Memo

TO: Codes and Judicial Committee
FR: Kevin Clermont, Risa Lieberwitz & Matt Campbell, members
DA: November 21, 2011
RE: Changes in Sexual-Harassment Procedures

In light of the CJC's illuminating debate last Wednesday, we propose that the University rewrite Policy 6.4 to facilitate the bringing of sexual-harassment grievances against the University and its officials, while disciplinary proceedings aimed at penalizing individual students remain governed by a revised Campus Code.

The University grievance mechanism would deliver the necessary compliance with the demands of the federal Office of Civil Rights of the Department of Education, thus helping to curb sexual harassment by balanced procedures that would test evidence by the preponderance-of-th-evidence standard and that would deliver equal rights to appeal. The Campus Code would still provide punishment for sexual harassment, but would continue to do so with sensitivity to the accused's rights.

1. OCR Letter

The Office of Civil Rights of the Department of Education has issued a "Dear Colleague" letter, http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf, 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 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. OCR advises schools "to examine their current policies and procedures" in the light of its views and then to "implement changes as needed."

The question in our minds has never been *whether* to comply with the letter's interpretation of the law. We are in no way opposed to the OCR's outlook. The question for us is *how* to comply.

2. UA Action

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.

So, what should the CJC propose in order to meet the UA's call for compliance with the OCR letter?

3. Administration's Position

The CJC debate over what to do has recently become much more focused and productive, now that the University administration has accepted its responsibility to revise the grievance procedures for sexual harassment. 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."

The University says it can promulgate the necessary sexual-harassment procedures by expanding its Policy 6.4. The administration's new position poses this critical question for the CJC: What changes to the Campus Code are necessary to enable the Policy 6.4 reform?

The premise for answering that question is that Cornell does indeed need 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, in our view, is not to lower the standard of proof to get more convictions and impose more, and even wrongful, punishment. Retaining the clear-and-convincing standard of proof meets the goal of punishing sexual harassment while also protecting the rights of the accused. On the other hand, the purpose of Title IX is to assure equal opportunity. To achieve

this goal, which includes eliminating sexual harassment, we support strengthening the remedial path in Policy 6.4. Under the strengthened 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.

In other words, we must recognize that a grievance mechanism under Policy 6.4 and proceedings under the Campus Code are, and should be, fundamentally different. The grievance procedures aim at remediation, and so should have informal and balanced procedures primarily based on an investigative process. A disciplinary code aims at punishment, even if imposed for "educational" reasons, and so by American principles of justice should have procedures protective of the accused, such as a right to a hearing before decision—and a right to await any criminal-court disposition so that the accused has the right to speak to advisors and decisionmakers without fear of incriminating himself.

Yet, the answer now advocated by the University administration is to extract sexual harassment committed by students from the Campus Code altogether and to subject accused students to the informal Policy 6.4 procedures. That strikes us as too radical a solution. We do not favor unnecessarily sacrificing the virtues of our Campus Code's respect for rights.

4. OCR's Demands

If the UA just hands over jurisdiction of Title IX cases to Policy 6.4, there is cause for concern that the University will adopt overly informal procedures that are a far cry from the process provided under the Campus Code. This concern arises because the administration exaggerates the OCR letter's import. The administration's representatives suffer from three conflicts of interests that discourage them from standing on principle. (a) Cornell does not want the hassle of appearing to resist 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) Its representatives serve a Cornell administration that has previously expressed opposition to a rights-based Campus Code. Thus, the administration tried to dump the Campus Code in 2006-2008. And the Title IX working group of University Counsel and administrators actually wrote last spring in favor of imposing the preponderance standard across the board: "If the standard is sufficiently reliable for government agency and federal [civil] court adjudications, it should suffice for [all] Campus Code proceedings."

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

We would be the first to admit that the OCR letter is ambiguous. University Counsel resolves the ambiguity in a way to make the OCR's position extremely demanding. We resolve the ambiguity the other way. Cornell's task is to decide how to resolve the ambiguity. Here are three reasons that we think the best way is to take OCR at its word, that is, as discussing grievance procedures:

- It is 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." What this means is that the sensible way to read the OCR letter is that it is talking only about *grievance* procedures, while it warns schools that provide only disciplinary procedures that they must overhaul them. **Our current Title IX problem thus arises from Cornell's failure to promulgate a satisfactory set of grievance procedures, having previously chosen to shoehorn the Campus Code into service as fulfillment of its legal obligation to fashion grievance procedures.**

- When the OCR letter eventually alludes to *disciplinary* procedures, 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." (Incidentally, OCR revealed the same protective attitude concerning due process when it cautioned in section X of its *Guidance* document, http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf: "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.") **These passages suggest 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.**

Moreover, if OCR defers to public universities' duty to provide due process, it is likely that it would also allow private universities to choose to provide due process. Given the existence of its statutory colleges, Cornell may be obliged to provide due process. See Powe v. Miles, 407 F.2d 73, 82 (2d Cir. 1968) ("We hold that regulation of demonstrations by and discipline of the students in the New York State College of Ceramics at Alfred University by the President and the Dean of Students constitutes state action, for the seemingly simple but entirely sufficient reason that the State has willed it that way."). In any event, Cornell has chosen to respect the rights of the accused in its disciplinary code, and it seems implausible that OCR meant to trump such a choice by a private university.

- If OCR really were to require us to overhaul our disciplinary procedures (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, which it has never used. It is not about to cut off Cornell's funding on the ground that the Campus Code uses a clear-and-convincing standard.

5. CJC's Alternatives

At this late point in the debate, it seems, the CJC can go down either of two paths:

(i) The CJC can surgically remove sexual-harassment cases from the Campus Code for treatment under Policy 6.4. The University would expand Policy 6.4 to include sanctioning students.

This change would mean that we would have two disciplinary procedures for accused students, one for many sorts of serious offenses and another less scrupulous one for targeted offenses. We refer again to our 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. The new Policy 6.4 would require only a preponderance

of evidence, having a huge effect in "he said/she said" cases.

This bifurcation would be appropriate only if the CJC feels that sexual-harassment cases are so different from all others, such as racial-harassment cases, as to require a wholly different and much more informal set of procedures.

(ii) The CJC can retain jurisdiction over sexual-harassment cases, making appropriate but targeted revisions to handle more sensitively and effectively those cases.

The CJC is considering this choice. However, we think there is a **compromise** that realizes the best of both of these alternatives.

6. Princeton's Approach

Princeton University has just resolved the same issue facing Cornell, and done so in an imaginative manner. What they have done in response to the OCR letter is beef up the mechanism for grieving against the University (where the standard of proof is the preponderance of the evidence), while making minor changes to their disciplinary code (where the standard of proof still equates to clear and convincing evidence):

> The University has revised its sexual-misconduct policy and adopted changes to "simplify and expedite" student disciplinary procedures, several months after federal officials notified schools across the country of their obligations under Title IX relating to sexual harassment and sexual violence against students.
> ....
> The University has established separate student disciplinary procedures and Title IX grievance procedures. Disciplinary proceedings — investigations of alleged student violations of University rules — require evidence that provides "a clear and persuasive case." Title IX grievances — complaints against the University alleging that Princeton has failed to meet its obligations under federal law — require a lesser standard, a preponderance of the evidence.
> ....
> [Provost Christopher] Eisgruber described the University's procedures as "fully compliant with Title IX," saying that the OCR letter notes that colleges and universities "have options about how to address Title IX grievances related to sexual misconduct."

http://paw.princeton.edu/issues/2011/11/16/pages/4526/index.xml. Elsewhere, at http://www.princeton.edu/pr/pwb/07/1112/policy/, the Princeton Provost further explained:

> Our objective has been to consider options for clarifying, disseminating and enforcing an anti-harassment policy and complaint procedure. We believe that the revisions will enable us to resolve harassment complaints more effectively, efficiently and fairly, and to protect the rights of all parties involved. The changes also represent an attempt to align us with

the prevailing disposition of the courts and agencies that enforce anti-harassment laws and administer complaints.

The Princeton decisional process produced new grievance procedures for sexual harassment, which appear at http://www.princeton.edu/pub/rrr/part1/index.xml#comp12. The Princeton Provost described the grievance changes thus: "As you will see, however, the revisions are very extensive; among other things, the revised version of the policy defines terms very explicitly."

Their new disciplinary procedures appear at http://www.princeton.edu/pub/rrr/part2/. Incidentally, the Princeton Provost noted as to the disciplinary procedures: "The changes extend to all student misconduct cases, not just to sexual harassment and sexual violence cases, because it made no sense to treat such cases differently from one another, especially since they often have overlapping factual predicates."

We feel that Princeton's approach[*] is in general the one that Cornell should follow.

7. Our Proposal

First, we would therefore recommend that the University rewrite Policy 6.4 to facilitate the bringing of sexual-harassment grievances against the University and its officials for failure to meet their obligations under federal law.

Second, we would have the CJC propose (a) repealing the UA's amendment to the Code made last spring while (b) adopting amendments to the Code suggested by our study of sexual-harassment treatment.

This two-part approach would achieve compliance with OCR's command and help to combat sexual harassment. But it would not toss aside any rights of the accused, rights that almost everyone endorses in contexts other than sexual harassment. As for the details:

- Some of those planned Code amendments would be general amendments, and some might be specific to sexual-harassment offenses. Admittedly, certain sexual-harassment cases might not be that different from others such as racial- harassment cases. But the CJC might be wise to differentiate sexual violence from sexual harassment. It might be advisable, for a prime example, to give the student accuser the right to opt for a hearing board without student members to handle a case

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[*]For those really interested in the process and content of Princeton's reaction to the OCR letter, see the Provost's explanation of recent changes at http://www.princeton.edu/vpsec/cpuc/links/cpuc-20110914-sexual-misconduct-cover-memo.pdf. The attachments to that memo, showing the actual changes to their two sets of procedures, lie at http://www.princeton.edu/vpsec/cpuc/links/cpuc-20110920-rrr-attachments.pdf.

involving sexual violence.

- Inspiration for these future amendments could come from Princeton's changes to their disciplinary system[**] or from the proposals put before the CJC last spring in a memo from Eva Drago et al. and in a memo from the Title IX working group of University Counsel and administrators. Drafting these amendments is not the CJC's task at this moment. The drafting task will be challenging. For a prime example, the right to appeal needs a lot more thought. But the very difficulty of envisioning the ideal code is an argument against the simplistic solution of slicing off sexual harassment by students from the Campus Code and subjecting accused students to the unspecified but informal procedures of a future Policy 6.4.

- The important point is that the CJC will propose amendments only to the extent that the CJC deems them appropriate for our disciplinary code, free of the chilling effects of the federal demands imposed on grievance mechanisms. This will be true because the University will have already satisfied the OCR mandate through its revision of the sexual-harassment grievance system.

- Our approach does not split any case of accuser versus accused into multiple proceedings, or otherwise burden the accuser (or accused). It recognizes that an accuser might want to seek systemic relief against the University or might want to see the accused punished, or both. But those are two very different routes, which warrant separate proceedings with different procedures.

[**] For the changes that Princeton made, see attachment #3 at http://www.princeton.edu/vpsec/cpuc/links/cpuc-20110920-rrr-attachments.pdf.