Report of the Student Conduct Process Working Group

To:       President Bud Peterson
From:    Nels Peterson, USG Vice Chancellor for Legal Affairs
CC:       Chancellor Henry M. Huckaby
           Members of Working Group
Date:     December 15, 2015

President Peterson:

You charged this working group with reviewing the process for investigating, charging, and resolving violations of the Institute's Student Code of Conduct. We have met multiple times, reviewed the text of the Code of Conduct and its associated process, and considered the application of that process in the context of a variety of cases. We also reviewed related policies at a number of peer institutions. The working group achieved consensus on each conclusion addressed here.

We want to begin by observing that Institute staff cooperated fully with our review. Gary Wolovick (a member of the working group) and the Office of Legal Affairs went above and beyond in rendering significant assistance with scheduling, logistics, and distribution of materials. Assistant Dean of Students Peter Paquette, although not a member of the working group, attended several meetings at our request to answer questions about the way the Institute's processes function in application. Although there were many questions, often probing and sometimes pointed, Peter responded thoughtfully and fully to all of them. We are grateful for his assistance.

As an initial matter, we found that the clarity of the process is at its most critical in the small percentage of cases where the parties involved disagree about what happened. Where the facts of the case are undisputed (as is true for over 95% of cases), the only real issues are (1) the proper interpretation of the Institute's Code of Conduct, which is not a process issue, and (2) the proper sanction (if any), which is a process issue only in a limited sense. With respect to these cases of undisputed facts, the Institute's policies work well and are consistent with peer institutions. We believe, however, that there is a need for change with respect to the small minority of cases, less than 5%, that present material disputes of fact.

In our view, the following aspects of the Institute's process require correction.¹

¹ Note that this review did not consider the Institute’s process for Title IX cases, as that process (1) differs from the Student Code of Conduct we were reviewing, (2) was beyond the scope of your charge, and (3) will soon become moot with the promulgation of a system-wide process.
I. Case Investigation

Discussion

The decision to bring charges, including any investigation that influences the making of that decision, is a crucial part of the Institute’s student discipline process. Presently, the Code of Conduct itself is insufficiently clear regarding that aspect of the process. As a result, there also is a lack of clarity surrounding how the Office of Student Integrity (“OSI”) actually carries out that initial part of the process. When students submit allegations to OSI, it is likely not unusual for their submissions to be somewhat unclear. When that is the case, it is certainly proper for OSI to speak with the complainant to gather more information in order to better understand his or her allegations. At that point, OSI may make a determination of whether, presuming the allegations are true, they would be sufficient to constitute a violation of the Code of Conduct. Problems arise, however, if OSI goes beyond that threshold determination and makes a decision that charges against a student or student organization are actually warranted based only on information provided from the complainant without seeking information from the accused student or student organization. If the pre-charge investigation is intended to go beyond simply understanding the nature of the complaint and instead seeks to determine the facts of what occurred, the investigator must talk with both sides and consider evidence submitted by each side. The issuance of charges should not be based on considering only one side to the story.

This latter scenario apparently occurred in one case that we reviewed. In that case, initiated by a student complaint, OSI’s pre-charge investigation was one-sided and considered only the complaining student’s evidence and evidence of witnesses the complainant provided. The OSI decided to bring charges against a student organization based only on one side of the story. In the case in question, this failing was then exacerbated by a second flaw in the process. In that case, OSI’s pre-charge investigation was summarized in a report that was then provided as evidence to the student hearing panel. The student hearing panel, of course, is designed to be the impartial factfinder when an accused student or student organization declines to have their case heard by the OSI administrator. The dangers of a one-sided pre-charge investigation are compounded when the results of that investigation are shared with the hearing panel, which is likely to give it inordinate weight.

Conclusion

Institute policy should be amended to require that pre-charge fact investigations, if conducted, talk with all parties and evenhandedly consider evidence submitted by all parties. Moreover, pre-charge investigation reports should not be used as evidence in student panel hearings where facts are in dispute.

II. Aggregation of Unrelated Cases

Discussion

The Institute’s policies do not address the appropriateness of aggregating unrelated cases as part of a single student conduct panel hearing. In one case we reviewed, two unrelated cases involving similar charges were heard as part of the same hearing. Of course, the simultaneous existence of two
unrelated accusations does not alter the likelihood of either accusation being true or untrue, but aggregating the charges arising from the accusations can certainly alter the perception of a factfinder. Aggregating unrelated charges before a student conduct panel, absent a particularly compelling reason to do so, only serves to increase the likelihood that the panel finds the accused student or organization responsible for the charged violation.

**Conclusion**

Institute policy should be amended to prohibit aggregating unrelated charges before a single student conduct panel, absent consent of the accused student or organization.

**III. Appellate rights**

**Discussion**

Presently, appeals may only be taken to the President from expulsions and suspensions. Cases in which the sanction is a suspension in abeyance are not subject to an appeal to the President. But Institute policy makes clear that a suspension in abeyance is automatically converted into a suspension by a finding of responsibility in any subsequent charge, no matter how minor the subsequent charge may be or how small the sanction for it. This creates the opportunity for a suspension to be imposed without any ability to appeal to the President.

**Conclusion**

Institute policy should be amended to allow appeals to the President in cases where the sanction is expulsion in abeyance or suspension in abeyance.

**IV. Challenges to hearing officer bias**

**Discussion**

Presently, there is no mechanism by which an accused student can challenge the bias of a hearing officer. In one case we reviewed, the Dean of Students (who is the ultimate appellate authority absent an expulsion or suspension) co-authored an op-ed in the student newspaper about a case pending in OSI; although the op-ed contained words like "alleged" and "if true," such qualifiers are not sufficient to avoid a reasonable perception of bias. That case later came to him as an appeal, and he decided the appeal despite the accused student organization challenging his participation on the basis of the op-ed. A mechanism should exist to prevent the reoccurrence of such things.

**Conclusion**

A policy should be added to create a mechanism to challenge a hearing officer on the basis of bias and to require that such challenge be decided by an impartial third party.
V. Formalization of Findings

Discussion

Presently, although the student conduct panel completes a form specifically detailing its findings of fact and reasoning for those findings, a similar form does not appear to be required when a student chooses an administrative review by a student conduct administrator. Such a form would render the process more transparent, ensure more consistent documentation, and assist with appellate review.

Conclusion

A form specifically detailing findings of fact and reasoning for those findings should be required to be completed in all cases in which there are disputes of fact, whether the accused student selects a student conduct panel or an administrative review.