



October 4, 2017

U.S. Department of Education

Public Hearing for Regulatory Reform

Comment from the Association for Student Conduct Administration (ASCA)

Good morning. My name is Jill Creighton and I serve as the President of the Association for Student Conduct Administration (ASCA), a 501(c)3 representing more than 3,000 higher education student conduct administrators at approximately 1,200 colleges and universities in all 50 states. We are the highly trained practitioners who work with student disciplinary concerns at the post-secondary level, including cases of alcohol or drug misuse, theft, physical assault, hazing, harassment, and sexual misconduct. 93% of us have earned Master's and/or terminal degrees. We have been trained in how to investigate, ask questions, apply laws, write thorough reports, and innumerable other skills required to do this work. Many of our members also serve as Deputy Title IX Coordinators.

For 30 years, ASCA has taught campus administrators to adjudicate student misconduct from a lens of fundamental fairness using a myriad of conflict resolution techniques, including formal investigation and adjudication, restorative justice, conflict coaching, and mediation. Every day, I am responsible for talking with, listening to, and learning about our students' lives. I am charged with ensuring that all students are treated with respect and dignity, and upholding the tenets of fundamental fairness.

Today, I will speak to three concerns raised by the student conduct administrator community.

First, I want to speak to campus student conduct due process and deference to campus administrations. Federal Courts have determined what encompasses adequate campus due process. Decisions including *Dixon v. Alabama State Board of Education*, *Goss v. Lopez*, and *Esteban v. Central Missouri State University*, give clear guidance that we must provide adequate notice. This includes a description of the alleged behavior, and the date and time of the alleged incident. We must also provide some kind of hearing. Hearings must include the opportunity to respond to and ask questions of the totality of information about the allegation, including information provided by other involved parties.

In 1968, the Western District of Missouri issued a General Order that clearly articulates why campus processes should not resemble courts of law and should have a separate and distinct function related to the maintenance of a safe campus environment. The courts have spelled out the requirements of campus due process, which are widely used today. Any new rulemaking should reflect what the courts have already decided, and not attempt to make campus administrative proceedings into a mock courtroom.

ASCA teaches that campus processes must be fundamentally fair. However, we do not believe it is the role of the government to micromanage them. The 2001 guidance states, "One of the fundamental aims ... has been to emphasize that, in addressing allegations of sexual harassment, the good judgment and common sense of teachers and school administrators are important elements of a response that meets the requirements of Title IX." The 1997 guidance, "Offers school personnel flexibility in how to respond to sexual harassment." I encourage this administration to continue to provide adequate flexibility to schools and professionals so they may feasibly manage their administrative processes, including student discipline.

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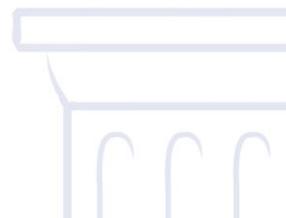
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Second, I want to address the preponderance of the evidence standard as it applies to Title IX. Case law asserts the preponderance of the evidence standard is the most appropriate for student conduct proceedings. ASCA recommends it because it is the only standard that reflects the integrity of equitable student conduct processes for all parties. On a campus, we are evaluating whether a student violated our institutional policies. We are not determining whether a student broke the law.

The most severe sanction an institution can impose is expulsion from that school. While this is certainly a serious consequence, it is not comparable to loss of life or liberty - that is what the criminal justice system protects. Given the lower stakes, the preponderance standard is the suitable and equitable standard by which to weigh a complaint. Most campuses already use, and have been using preponderance for student conduct cases long prior to the rescinded 2011 guidance, the same standard by which civil litigation cases are decided in a court of law.

In *Doe v. Brandeis University*, which was not a Title IX complaint, the court raised concerns that applying different standards of proof for different behaviors at the same institution is in and of itself discriminatory. Changing a campus' burden of proof through regulation, whether at the federal or state level, not only ignores institutional deference, it also de facto determines the standard for all campus violations less we create a discriminatory environment.

Third, I ask for a clarification on the use of mediation for sexual violence cases. On her September 28, 2017 call with NACUA, Assistant Secretary Jackson stated that mediation is permitted for sexual violence cases whereas the 2001 guidance specifically prohibits this. We request clarification as to the definition of mediation as the Department of Education sees it, as well as the role of other methods of informal resolution such as restorative justice, shuttle diplomacy, and facilitated dialogue.

In conclusion, student conduct administrators have, thus far, been excluded from conversations that directly impact our abilities to do our jobs well. I understand the Department of Education has been working with both NACUA and ACE. While student conduct professionals often work closely with campus legal counsel, we have the valuable perspective of interacting directly with all students – respondents, complainants, witnesses, and others – as we execute campus procedures. The Department of Education would be remiss to exclude our practical experience from any future negotiated rulemaking or other procedures. Therefore, we respectfully request to be included in future efforts to change the Federal Regulations.

We invite Secretary DeVos and Assistant Secretary Jackson to attend the ASCA Annual Conference in February 2018 as our guests. It is prudent and necessary for the Department of Education to garner a stronger sense of the student conduct profession, those who work in this field, and the level of training and expertise we bring to the table.

Thank you for your time.

Respectfully submitted,

A handwritten signature in black ink that reads "Jill L." followed by a stylized flourish.

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