

# *Required Updates to Student Code of Conduct*

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# *Overview*

- Reasons for Code of Conduct
- Events That Trigger Required Review
- Process for Review
- Important Code Components
- Specific Issues
  - Confidentiality Issues
  - Academic Dishonesty
  - Title IX
- Conclusion and Questions

# *Reason For Code of Conduct*

- Need for control of student conduct
- When dealing with young adults, often have issues
- Enforcement is a necessary component to student affairs, although usually not favorite part of the job
- Focus on education and learning, not on punishment and sentence
- Not criminal code, so need to make sure it does not contain language to suggest that it is

# *Reasons for Code of Conduct*

- Provide clear expectations for student participation
- Provide direction for staff members who are responsible for enforcement
- Ensure compliance with state and federal laws and state association requirements
- Provide for fair and consistent rules throughout the college for equal treatment of all

# *Reasons for Review of Code*

- Codes must be evaluated regularly to see if they are working and accomplishing their goal
- Input should be encouraged from students, staff members, and coaches regarding the code
- Specific questions should be asked to determine whether the code is sufficient

# *Events That Trigger Review*

- Code of Conduct itself may trigger review.
  - “Reviews and revisions of the Student Code of Conduct are made periodically and are not to exceed more than five (5) years between such review and revision.” MATC, p. 18.
  - Code of Conduct should not limit review.
- Failure to conduct review may result in legal consequences, aside from other legal issues
- Code identified periodic review ensures priority for review, even with staff turnover

# *Events That Trigger Review*

- College's Own and Other Practical Experience
  - Has your college or other colleges had recent student conduct matters, which have created internal or external concerns with your code of conduct?
  - McCann, Michael, *After Re-Admitting Quintez Cephus, Wisconsin Could Face a Tough Legal Battle*, Sports Illustrated (Sept. 7, 2019).
- Specificity? Process? Evidentiary Standard?

# *Events That Trigger Review*

- Institutional Changes
  - Recent restructure in offices
  - Recent hires in student affairs or other offices
  - Recent changes in leadership
- Individuals may bring different perspective depending on experience
- Cautious of change for sake of change, or no change because “always done it that way”



# *Events That Trigger Review*

- Legislative / Administrative Agency Decisions
  - Department of Education, Office of Civil Rights, Proposed Title IX Rule, November 16, 2018.
    - Brown, Sarah, *What Does Higher Ed Have to Say About the Proposed Title IX Rules?* The Chronicle of Higher Education (Jan. 30, 2019).
  - Department of Education, Privacy Technical Assistance Center and Student Privacy Policy Office
    - *Letter to Wachter Regarding Surveillance Video of Multiple Students*, December 2017.

# *Events That Trigger Review*

- Court Decisions

- Anderson, Greta, *More Title IX Lawsuits by Accusers and Accused*, Insider Higher Ed (Oct. 3, 2019).
- *Olson v. Rafn, et. al*, Case No. 18-C-1366 (E.D. Wis. Sept. 13, 2019) (distribution of valentines on campus).
- *Calautti v. Shanahan, et. al*, (S.D. Ind. Aug. 7, 2019) (conduct by student on Facebook and during investigation).

# *Events That Trigger Review*

- Attorney or other colleague discussions
  - King, Tamara and White, Benjamin, “*An Attorney’s Role in the Conduct Process*,” Association for Student Conduct Administration (2016).
- Conferences by student administration experts
- Recommended model code
- Ongoing discussions with colleagues

# *Process for Review*

- Many colleges use special committees consisting of administrators, coaches, students, and others in the development process.
- Committees can identify problems, identify creative solutions, and recommend appropriate penalties based on community standards.
- Committees should promote reasonable rules that are related to educational purposes and that can be reasonably enforced.

# *Process For Review*

- Scope of review
  - Full review of Code
  - Partial review of Code
- Time for review and approval
  - Consider time for review, input, approval, and effective date

# *Process for Review*

- Process for Review
  - Review By Individuals
  - Review By Committee
  - Input from Interested Groups
  - Role of Legal Counsel
  - Approval of Changes
  - Communication to Students

# *Process for Review*

- Preparing for Review
  - Compile Information Related to Code Issues
  - Identify Problem Areas
  - Identify Potential Problem Areas
  - Student Conduct Office File
  - Survey Participants for Feedback
  - Identify All Related Conduct Policies
  - Consider Model Policies (NCERM Group Model Code)

# *Process for Review*

- Establishing the Review Committee
  - Limit the Size
  - Consider Interested Groups (Student Affairs Staff, Faculty, Campus Police, Counseling Staff, Student Government or Conduct Boards, Athletic Department Staff)
  - Certain Groups Can Provide Input, Including Critics
  - Establishing Committee Chair and Utilizing Support Staff



# *Process for Review*

- Identify Timeline for Committee Work
- Establish Scope for Committee Work
- Educate about Conduct Administration
- Create Opportunities to Give Feedback and Input
- Carefully Document Process
- Public Records / Open Meeting Issues

# *Process for Review*

- Approval of Final Code
- Timing of the Effective Date
- Consider Effective Date Issues
- Informing Community of Changes

# *Important Code Components*

- Code must be definite and provide sufficient notice to students of its requirements (and if exceptions may apply)
- Requirements and restrictions will generally be upheld if they are rationally related to the educational purpose
- Codes must not:
  - Discriminate on an unlawful basis in allowing students to participate
  - Prevent students from participating as a penalty for the exercise of constitutional rights
  - Provide opportunities other than on a fair and equal basis

# *Important Code Components*

- Provide clear definitions (e.g., “Student”)
- Careful citing to criminal or employment statutes
- Clearly list prohibited conduct
  - List as many prohibited conduct as possible
  - Use catchall provisions
  - No need to write new prohibition for every new situation
  - Identify who will make decisions on whether something prohibited

# *Important Code Components*

- Common prohibited conduct, include:
  - Physical conduct (fighting, assaults, etc.)
  - Verbal or written threatening behavior
  - Alcohol or drug possession or use
  - Misuse of technology
  - Academic dishonesty
  - Destruction of property
  - Violation of college rules
  - Disruptive behavior (including but not limited to)
  - Immoral or unethical behavior (including but not limited to)
  - On-campus versus off-campus behavior

# *Important Code Components*

- Notice of prohibited conduct (how is notice received?)
- Reporting of prohibited conduct (who is responsible for reporting and who should it be reported to?)
- Codes must be consistently enforced to promote fairness.
- College officials who do not follow through with enforcement jeopardize legitimacy with their code
- Students biggest complaint tends to be that their student is not being treated similarly to other students

# *Important Code Components*

- The code should identify which personnel will respond to violation reports and when such reports will be investigated.
- Are there other investigations / policies involved?
- The code should contemplate interim measures, including interim non-disciplinary actions.

# *Important Code Components*

- Any investigation should identify all relevant witnesses and relevant evidence and should prohibit any retaliation.
- The code should allow students to have the opportunity to present their side and have their side considered in full.
- Investigators should respect student confidentiality and any due process rights that students may have, and should also work effectively with law enforcement when appropriate.



# *Important Code Components*

- The code may have a process for informal resolution in less serious cases.
- The code may have a process for formal review in more serious cases or in the event of an appeal.
- The code should identify the standard of proof necessary for any decision.
  - Preponderance of the Evidence
  - Clear and Convincing Evidence
  - Beyond a Reasonable Doubt
- Alternative sanctions based on conduct involved

# *Important Code Components*

- During any investigation or hearing, a student may refuse to cooperate or be untruthful during the investigation.
- During any hearing, a student may request any and all information related to his case, including video or notes from the investigation.
- During any hearing, the rules of evidence should not apply. Hearsay should be generally allowed. No cross examination of witnesses is generally required.

# *Important Code Components*

- Penalties should be flexible, but consistently applied
- Penalties may include rehabilitative measures, and if so, those should be identified
- Penalties may be reduced depending on whether the student reports the conduct
- Penalties may be assessed in areas, including student organization removal, discipline, housing, or athletics.

# *Important Code Components*

- After investigation is complete, there should be appropriate notification to faculty, students, and coaches.
- Any decision should have some ability for the student to appeal that decision to someone other than the investigative body.
- The code should provide clear timelines for when such decisions will be made on any appeal and whether any decision will be a final determination.

# *Important Code Components*

- If an appeal is permitted, it should be clearly stated whether the underlying penalty will remain in place.
- If an appeal is permitted, consider how many levels of appeal are necessary and what individual(s) will hear the appeal.
- If an appeal is permitted, limit the scope of review of any appeal (e.g., error in procedure; clear violation of interpretation of the rule; clear lack of consideration of underlying evidence).
- If appeal is permitted, consider whether it will be a paper review or whether additional hearing is necessary.

# *Confidentiality Issues*

- Any investigation must protect the confidentiality rights under the Family Educational Rights and Privacy Act and other applicable laws.
- FERPA is a federal law (20 U.S.C. s. 1232g; 34 C.F.R. Part 99) that affords parents the right to have access to education records, the right to seek to have the records amended, and the right to consent to the disclosure of personally identifiable information from education records, except as provided by law.

# *Confidentiality Issues*

- No funds may be made available under any applicable program to an educational institution with a policy or practice of allowing **disclosure** of education records (or personally identifiable information contained therein except for directory information) without the written consent of eligible students except as permitted by FERPA.
- **Disclosure** means to permit access to or the release, transfer, or other communication of **personally identifiable information** contained in **education records** by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record.

# *Confidentiality Issues*

## **Education Records**

- A record, file, document, and other material that contains:
  - Information directly related to a student; and
  - Maintained by an educational agency or institution or by a party acting for the agency or institution.

34 C.F.R. § 99.3.

- A “record” is “any information recorded in any way, including, but not limited to handwriting, print, computer media, video or audiotape, film, microfilm and microfiche.” 34 C.F.R. § 99.3.



# *Confidentiality Issues*

## **Education Records**

- Exceptions to “education records” include:
  - Sole possession records used as a personal memory aid;
  - Law enforcement unit records;
  - Student employment records;
  - Treatment records; and
  - Records created or received after attendance and not directly related to attendance.

34 C.F.R. § 99.3



# *Confidentiality Issues*

## **Inspection and Review of Education Records**

- An eligible student generally must be given the opportunity to inspect and review the student's education records. 34 C.F.R. § 99.10(a).
- The institution must respond to reasonable requests for explanations and interpretations of records. 34 C.F.R. § 99.10(c).
- School must comply with a request within 45 days. School may not destroy records if a request for access is pending. 34 C.F.R. § 99.10(b) and (e).
- If the records contain information on more than one student, the requesting eligible student may inspect, review, or be informed of only the specific information about his or her records.

# *Academic Dishonesty*

- Academic Dishonesty
  - Actions that result in creating an unfair academic advantage
  - Much broader than just cheating or plagiarism
  - Can include:
    - Sabotaging another person's project,
    - Stealing and distributing test answers, or
    - Altering a previously graded examination.

# *Academic Dishonesty*

- Cheating
  - Fraud, deceit or dishonesty on an academic assignment
  - Using materials that are prohibited in the context of an assignment
  - Can include:
    - Copying from another during an exam,
    - Using concealed information during an exam, or
    - Unauthorized collaboration on an assignment.

# *Academic Dishonesty*

- Plagiarism
  - Use of another person's intellectual material without acknowledging the other person.
  - Different than merely paraphrasing material from another's work.
  - Can include:
    - Using another's paper without acknowledgment,
    - Copying and pasting papers or articles from the Internet, or
    - Purchasing prewritten papers from others.

# *Reasons for Academic Dishonesty*

- Students Engage In Misconduct for Various Reasons
  - Some students do not have confidence in their test taking abilities or struggle with overall note taking.
  - Some students feel pressure to do very well academically in order to get into the best graduate schools and engage in misconduct to maintain high grades.
  - Some students may not realize that certain actions (collaboration, copying assignments) amount to misconduct, may not understand the consequences, or may not believe that they will get caught.

# *Detecting Academic Dishonesty*

- Before technology, detection depended on observant teachers to identify students who were copying answers, who used additional materials on exams, or copied assignments.
- With technology, teachers must also now be aware of other resources available on the Internet and consider whether students will be using these materials.
- Students may also now be using devices to exchange answers over social media.
- Video in the classroom may also detect certain misconduct.

# ***Title IX September 2017 Guidance***

- Includes 12 questions and answers on issues related to sexual misconduct on campus.
- Subtle changes on matters related to sexual misconduct, including changes in footnotes.
- Must also note changes resulting from withdrawal of other guidance documents.



# ***Title IX Proposed Rules***

- Defines sexual harassment
- Requires that school must have actual knowledge of sexual harassment (or allegations)
- Requires that alleged harassment must involve conduct that occurred within the school's own program or activity
- Must respond in a way that is not deliberately indifferent, which may including supportive measures.
- Provides a safe harbor for schools who investigate pursuant to grievance procedures.
- Provides a presumption of innocence for the respondent

# ***Title IX Proposed Rules***

- Requires that a written determination on sexual harassment be made by a decision-maker who is not the same person as the Title IX Coordinator or investigator.
- Requires the determination to be made using the preponderance of the evidence standard or the clear and convincing standard, but may only use the preponderance standard if uses that standard for conduct code violations that do not involve sexual harassment.
- Requires schools to create and maintain records documenting every Title IX sexual harassment investigation and parties may request copies of these records pertaining to their own case.

# *Conclusion*

- Updating your code may take time, so make sure you allow sufficient time for appropriate review.
- Consider application of code to students (transgender) or behavior that may not be prohibited under the law.
- Consider how accommodations will be provided to students who may allege conduct caused by disability or cannot participate in investigation due to disability.

# *Questions*

- Please contact me with any questions.
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