

## **Report of the Boulder Faculty Assembly (BFA) Ad Hoc Committee to Investigate the Patricia Adler Case**

**(Submitted to the Boulder Faculty Assembly on May 1, 2014)**

BFA Ad Hoc Committee:

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## I. Introduction and Timeline

### **A. Introduction**

On December 12, 2013, tenured sociology professor, Patricia ("Patti") Adler, informed students in her "Deviance" course (Sociology 1004, Deviance in U.S. Society) that the University of Colorado Administration (including the Chair of Sociology and the Dean of the College of Arts and Sciences) was removing her from the course and that she was being forced to accept an early retirement. This announcement created an outcry among the students that took the form of several hundred emails to Steven R. Leigh, Dean of the College of Arts and Sciences, and a petition signed by over 2000 students calling for Professor Adler's reinstatement. Administrators' decision to remove Professor Adler from the course also caught the attention of local and national media and professional organizations. Commentators raised the issue of whether the sanction levied against Professor Adler (her removal from the course) violated her faculty rights and academic freedom. Following this, Provost Russell Moore sent an email to the entire campus that further enflamed the situation. In addition, because the case involved concerns over a "prostitution skit" in the course (see page 3 description), the sanction fueled public insinuations that Professor Adler had engaged in unlawful "sexual harassment."

In the wake of these events, the Boulder Faculty Assembly (BFA) called a special meeting on December 18, 2013, to discuss what had happened. Dean Steven Leigh and Provost Russell Moore attended the meeting and responded to questions from the faculty. During this meeting Dean Leigh reported that he had only recently become aware that the Sociology Department had not reviewed Professor Adler's course before the sanction was imposed and that he had accordingly requested Sociology to review the course. In addition, Dean Leigh asked the BFA to conduct a general review of the issues raised by this case. On December 30, 2013, an ad hoc committee of Sociology faculty members reviewed the Deviance course and recommended that Professor Adler be reinstated to teach the course. The Department's Executive Committee approved the recommendation on January 2, 2014. Dean Leigh accepted this decision and removed the sanction. On January 10, 2014, Professor Adler announced that she would return to the University of Colorado and teach the Deviance course in the spring semester.

Given this sequence of events, the faculty became concerned about the manner and lack of transparency in which administrators imposed a serious sanction on Professor Adler, a respected faculty member and acknowledged leader in her field. This concern is heightened by the fact that Professor Adler, during the twenty-five years she has been at the University, successfully taught the course in question to thousands of students. In addition, only thirty days after the Administration imposed the sanction, it removed it. Professor Adler returned to the classroom, but without any doubt, her reputation, along with the reputations of the Sociology Department and the University, has been severely damaged.

In an attempt to understand this extraordinary course of events, on January 13, 2014, the BFA Executive Committee appointed an ad hoc committee to examine Professor Adler's case, which is the committee writing this Report ("the Committee").

### **B. The BFA Charge to the Committee**

The BFA charged the Committee with reviewing "whether administrators followed established University policies and procedures" and to do so by addressing the following questions:

1. What are the facts surrounding the case?
2. What specific policies and procedures should have been followed in this case?
3. Did the Administration and/or faculty follow policies and procedures?
4. Did the Administration and/or faculty violate fundamentals of academic freedom and academic responsibility?
5. What are the recommendations for avoiding this situation in the future?

The Committee was further charged with reporting findings to the Executive Committee of the Boulder Faculty Assembly by May 1, 2014.

### ***C. The Committee's Investigative Process***

The Committee met with and interviewed the following people:

- Professor Patricia (Patti) Adler, Sociology.
- Professor Joanne Belknap, Chair of the Department of Sociology (accompanied by John Sleeman, Senior Managing Associate Counsel).
- Katherine Erwin, Director, and Llen Pomeroy, Office Manager of the Office of Discrimination and Harassment ("ODH") (accompanied by John Sleeman and Candice Bowen, Associate Vice Chancellor for Human Resources).
- Professor Leslie Irvine, Sociology (Professor Irvine accompanied Professor Adler to the meeting with ODH on December 10, 2013. Professor Irvine also serves on the ODH Advisory Board.)
- Professor Stephen Leigh, Dean of the College of Arts and Sciences (accompanied by John Sleeman).
- Professor Russell Moore, Provost (accompanied by John Sleeman).
- Professor Joyce Nielsen, former Chair of the Department of Sociology (Professor Nielsen accompanied Professor Adler to the meeting with Deans Steve Leigh and Ann Carlos on December 10, 2013).
- Professor Michael Radelet, former Chair of the Department of Sociology (Professor Radelet served on the Department committee that reviewed Professor Adler's Deviance course).

Professor Adler signed general waivers of confidentiality and designated every member of the Committee as a "Person in Interest" under the Colorado Open Records Act (CORA). This enabled the Committee to view written materials that had been redacted by the University Counsel involving concerns with Adler's course. The Committee read documents specifically relating to facts of the case, including emails, transcripts from meetings, office logs, a script for the skit, and course syllabi. The Committee also reviewed relevant University policies, newspaper stories, letters of concern from external bodies such as the American Association of University Professors (AAUP), ACLU, and others, an encyclopedia overview of deviance from a sociological perspective, and other materials. Particularly relevant to this Report are the documents, "Professional Rights and Duties of Faculty Members & Roles and Professional Responsibilities of Department Chairs" (Appendix 1) and the Office of Discrimination and Harassment's "Discrimination and Harassment Policies and Procedures" (Appendix 2) and "Sexual Harassment Policies and Procedures" (Appendix 3). The Committee also reviewed a summary of administrators' concerns about the prostitution skit provided by Dean Leigh. This summary is included later in this Report in its entirety. In total, the Committee read and reviewed over 2000 pages of documentation. It should be noted that, contrary to the Committee's understanding of confidentiality and attorney-client privilege, the University Counsel prevented the Committee from accessing certain

relevant information regarding this case. In addition, the University Counsel declared certain documents upon which the Committee relied "confidential" in nature and prohibited the Committee from citing them in this Report. It also should be noted that the committee was unable to interview any students.

## **II. A Brief Chronological Summary of the Facts of the Case**

### **A. *The Prostitution Skit***

Professor Adler has taught Sociology 1004, "Deviance in U. S. Society,"<sup>1</sup> at the University of Colorado for twenty-five years. Enrollment in the Fall and Spring semesters is capped at 500 per semester. To engage such a large class, Professor Adler uses a variety of methods, including dressing in costume, humor, role-play, and a skit on prostitution designed to teach students about status stratification within a deviant subculture. Graduate Teaching Assistants ("TAs") and undergraduate Assistant Teaching Assistants ("ATAs") assist in the skit presentation. Professor Adler selects the ATAs from among a pool of applicants who have taken and done well in the Deviance course in a previous semester. Thus, undergraduate students who apply to be Adler's ATAs are already familiar with the prostitution skit, having seen it performed when they were enrolled in the Deviance course as students. By contrast, not all of the graduate student TAs who assist in the skit have previously observed or participated in the presentation of the skit.

### **B. *Timeline of Events***

**Oct. 31, 2013:** A student reports concerns to Sociology Chair Joanne Belknap about the possibility that other students are uncomfortable about performing in the prostitution skit. Professor Belknap testified to the Committee that there were concerns expressed by other students as well. Professor Belknap, seeking to comply with her obligation as an administrator to report potential incidents of discrimination and harassment, notifies ODH of the concerns.

**Oct 31 - Nov 5:** ODH conducts a preliminary inquiry, involving discussions with potential complainants and witnesses. Upon receiving permission from Professor Belknap, ODH investigators, accompanied by Professor Belknap, attend Professor Adler's Deviance course and view the performance of the prostitution skit. Professor Adler is not informed of the visit and is unaware that it has taken place.

**Nov 12:** Professor Adler hears for the first time, essentially by rumor, that ODH is conducting an inquiry into the skit.

**Dec 3:** Aware that ODH has become involved, Professor Adler requests and has a meeting with Professor Belknap to discuss concerns about the course and consider whether the skit should be discontinued or modified. At this point Professor Adler does not know that ODH investigators viewed the skit. By this meeting, Professor Belknap has decided that Professor Adler cannot teach the course in the Spring, but she does not inform her of the decision at the meeting.

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<sup>1</sup> *Blackwell Encyclopedia of Sociology Online*, s. v. "Deviance"  
[http://Owww.blackwellreference.com/libraries.colorado.edu/subscriber/tocnode.html?id=g9781405124331\\_chunk\\_g978140512433110\\_ss1-38](http://Owww.blackwellreference.com/libraries.colorado.edu/subscriber/tocnode.html?id=g9781405124331_chunk_g978140512433110_ss1-38) (accessed April 15, 2014)

**Dec 5:** ODH personnel (Llen Pomeroy and Megan Clark) call for a meeting with Deans Leigh and Carlos, University Counsel John Sleeman, and Professor Belknap to inform them that there is no basis to proceed with an investigation. At this meeting, Professor Belknap recommends that Professor Adler be disallowed to teach the Deviance course in the Spring semester. Deans Carlos and Leigh accept the recommendation. The Committee notes that the University Counsel limited our access to what was said at this meeting on the ground of attorney-client privilege.

**Dec 5:** Professor Belknap meets briefly with Professor Adler to inform her that the University Administration approved the application for early retirement that Professor Adler had requested earlier in the semester, but Professor Adler would need to retire by the end of the month. Professor Belknap also tells Professor Adler that she will not be teaching the Deviance course in the Spring semester.

**Dec 6:** Seeking advice on how to respond, Professor Adler contacts the Chancellor, the University Ombuds Professor Emily Calhoun, the Dean's office, and various departmental colleagues. The Ombuds advises her to request meetings with the Dean and ODH and to take colleagues along as witnesses.

**Dec 10 (8:15 AM):** As recommended by the Ombuds, Professor Adler, accompanied by Professor Leslie Irvine of the Sociology Department, meets with ODH representatives Llen Pomeroy and Megan Clark. The ODH representatives' make various statements about Professor Adler's case, later summarized in a December 10<sup>th</sup> email from Ms. Pomeroy to Professor Adler. They state:

- ODH is not conducting an investigation based on a "hostile environment complaint;"
- There is no complainant;
- ODH has not received other concerns or complaints about the prostitution skit, Professor Adler's class, or Professor Adler;
- ODH is still concerned about the language used in the skit and "potential harms" to ATAs; and
- ODH appreciates Professor Adler's receptiveness to their feedback and willingness to discontinue the skit. (Appendix 4 and Appendix 5)

**Dec 10 (1:15 – 1:45 PM):** As recommended by the Ombuds, Professor Adler meets with Deans Leigh and Carlos. Professor Adler is accompanied by Professor Joyce Nielsen, who attends as the former Chair of Sociology in place of Professor Belknap. According to Professors Adler and Nielsen, the meeting does not go well—it is rushed, and communication is ineffective. The Committee believes that the deans and professors left with different impressions of the outcomes. According to Dean Leigh, the meeting was too brief and did not get to a resolution. However, he believes that he communicated to Adler that the sanction was not final, there would be further review of the skit by an independent body, and she could talk to the Chancellor, Provost, BFA, or follow other grievance procedures. For her part, Professor Adler understands that that she has been sanctioned, that she cannot continue to teach the course, and that she is being threatened and forced to retire in a timeframe she finds unacceptable. Professor Nielsen's testimony supported Professor Adler's view of the meeting. According to both Professors Nielsen and Adler, the deans used most of the meeting to encourage Professor Adler to accept an early retirement package. Professor Nielsen was clear that the deans were firm in their position that Professor Adler could not return to the class. She was also clear that the deans stated that regardless of whether Professor Adler accepted the retirement, she would not be permitted to teach the course.

**Dec 10:** During a Sociology Department faculty meeting, Professor Belknap informs the Sociology faculty that she contacted ODH about Professor Adler's course.

**Dec 12:** Professor Adler informs the students in her class that she is being forced to retire. A public uproar follows shortly.

**Dec 16:** Dean Leigh has received hundreds of emails from former students asking him to reinstate Professor Adler. He meets with a group of ATAs who had requested a meeting.

**Dec 16:** Dean Leigh holds an “emergency meeting” with senior faculty in the Sociology Department and also attends the regular Department faculty meeting. According to Dean Leigh’s testimony, during the emergency meeting, he finds out that there had been no “peer review” of the course prior to the sanction. He then decides to reverse his position supporting the sanction. At this meeting or soon thereafter, Dean Leigh calls for an ad hoc Sociology Department committee to review the Deviance course.

**Dec 18:** The Boulder Faculty Assembly schedules its own “emergency meeting” with Dean Leigh and Provost Moore. At that meeting, Dean Leigh states that Professor Adler’s “due process” must follow its course. Shortly thereafter, the BFA Chair recommends that a committee be convened to investigate the case thoroughly. The BFA Executive Committee subsequently appoints this Committee.

**Dec 23:** The Executive Committee of the Sociology Department appoints an ad hoc committee composed of Sociology Professors Jane Menken, Michael Radelet, Kathleen Tierney, and Joyce Nielsen to review the Deviance course. After a thorough review of the course, the ad hoc committee recommends to the Sociology Department Executive Committee that Professor Adler is “welcome to teach the course in Spring 2014” as long as she follows “informed consent procedures” when “skits or similar role-playing exercises are included.”

**Jan 2:** The Sociology Department Executive Committee clears Professor Adler to teach the Deviance course in Spring 2014, although one member of that committee objects to continued inclusion of the prostitution skit.

**Jan 10:** Professor Adler publicly announces her return to CU.

### **III. Report on Violations of Policies and Procedures**

Department Chairs have the responsibility and authority to make faculty teaching assignments. However, the sanction of removing a faculty member from the classroom is an extraordinary measure, and it implies that the faculty member has engaged in misconduct. Both the imposition of a sanction and the process by which a sanction may be appealed are governed by University policies. These policies are contained in a document entitled “Professional Rights and Duties of Faculty Members & Roles and Professional Responsibilities of Department Chairs” (referred to here as PRD). The Committee carefully reviewed these policies as they pertain to this case. Because this case involves concerns over potential discrimination and sexual harassment, the Committee also reviewed policies governing the Office of Discrimination and Harassment (ODH) contained in the “Discrimination and Harassment Policy and Procedures” and “Sexual Harassment Policy and Procedures.”

## **A. ODH Policies and Procedures**

A central question is whether ODH followed their own policies and procedures, including whether their policies allowed ODH to refrain from notifying Professor Adler of their preliminary inquiry. The Committee believes that the answer to this question is yes, with the caveat that the ODH procedures that govern the preliminary inquiry consist entirely of unwritten practices rather than formal policies. To understand this conclusion and its implications, one has to understand ODH policies and practices.

On October 31, 2013, as required under existing policy, the Chair of Sociology notified ODH of a potential complaint associated with Professor Adler and her course that might fall under ODH purview. ODH immediately began an inquiry into the potential complaint. However, Professor Adler did not learn about ODH's involvement until November 12<sup>th</sup>. She did not learn this either from ODH or the Chair. According to an ODH document, "The Investigative Process," ODH adheres to the following procedures upon receiving a complaint:

Step 1: ODH receives an allegation of discrimination or harassment.

Step 2: ODH interviews the complainant and alleged victim(s).

Step 3: The ODH officer or investigator determines whether to conduct a full investigation, resolve the matter through an informal process, or close the case.

Step 4: If ODH decides to conduct a full investigation, they send a Notice of Investigation (NOI) to the "respondent" (alleged harasser or discriminator) informing him/her of the allegations. The respondent must then contact ODH and meet with the investigator.

Step 5: The investigator meets with the parties and relevant witnesses and collects supporting evidence.

Step 6: The investigator drafts a report.

Step 7: The investigator submits the report to the ODH Standing Review Committee for review.

Step 8: After the Standing Review Committee approves the report, it is sent to the complainant, respondent, the respondent's supervisors, and the Chancellor.

Steps 1, 2, and 3 constitute what ODH refers to as a "preliminary inquiry," which precedes a full "investigation." According to ODH, the purpose of the preliminary inquiry is to determine whether to initiate a full investigation (and notify the respondent), work toward an informal resolution (and notify the respondent), or simply close the case (without notifying the respondent). In Professor Adler's case, ODH followed its normal practice of conducting a preliminary inquiry and closing the case without notifying the respondent. However, the Committee notes that ODH possesses tremendous latitude in the actual conduct and duration of a preliminary inquiry. The phrase, "preliminary inquiry" nowhere appears in the Discrimination and Harassment or Sexual Harassment documents that govern the operation of ODH. Consequently, a preliminary inquiry proceeds without regulation because it is not formally included, much less described, in official ODH documents.



Professor Adler's case never emerged from the preliminary inquiry stage. ODH initiated the meeting on December 5 with the Chair of Sociology, the Dean of Arts and Sciences, Associate Dean Ann Carlos and University Counsel John Sleeman to inform them that they did not have adequate grounds to investigate and were closing Professor Adler's case. Ultimately, ODH reported this to Professor Adler by email in response to her request for clarification. Crucially, it was during the preliminary inquiry stage that ODH decided to attend Professor Adler's Deviance class and observe the prostitution skit, without informing her of their attendance or even the fact of an investigation. ODH acknowledges that this action was unusual and unprecedented. The visit to Professor Adler's class has created the perception that ODH may assume unilateral authority to come unannounced to a class, and, by extension, concern itself with course content. This perception, which raises substantive concerns about academic freedom, will be discussed more fully in the academic freedom and recommendations sections of this Report. Nevertheless, ODH's observation of the Deviance course, held secret from Professor Adler, underscores the risks associated with an unregulated and ad hoc preliminary inquiry process.

### ***B. Administrative Policies and Procedures***

The drafters of the University's policies and procedures recognize that allegations of serious misconduct, especially of sexual harassment and discrimination, against a faculty member are highly inflammatory. Even if unfounded, they may irredeemably damage the faculty member's reputation. It is the opinion of the Committee that if a faculty member is found to have engaged in misconduct, the faculty member should be sanctioned appropriately. Otherwise, the administration should treat the faculty member as exonerated and, if necessary, make efforts to restore the faculty member's reputation.

The "Professional Rights and Duties of Faculty Members" ("PRD") discusses the sanction imposed on Professor Adler. PRD, Part D.4.d.vi governs "reassignment, temporarily or permanently, of the faculty member's courses or other duties" and specifies that it is a serious action that can only be imposed when a faculty member has engaged in professional misconduct. Moreover, when imposing such a sanction, administrators must follow specific procedural rules to ensure that the faculty member's rights are not violated. In determining whether administrators adhered to the PRD, the Committee addresses two questions about the sanction of disallowing Professor Adler to teach the Deviance course: (1) Did Professor Adler engage in misconduct that justified the sanction?; and (2) Did administrators follow the procedures laid out in the PRD that govern imposing such a sanction?

#### **1. Professor Adler's Alleged Misconduct Did Not Justify the Sanction**

This committee does not find that Professor Adler engaged in misconduct that justified the imposed sanction. We note that the Administration never documented its allegations against Professor Adler or the grounds on which they were based. However, after the fact, on April 11, 2014, Dean Leigh forwarded to Committee Chair Professor Jobe a list of concerns that were raised at the December 5th meeting between administrators and ODH (Appendix 7). These concerns are listed here verbatim:

1. Whether or not the undergraduate teaching assistants' consent to participate was truly knowing and voluntary given the inherent power differential between students and faculty.
2. Whether or not mechanisms were in place to address student concerns or fears about negative consequences if students declined to perform.

3. The potential impact on the participants in the skit, including:
  - possible personal humiliation from performing in the skit in front of an auditorium of students.
  - possible compromised ability of assistant teaching assistants to effectively conduct their responsibilities following the skit.
  - concerns stemming from the possible distribution of images from the skit, whether from the DVD recording of the performance made by the faculty member and sold to the participants or from surreptitious recordings made by audience members, particularly since admission to class for the skit was not restricted to students enrolled in the class.
4. Whether the pedagogical value of the skit was established through discussions, reading assignments, or other exercises.
5. Whether participating in the skit was unwelcome conduct that was sufficiently severe or pervasive to alter the learning or working environment, creating a hostile environment in violation of the University's Sexual Harassment Policy, or whether expressing concern about the skit would subject students to retaliation.
6. Whether the skit could constitute protected class discrimination or harassment in violation of the Discrimination and Harassment policy.

Because University Counsel did not permit the Committee to learn the substance of the conversation at the December 5<sup>th</sup> meeting, we have no way of knowing whether any of these concerns figured into the decision to sanction Professor Adler. We do know, however, that ODH called the meeting on Dec 5th for the purpose of informing the participants that it had no basis for going forward and was closing the case. If the sanction was imposed based on concerns over sexual harassment and discrimination, it was inappropriate given that ODH had determined it had no basis to proceed. ODH is the proper investigating body for claims of discrimination and harassment, and an administrator should not bypass the ODH process simply by assuming unsubstantiated allegations, even if compelling, to be true. If the sanction was based on general concerns over student discomfort, the administration had less punitive options available.

The ODH investigation was initiated in response to concerns about students' welfare. The Committee fundamentally agrees that student safety is a paramount concern. Dean Leigh provided a list of specific concerns about the impact of the prostitution skit in Professor Adler's Deviance course. Even though the Committee believes the administrators' decision may have been motivated by such concerns, we find that neither Professor Adler's personal conduct nor the skit threatened student safety and that the sanction was unwarranted. Our conclusion is reinforced by the fact that Dean Leigh, after additional review, removed the sanction.

## 2. Administrators Failed to Follow Procedures set forth in the "Professional Rights and Duties of Faculty Members ("PRD")

The PRD lays out the University of Colorado's procedures governing the professional behavior of faculty and administrators. The PRD consists of four parts: Part I. Professional Rights of Faculty Members; Part II. Professional Responsibilities, Ethical Principles, and Faculty Conduct; Part III. Roles and Professional Duties of Department Chairs; and Part IV. Review of Faculty Conduct and Sanctions for Unprofessional Conduct by a Faculty Member. Part IV.D, which addresses sanctions for faculty misconduct, is particularly relevant to this Report.

The Committee finds that administrators committed three principal violations of the PRD:

- (i) Administrators failed to notify Professor Adler in writing of the sanction against her, in violation of PRD, part IV.C.6.B;
- (ii) Administrators failed to apprise Professor Adler of her right to appeal the sanction against her to a reviewing authority, in violation of PRD, part IV.C.6.B; and
- (iii) Dean Leigh, by participating in the initial decision to sanction Professor Adler, did not “employ such procedures as provide for . . . [an] impartial review of the allegations,” as required by PRD, part IV.C.6.b.iii.

*(i) Administrators violated the PRD by failing to notify Professor Adler of the sanction against her in writing.*

On December 3, 2013, at her request, Professor Adler met with Professor Belknap to discuss the future of the Deviance course. Professor Belknap informed the Committee that by that date she already had determined that Professor Adler had engaged in professional misconduct that warranted an administrative sanction. (Whether Professor Belknap gave “due consideration of the principles of academic freedom” in fashioning the sanction, as required by PRD, part IV.D.1, will be addressed later in the Report.) However, Professor Belknap did not inform Professor Adler of her decision to disallow Professor Adler to teach the course, nor did she provide Professor Adler with a written document describing the sanction imposed and the grounds for the sanction. On December 5<sup>th</sup>, Professor Belknap informed Professor Adler of the sanction, but she again did not provide any documentation. The PRD provides that a Supervising Administrator may conclude that a faculty member “has engaged in unprofessional conduct” and “may impose a sanction that he or she deems appropriate.” (PRD, part IV.C.3.a.ii). If such a sanction consists of “emphasiz[ing] the faculty member’s professional responsibilities” or “admonish[ing] the faculty member orally,” the sanction is final, and no written document is required (PRD, part IV.C.6.a). In this case, however, the sanction was more serious than an oral admonition. Consequently, Professor Belknap was obligated to inform Professor Adler “in writing” of the sanction, the basis for the determination of this sanction, and any consideration of academic freedom. (PRD, part IV.C.6.b.). By failing to apprise Professor Adler of the grounds for and nature of the serious sanction imposed against her in writing, Professor Belknap violated the clear language of the PRD.

*(ii) Administrators violated the PRD by failing to inform Professor Adler of her right to appeal.*

The PRD sets forth a comprehensive procedural framework to govern administrative sanctions against faculty members. Sanctions that go beyond *de minimis* oral advisements exact hardship on faculty members and are thus subject to rigorous procedural regulation, including appellate review. The PRD provides that “serious sanction[s]” must be imposed “in writing” and that “[t]he Responding Faculty Member may appeal either the Supervising Administrator’s finding or the sanction(s) imposed, or both.” (PRD, part IV.C.6.b.). Not only did Professor Belknap fail to apprise Professor Adler of her findings and sanction in writing, she also made no mention of the fact that Professor Adler had due process rights, including a robust right to appeal the findings and sanction to a higher administrative authority. The Committee accordingly finds that these administrative actions left Professor Adler with the impression that she did not have a right of appeal and thus violated PRD, part IV.C.6.b.

*(iii) Administrators violated the PRD by failing to provide for an “impartial review of the allegations” against Professor Adler., as required by PRD, part IV.C.6.b.iii.*

Professor Belknap’s decision to impose a serious sanction on Professor Adler triggered Professor Adler’s right to appeal to a “Reviewing Administrator.” (PRD, part IV.C.6.b.). The Reviewing Administrator in Professor Adler’s case was Dean Leigh. As the Reviewing Authority, Dean Leigh had the duty to “employ such procedures as provide for a timely and impartial review of the allegations.” (PRD, part IV.C.6.b.iii). The PRD thus contemplates that the Reviewing Administrator will sit as an impartial appellate body and review the sanctions imposed against a faculty member, taking into account “the recommendation for sanction, any record available, and any written statement the Responding Faculty Member may wish to make in the matter to that administrator.” (PRD, part IV.D.4.b).

Administrators patently failed to follow these PRD procedures. On December 5, 2013, representatives of the ODH called a meeting with administrators to inform them that ODH was not initiating a formal investigation into Professor Adler’s conduct. The ODH decision notwithstanding, at that meeting Professor Belknap apparently informed the participants, including Dean Leigh, of her decision to sanction Professor Adler. At that point, Dean Leigh should have “employ[ed] procedures” to preserve his impartiality and waited to gather all the information on the case in order to conduct a thorough appellate review of the sanction. Instead, without any further inquiry, Dean Leigh joined in the decision to prohibit Professor Adler from teaching the Deviance course. This action amounted to a violation of PRD parts IV.C.6.b.iii and IV.D.4.b. Even after Dean Leigh, the Reviewing Authority, joined the decision to sanction Professor Adler, the Administration still did not inform her of the sanction in writing or of any right to appeal. In fact, Professor Adler had to request a meeting with Deans Leigh and Carlos (on December 10, 2014) in order to talk to them about the sanction. The substance of this meeting is contested between Dean Leigh and Professors Adler and Nielsen. However, irrespective of the actual events of the meeting, Deans Leigh and Carlos compromised their positions as reviewing authorities.

Professors Adler and Nielsen testified to the Committee that Dean Leigh intimated that Professor Adler’s best method of avoiding the sanction (and any future sanctions based on claims of sexual harassment) was to retire. Consequently, Professor Adler left the December 10<sup>th</sup> meeting with Deans Leigh and Carlos with the impression that Professor Belknap’s finding (joined by Dean Leigh) that she had engaged in professional misconduct warranting a serious sanction was final and unreviewable. Dean Leigh testified to the Committee that the discussion had not reached a resolution on this issue.

*(iv) The aftermath of administrators’ violations of PRD procedures*

Administrators’ failure to follow established policies and procedures proved costly both to Professor Adler, the University’s reputation, and academic freedom (discussed further below). Administrators kept Professor Adler completely in the dark about the investigation against her, their findings, and their decision to impose a sanction. Further, the Reviewing Administrator supported the initial sanction decision before gathering the facts and reviewing the matter in a systematic, impartial, and dispassionate matter. Most disturbingly, administrators kept Professor Adler ignorant of her procedural rights. These failures culminated in Professor Adler leaving the December 10<sup>th</sup> meeting believing that administrators’ had made a final decision to force her out of her course and even the University. It is the Committee’s opinion that this belief was not unfounded. It was in this frame of mind that Professor Adler announced to her class that she would no longer be teaching the Deviance course,

which, in turn, led to the explosion of press and social media commentary on the case and the consequent reputational harm to the University.

#### **IV. Report on Academic Freedom**

The Committee is charged with determining whether administrative actions in Professor Adler's case violated fundamentals of academic freedom. In doing so, we discuss two different but related issues: (1) whether the conduct of the Administration and ODH negatively have affected or violated Professor Adler's right to academic freedom, and (2) whether the conduct of the Administration and ODH in Professor Adler's case have chilled academic speech in general and, if not corrected, pose an ongoing threat to academic freedom.

Academic freedom is a paramount, if not *the* paramount, value in higher education. First, the freedom to teach a subject using favored pedagogical methods is a vital individual right, embedded in the First Amendment to the U.S. Constitution. The Supreme Court has repeatedly characterized academic freedom as a necessary component of free speech and association. See *Weimann v. Updegraf* (1952) (calling academic freedom one of "those fundamental principles of liberty which lie at the base of all our civil and political institutions"); *Sweezy v. State of New Hampshire* (1957) ("The essentiality of freedom in the community of American universities is almost self-evident."); *Grutter v. Bollinger* (2003) (observing "the expansive freedoms of speech and thought associated with the university environment"). Perhaps more importantly, free inquiry, the exchange of ideas, and the broad ability to open students' minds to new thoughts and discoveries is essential to the university mission and intellectual flourishing of humankind.

##### ***A. Impingements on Professor Adler's Right of Academic Freedom***

The Committee finds that the conduct of ODH and the Administration's actions impeded Professor Adler's First Amendment right of academic freedom. After receiving concerns from a student and Professor Belknap about Professor Adler's prostitution skit, ODH opened a preliminary inquiry into the case. At some point, investigators from ODH determined they should attend Professor Adler's class without informing her of their attendance. ODH personnel thereafter sought and received Professor Belknap's permission to secretly view Professor Adler's class. After viewing Professor Adler's class, an ODH investigator advised Professor Adler that the content of her class posed "risks." Specifically, the investigator expressed concerns over the language used by participants in the skit, such as "the repeated use of the word 'faggot,' the references to beating women, and the use of a fake Latvian accent . . . which resulted in laughter from the class." In addition, ODH noted the "potential harms" when students "play the role of prostitutes and dress/act accordingly." (December 10<sup>th</sup> email from ODH to Professor Adler). The Committee believes that ODH investigators' visit to Professor Adler's class was an unfortunate mistake and a violation of principles of academic freedom, if for no other reason than it created the fear among faculty that ODH had unbridled leeway to visit classrooms and could be the arbiter of course content.

As discussed earlier in the Report, the complaints about Professor Adler's prostitution skit eventually resulted in Administrators imposing a serious sanction on Adler, without regard to due process. In doing so, they removed Professor Adler from a course she had taught successfully for twenty-five years. Removal from a class, by itself, is not a violation of academic freedom. Because the Committee was prevented from knowing the administration's precise grounds for sanctioning Adler, it is

possible that the skit did not figure into the sanction decision. However, based on the information we received from witnesses, the skit (and therefore Adler's classroom pedagogy) did figure in the sanction decision. PRD procedures are designed specifically to ensure that administrators carefully balance academic freedom against countervailing values of professional responsibility. When Administrators on the departmental and College levels imposed a sanction without following the carefully constructed polices governing faculty rights, they risked violating the principles of academic freedom. The fact that the sanction was later reversed does not erase the imposition on Professor Adler's liberty to teach material and choose pedagogical methods as she saw fit. The turn of events in this case has fundamentally changed the nature of the Deviance course and the skit, and Professor Adler has decided to no longer use the skit.

### ***B. The Chilling Effect on Academic Speech***

Administrators have a fundamental obligation to carefully and thoughtfully balance their concerns over student comfort and safety, preventing discrimination, and promoting civility with the importance of the free exchange of ideas in the classroom. The Supreme Court elevated academic freedom to a fundamental right precisely to protect educators who espouse controversial ideas, teach sensitive topics, and challenge prevailing dogma. As Justice Frankfurter eloquently wrote in *Weimann*:

To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or State government.

The actions of administrators in sanctioning Professor Adler and ODH in secretly screening Professor Adler's class and determining that its content posed "risks" served to incite fear in professors desiring to inquire "into the checkered history of social and economic dogma," lest they also be subject to administrative reprobation and penalty, or worse, be painted as "sexual harassers." In the wake of the Adler case, professors, especially untenured professors and contract professors, have become afraid to teach subjects that deal with race, gender, sexual orientation, and sexuality. A university that prides itself on diversity and inclusiveness should not discourage professors, many of whom may be minorities and women themselves, from teaching the very subjects about which diverse students care most.

Of course, a professor does not have the academic freedom to target minority students and engage in systematic harassment that creates a hostile learning environment. Some in the Administration have attempted to justify Adler's sanction on the ground that academic freedom must always yield to "student safety." The Committee, of course, recognizes that student safety should be a paramount concern of the University. It also recognizes that Professor Adler may have underestimated

how potential use of cell phone technology and social media could amplify the risks of performing in the skit, as Professor Adler herself admitted. However, the claim that performance in the skit, itself, threatened student safety reflects an incomplete understanding of academic freedom and student safety. First of all, the statement conflates student discomfort with subject-matter and in-class exercises with lack of safety. Some in the Administration emphasized this unfortunate conflation by drawing parallels between concerns over Professor Adler's class exercises and the violent and horrific sexual abuse that occurred at Penn State. Professors' teaching methods, even ones that are inappropriate and unprofessional, should not be equated with unwanted and dangerous sexual conduct. Moreover, there is a vast difference between speech involving sexual matters and sexual harassment. Sexual harassment does not occur simply because a student would rather not hear about some sexual topic or even when a sexual utterance is deliberately offensive. Rather, sexual harassment occurs when a person, because of their *gender*, is subject to repeated, acute, and threatening conduct, whether sexual or not. See *Harris v. Forklift Sys., Inc.* (S.Ct. 1993) ("The nature of a sexual harassment claim is gendered. In other words, sexual harassment occurs when a supervisor's discriminatory words or acts (sexual or not) are sufficiently severe or pervasive to create an abusive working environment.").

Teaching a course involving sexual subject matter and even having students participate in an in-class exercise that involves sexual subject matter is not sexual harassment, nor does it threaten personal safety. In a case strikingly similar to the Adler case, *Cohen v. San Bernardino Valley College* (9<sup>th</sup> Cir. 1996), the Federal Court of Appeals held that that a professor's First Amendment rights were violated when "officials of the College, on an entirely ad hoc basis, applied the [sexual harassment] policy's nebulous outer reaches to punish teaching methods that [he] had used for many years." Consequently, conflating Professor Adler's prostitution skit with sexual harassment and, worse, threats to students, allows the University's sexual harassment policy and "student safety concerns" to be exploited by anyone who disagrees with a professor's chosen method of teaching a sensitive or controversial subject. Further, the Committee believes that prevalent misunderstandings about the scope of academic freedom, the definition of sexual harassment, and the appropriate balance between faculty and student rights undergirded the various administrative failures in the Adler case. We thus encourage the Administration to support a campus-wide conference to discuss the balance between academic freedom and professionalism toward students.

#### **V. Concluding Recommendations**

The Committee acknowledges the importance of informal relations in academic institutions like the College of Arts and Sciences. Many and perhaps most disputes between faculty and administrators are best resolved in an informal manner. The practice of using informal means to resolve problems is therefore understandable. However, when a case involves serious accusations and sanctions, administrators must recognize the need to strictly follow and enforce established University policies. This is especially important if there is any indication that the case involves a faculty member's fundamental rights, like academic freedom. Our conclusions should in no way be construed as a lack of concern for student safety or that student concerns are not legitimate. Moreover, the committee believes that it is vital that students have a clear path for reporting issues that affect their safety. The problems identified in the Report are associated with how the investigation was conducted, decisions were reached, and with problems with communication, as well as with the policies that were violated in the process. So, with the benefit of hindsight, the Committee offers a set of recommendations that we hope will be useful in the future.

### **Issue 1: Lack of Understanding of University Policies**

The investigation revealed that administrators might not have been fully informed of the University policies that must be followed in cases involving sanctions against faculty members.

#### ***Recommendation:***

Administrators (Chairs, Deans, and the Provost) should read and periodically review: (1) ODH policies and definitions, making sure that they fully understand technical definitions of sexual harassment and discrimination, and (2) the "Professional Rights and Duties of Faculty Members and Roles and Professional Responsibilities of Department Chairs" ("PRD"). Whenever a faculty member might be sanctioned, it is essential that administrators re-read these policies.

### **Issue 2: Failure to Document Sanction**

Dean Leigh was apparently unaware of the full basis for and procedures followed in determining Professor Belknap's decision to sanction Professor Adler. As a result, within days of approving the sanction, the Dean decided to reverse his decision and directed the Chair to appoint a faculty committee to reexamine the sanction.

#### ***Recommendation:***

Chairs should follow PRD policy and provide a written report whenever they impose serious sanctions. This report should include the justification for the sanction and the procedures followed in determining the sanction. The Chair should transmit a copy of this report to the Dean.

### **Issue 3: Lack of Awareness of Professional Rights and Responsibilities**

Faculty members are generally not fully aware that the PRD regulates the professional conduct of faculty members and that violating the PRD can result in administrative review and sanction. Faculty members are also not generally aware that the PRD specifies faculty rights.

#### ***Recommendation:***

When informing a faculty member of a sanction, the relevant administrator should give her/him a copy of the PRD and inform the faculty member of her/his rights, including the right to appeal the sanction to a higher administrative authority, the specific means to do so, and the right to seek counsel.



#### **Issue 4: Lack of Syllabus for “Teaching Sociology”**

Because there was no syllabus for *Sociology 4911 Teaching Sociology*, ATAs who had enrolled in the course and agreed to participate in the prostitution skit may not have been fully aware of the implications of participating in the skit. In this case, potential widespread use of camera phones and social media posed new, and perhaps under-appreciated, challenges. Although the ATAs were selected from previous students of the course and were aware of the skit’s content, once an ATA agreed to participate in the skit, there was no established procedure for withdrawing such participation.

#### ***Recommendation:***

Every course should have a syllabus that explains the expectations for and requirements of the course, including class participation requirements.

#### **Issue 5: Lack of Written Policy Governing ODH Preliminary Inquiries**

There are no written policies governing the "preliminary inquiry" phase of an ODH investigation. In the absence of any stated policy, ODH decided, among other things, that they were entitled to visit Professor Adler’s class without her knowledge. The consequence of this decision, when it became public, was the general perception that ODH had the right to visit any class and review its content. In addition, during the preliminary inquiry and after, if there is no basis to proceed, ODH practice is to not notify the subject that an inquiry is occurring or had taken place. There are no written policies that justify the practice of not informing subjects about preliminary inquiries. Finally, there are no policies governing the length of the preliminary inquiry.

#### ***Recommendation:***

1. The Chancellor should appoint a task force, composed of representatives from ODH, the student body, staff, faculty and administration, to develop written policies to guide the various steps of the ODH investigation process, including the preliminary inquiry. Specifically, the task force should develop guidelines governing the duration of a preliminary inquiry and when to notify or refrain from notifying a subject of the existence of a preliminary inquiry. In addition, because class visits potentially infringe academic freedom, ODH should adopt a written policy stating that, under no circumstances, will ODH observe an instructor's class.
2. Until these new policies are created, ODH should state its practices regarding the preliminary inquiry clearly on its website, including that its current practice is that they do not notify a subject of a preliminary inquiry, unless the case proceeds to an "investigation." Further, ODH will not observe classes.

### **Issue 6: Overly Broad Reporting Requirement**

There are many good reasons for ODH to encourage broad mandatory reporting of sexual harassment and discrimination. The Committee is very supportive of the University's regard for student safety and freedom from discrimination. However, broad reporting of student concerns with professors' course content or teaching methodology imposes significant costs. A broad reporting requirement in such a context puts administrators in a bind because it requires them to initiate an ODH investigation into academic content and pedagogical methodology, thereby risking infringements on academic freedom.

#### ***Recommendation:***

ODH and the faculty should work together to develop a narrower mandatory reporting norm for complaints about course content and teaching methods. Unlike the mandatory reporting requirement for behaviors that occur outside of the classroom, a reporting requirement for in-class conduct must reflect an appropriate balance between student needs and academic freedom.

### **Issue 7: Lack of Understanding of the Balance between Academic Freedom and Anti-discrimination Policy and Professional Treatment of Students**

This case has raised serious questions about whether all members of the University of Colorado community fully understand the nuanced relationship between faculty rights and responsibilities, academic freedom, professional treatment of students, and harassment and discrimination policy.

#### ***Recommendation:***

The Committee recommends that the University hold a conference on academic freedom and anti-discrimination policy (Title IX). This conference should involve faculty, staff, students, administrators, ODH personnel, and legal counsel.

### **Issue 8: Damage to Adler's Reputation**

Even though the Administration eventually removed the sanction, the events of this case have severely damaged Professor Adler's reputation.

#### ***Recommendation:***

The Administration should take affirmative steps to repair, as much as possible, the damage done to Professor Adler's professional reputation.

## VI. Appendices

1. *Professional Rights and Duties of Faculty Members & Roles and Professional Responsibilities of Department Chairs*. Endorsed by the Boulder Faculty Assembly, March 4, 2010. Approved by Provost Russell Moore on January 16, 2013.
2. *Discrimination and Harassment Policy and Procedures*. (Effective date January 1, 2014). Approved by Chancellor Philip P. DiStefano, University of Colorado Boulder.
3. *Administrative Policy Statement (APS) 5014: Sexual Harassment Policy and Procedures*. (Effective date July 20, 2012). Approved by President Bruce D. Benson, University of Colorado.
4. Email from Patti Adler to Llen Pomeroy, December 10, 2013 (10:31 am)
5. Email from Llen Pomeroy to Patti Adler, December 10, 2013 (11:30 am)
6. *The Investigative Process*. University of Colorado Boulder Office of Discrimination and Harassment.
7. Confirmation of email and attachment from Dean Leigh to Peggy Jobe, April 11, 2014.