Memo

TO: Codes and Judicial Committee
FR: Kevin Clermont, member
DA: October 14, 2011
RE: Sexual Harassment Changes

Last spring the UA added to the Campus Code this appendix, on an emergency basis:

> The following motion was approved on 17 May 2011:
> "Be it resolved that, in cases of sexual violence and sexual harassment (as identified in Sections 1(A) and 1(C)) arising under the Campus Code of Conduct, the standard of proof will be preponderance of evidence and all rights of appeal afforded to the accused will also be afforded to the complainant."
> To assist readers in interpreting the Campus Code of Conduct (the Code), references to this language have been made by footnotes throughout the Code; however, the text may apply to other sections of the Code even if no explicit footnote reference is provided.

The UA expected the CJC to revisit the matter this year. The minutes of the UA on this change are at http://assembly.cornell.edu/UA/20110427Minutes#toc4.

I therefore now move that the CJC amend the appendix as follows:

> For the imposition of remedies as opposed to penalties (as identified in Article IV.A and B of Title Three) in cases of sexual violence and sexual harassment (as identified in Article II.A.1.1(a) and (c) of Title Three) arising under the Campus Code of Conduct, the standard of proof will be preponderance of evidence and all rights of appeal afforded to the accused will also be afforded to the complainant with regard to remedies.
> To assist readers in interpreting the Code, references to this language have been made by footnotes throughout the Code; however, the text may apply to other sections of the Code even if no explicit footnote reference is provided.

Alternatively, we could eliminate the footnotes and create a new Article IV.E of Title Three that reads:

> Notwithstanding any other provision of this Code, for the imposition of remedies as opposed to penalties (as identified in Article IV.A and B of Title Three) in cases of sexual violence and sexual harassment (as identified in Article II.A.1.1(a) and (c) of Title

Three), the standard of proof will be preponderance of evidence and all rights of appeal afforded to the accused will also be afforded to the complainant with regard to remedies.

Background

The federal Office of Civil Rights of the Department of Education has issued a "Dear Colleague" letter that urges schools to level the pitch in *grievance procedures* for "sexual harassment" (which includes sexual violence, in OCR's parlance), so as to provide parity between complainant and alleged perpetrator. A Dear Colleague letter is not law, but instead is a statement of how OCR will henceforth read the dictates of the governing statutes and regulation, when OCR in the future seeks to induce voluntary compliance or to obtain administrative enforcement if necessary. OCR issued the letter without any of the notice-and-comment safeguards that are prerequisite to issuing an actual regulation. The actual law in fact is very general, providing by regulation in 34 C.F.R. § 106.8(b) only: "A recipient [of federal funds] shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part." The OCR letter is a reasonable, albeit imaginative, interpretation of that concise legal requirement. Although OCR wants immediate compliance because it is stating what it thinks the law already requires as "prompt and equitable" grievance procedures, it is simply advising schools "to examine their current policies and procedures" in that light and, only then, to "implement changes as needed."

The question in my mind is not *whether* to comply with the letter's interpretation. I am in no way opposed to the OCR's outlook. The question for me is *how* to comply.

First, I find OCR's command to be ambiguous. If OCR really were to require us to overhaul the Campus Code (e.g., to switch from a clear-and-convincing standard to a preponderance-of-the-evidence standard), its action would be illegal, unwise, and unenforceable. (a) It would be illegal because this would involve an agency going arbitrarily beyond its statutory authorization; the pursuit of eliminating discrimination does not authorize imposing a standard of proof that a university considers unfair for proceedings at least in part punitive. (b) It would be unwise to countenance different disciplinary regimes for different offenses of equal seriousness. A basic premise of legal fair play in our country is to treat the like in a like way. Moreover, it would be simply illogical for OCR to argue that because civil and administrative procedures use the preponderance-of-the-evidence standard, a punitive scheme must do so too. If OCR were to try converting criminal court proceedings to the preponderance standard, it would run into an absolute impediment: the Constitution. (c) It would be unenforceable because the only tool available to OCR itself is cutting off federal funds; it is not about to cut off Cornell's funding on the ground that the Campus Code uses a clear-and-convincing standard.

I recognize that Cornell's working group of University Counsel and administrators has thrown its significant weight behind total capitulation. It wants many complicated changes to the Campus Code (e.g., allowing parents to institute proceedings and to appeal). But the working group suffers from conflicts of interests that discourage it from standing on principle. (a) Cornell

does not want the hassle of resisting a federal agency, understandably enough. (b) The administration has no will to resist prevailing political winds in the absence of a considerable Cornell interest. (c) The working group serves a Cornell administration that has previously expressed opposition to a rights-based Campus Code. Thus, the working group actually writes in favor of the preponderance standard: "If the standard is sufficiently reliable for government agency and federal [civil] court adjudications, it should suffice for Campus Code proceedings."

Second, I in fact do not think that OCR is at fault, because it does not require what the working group thinks it requires. OCR nowhere says that a *disciplinary* system must follow its new guidelines, but instead says that *grievance* procedures must. Its aim is to get schools to adopt procedures "to eliminate the harassment [or hostile environment], prevent its recurrence, and address its effects." This aim will require ameliorative steps, compensatory acts, and perhaps even moderate sanctions of a civil or corrective style (i.e., "rehabilitative" rather than "punitive," to use the words of the Title IX webinar sponsored by University Counsel on May 5, 2011). The OCR's required complainant-favoring procedures for imposing these compliance-directed remedies all conform to that aim. Indeed, OCR's discussion of remedies focuses on broad corrective steps. When it alludes to discipline, it makes this telling qualification regarding accused-oriented steps: "Public and state-supported schools must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant." This passage suggests that OCR views punitive procedures as separate from grievance procedures, and indeed that it views its procedures as not being in accord with the due process required for punishment. (Incidentally, the same lessons concerning due process appear in section X of OCR's *Guidance* document, http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf, which in fact goes on to say: "In both public and private schools, additional or separate rights may be created for employees or students by State law, institutional regulations and policies, such as faculty or student handbooks, and collective bargaining agreements. Schools should be aware of these rights and their legal responsibilities to individuals accused of harassment.")

It is true that the distinction between civil (or corrective) and criminal (or punitive) is sometimes fuzzy. But it is a distinction our judicial and administrative systems—and our Constitution—insist on drawing. If the aim is to punish someone, we owe that person greater protections.

It is also true that OCR says: "Title IX does not require a recipient to provide separate grievance procedures for sexual harassment and sexual violence complaints. Therefore, a recipient may use student disciplinary procedures or other separate procedures to resolve such complaints. Any procedures used to adjudicate complaints of sexual harassment or sexual violence, including disciplinary procedures, however, must meet the Title IX requirement of affording a complainant a prompt and equitable resolution." Our current Title IX problem thus arises from Cornell's failure to promulgate a set of grievance procedures, having chosen to shoehorn the Campus Code into service as fulfillment of its legal obligation to fashion grievance procedures.

Third, Cornell needs grievance procedures separate from the Campus Code. There *should* be two systems: one being a disciplinary code, and one aimed at providing equal opportunity through grievances. On the one hand, although a disciplinary code tries to educate individuals, it also punishes when education does not work. In punishing sexual harassment, the problem is that the facts are often hard to prove. The solution is not to lower the standard of proof to get more convictions and impose more, and even wrongful, punishment. The superior solution for curbing sexual harassment is to develop a different remedial path. On the other hand, the purpose of Title IX is to assure equal opportunity. Under grievance procedures, the accuser and the University could impose civil-style remedies, in pursuit of amelioration, compensation, and correction. Indeed, many grievances will in effect be complaints against the University for not providing the right environment. For such purposes, Cornell should act quickly and effectively to redress inequality, with some mistakes being tolerable as they would only mean unnecessary remedies. Thus, preponderance of the evidence is the appropriate standard in a grievance system.

This failure of the University to issue grievance procedures could signify that the administration does not take sexual harassment seriously enough. More certainly, this failure of the University to issue grievance procedures is responsible for putting us in the position of accommodating changes to the Campus Code that are suitable only to a grievance system. I favor fighting the evil of sexual harassment. I do not favor unnecessarily sacrificing the virtues of our Campus Code.

Alternatives

At this point, the CJC can go down any of three paths:

1. The CJC can send the matter to the University Counsel, so that Counsel can draw up grievance procedures for sexual harassment, just as it is supposed to do. To repeat, the relevant federal regulation provides: "(b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part." Counsel could probably do this faster than the CJC could manage change to the Campus Code. It could promulgate the procedures by expanding the University's Policy 6.4 to include students and other concerned persons (it currently provides: "Accused is Known Cornell Student (Excluding Student Employees)—Apply the Campus Code of Conduct through the Office of the Judicial Administrator."). The problem with this ideal solution is that the University administration is opposed.

2. The CJC can make the changes to the Campus Code that the University's working group insists on. This will mean either that we have two disciplinary procedures, one for many sorts of serious offenses and another less scrupulous one for targeted offenses, <u>or</u> that for all offenses we throw out the accused's protections that the whole community recently approved. I refer again to my recurring but representative illustration of the standard of proof: The accuser and the accused do not in fact, and should not, stand at the same level in the typical Campus Code

proceeding. The purpose of such a proceeding is to impose sanctions on the accused alone. We have thought that we want to be sure before doing so. We therefore have required clear and convincing evidence.

3. I favor and hence propose a third route. I propose to accomplish the OCR's aim by applying its reforms to the grievance-like portion of the Campus Code, but not to its disciplinary portion. That is what I am proposing by the language at the beginning of this memo. It will achieve compliance with OCR's command and help to combat sexual harassment. But it will not toss aside any rights of the accused, rights that almost everyone endorses in contexts other than sexual harassment.