 1997) (allowing mandatory apology but clearly noting that this finding was grounded in the fact that “children in a public school” do not have the same free speech rights as adults) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)).

¹⁶⁰ *See* 29 U.S.C. § 106 (1931).

¹⁶¹ *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 932 (1982) (“[G]uilt by association is a philosophy alien to the traditions of a free society and the First Amendment itself”) (internal citations omitted).

Section IX. CONFIDENTIALITY

Section IX.1 Educational records related to any aspect of discipline against a Student may not be released by the College without the Student's authorization. This prohibition does not apply to Students in possession of their own educational records. Only exceptions authorized under the Family Educational Rights and Privacy Act (FERPA)¹⁶² will be permitted. Specifically, the College may release records:

- (a) To comply with a judicial order or a lawfully issued subpoena;
- (b) To inform the Complainant in a case involving allegations of a crime of violence or a non-forcible sex offense of the final results of a related disciplinary Hearing;
- (c) To inform any third party, including other educational institutions, of the final results of a disciplinary proceeding related to a crime of violence or non-forcible sex offense if the Respondent is found responsible;
- (d) To any Student's parents;
 - i. If the parents claimed the Student as a dependent on their tax returns; or
 - ii. To inform the parents if the Student is found responsible for an offense related to drugs or alcohol and the Student is under the age of twenty-one at the time of the disclosure; or
- (e) To address a health or safety emergency.¹⁶³

Section IX.2 For alleged sexual misconduct under Title IX, the College shall keep confidential the identity of any Complainant, Respondent, and witness, except as permitted by FERPA, required by law, or necessary to conduct any investigation, Hearing, or judicial proceeding arising under the Title IX grievance process.¹⁶⁴

Section IX.3 Disclosure of final results to third Parties shall include only the name of the Responsible Student, the violation committed, and any sanction imposed. The disclosure must not include the name of any other Student, including a victim or witness, without the written consent of that other Student.

Section IX.4 Upon a Student's request, the College will expunge a Student's disciplinary records three years after the Student's final day of enrollment, including any disciplinary notation on the Student's transcript, unless the sanction involved suspension or expulsion. Students may request that records of violations not resulting in suspension or expulsion be expunged before graduation.

¹⁶² 20 U.S.C. § 1232g (2013); 34 C.F.R. § 99 (2019).

¹⁶³ See 34 C.F.R. § 99.36 (2019) (describing the conditions that apply to the disclosure of information in health and safety emergencies under FERPA).

¹⁶⁴ Title IX Regulations, *supra* note 3, at § 106.71(a).

NOTES

This Section is based on the restatement of the requirements for confidentiality contained in Department of Education guidance.¹⁶⁵ Nothing in this Section shall be construed to violate any obligations the College may have under FERPA or the Clery Act.¹⁶⁶

¹⁶⁵ See generally U.S. DEP'T OF EDUC., FERPA GENERAL GUIDANCE FOR STUDENTS (2011), available at www2.ed.gov/policy/gen/guid/fpco/ferpa/students.html.

¹⁶⁶ 20 U.S.C. § 1232g (2013) (FERPA); 20 U.S.C. § 1092(f) (2013) (Clery Act).