

Introduction

The United States Department of Education Office of Civil Right Office recently issued guidance for complying with Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 *et seq.* The guidance, in the form of a “Dear Colleague” letter sets forth specific requirements for compliance with Title IX and its implementing regulations, 34 C.F.R. Part 106. Title IX and its implementing regulations prohibit discrimination on the basis of sex in education programs or activities operated by recipients of federal financial assistance. As a recipient of federal funds, Cornell is required to comply with Title IX and the regulations implementing Title IX.

This memo is the product of a recent meeting of University officials convened to discuss the impact of the guidance on Cornell. The guidance requires that Cornell modify portions of the Campus Code of Conduct and of Policy 6.4. This memorandum outlines the changes that must be made to the Campus Code of Conduct to comply with the OCR guidance as well as the changes we recommend that CJC consider adopting in light of the guidance letter. Although not specifically stated below with respect to each required change, we strongly recommend that CJC consider whether the changes apply only to complaints covered by Title IX or to all cases covered by the Campus Code.

For ease of reading, the following format (indentations and formatting) is used:

The italic text is from the Dear Colleague letter.

The bold text is the current code language.

The underlined text is the explicit code language that must be changed and/or commentary.

I. COVERAGE

A. Off-campus conduct: *Schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school's education program or activity. If a student files a complaint with the school, regardless of where the conduct occurred, the school must process the complaint in accordance with its established procedures. Because students often experience the continuing effects of off-campus sexual harassment in the educational setting, schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus.*

TITLE THREE: REGULATIONS FOR MAINTENANCE OF EDUCATIONAL ENVIRONMENT

Article I. Applicability

This Title shall apply to conduct on any campus of the University, on any other property or facility used by it for educational purposes, or on the property of a University-related residential organization in the Ithaca or Geneva area.

This Title shall also apply to conduct elsewhere if the Judicial Administrator—with the approval of the President or his or her designated representative in the person of the Dean of Students for conduct by students, the Provost for conduct by faculty, or the Vice President for Human Resources for conduct by other employees—considers the conduct to constitute a serious violation of this Title, in that the conduct poses a substantial threat to the University's educational mission or property or to the health or safety of University community members.

NOTE: We recommend that this section be modified because OCR appears to impose an obligation to take action in cases other than the ones in which we consider “the conduct to constitute a serious violation of this Title, in that the conduct poses a substantial threat to the University's educational mission or property or to the health or safety of University community members.”

B. Complaints on a student's behalf: Complaints may be filed by a harassed student, his or her parent, or a third party on the student's behalf. A school that knows, or reasonably should know, about possible harassment must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation.

Article III. Judicial Participants

A. Complainant and Victim

1. Any student, member of the University faculty, or other employee of the University can allege a violation of this Code, of which he or she was the victim, by filing a complaint with the Judicial Administrator.

NOTE: This provision seems to require complainant to be a member of Cornell community – does not explicitly allow for parent or third party to file on behalf of a student.

C. Third-party complaints: Title IX also protects third parties from sexual harassment or violence in a school's education programs and activities. For example, Title IX protects a high school student participating in a college's recruitment program, a visiting student athlete, and a visitor in a school's on-campus residence hall.

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NOTE: This provision seems to require complainant to be a member of Cornell community – does not explicitly allow for third party complaint.

II. PROCEDURES

- A. Mediation (even voluntary) cannot be used in sexual assault cases: OCR recommends that recipients clarify in their grievance procedures that mediation will not be used to resolve sexual assault complaints.

NOTE: The Code does not appear to address mediation explicitly. We might consider whether the summary decision section should include an explicit reference that mediation is not appropriate in sexual assault matters.

- B. Trained / Impartial investigators and adjudicators: All persons involved in implementing a recipient's grievance procedures must have training or experience in handling complaints of sexual harassment and sexual violence, and in the recipient's grievance procedures. Additionally, a school's investigation and hearing processes cannot be equitable unless they are impartial. Therefore, any real or perceived conflicts of interest between the fact-finder or decision-maker and the parties should be disclosed.

NOTE: We would recommend a specific mention in Article IV. Judicial Boards re: training in handling complaints of sexual harassment and sexual violence and obligations to recuse.

- C. Code must include designated and reasonably prompt time frames for the major stages of the complaint process. OCR will evaluate whether a school's grievance procedures specify the time frames for all major stages of the procedures, as well as the process for extending timelines. Grievance procedures should specify the time frame within which: (1) the school will conduct a full investigation of the complaint; (2) both parties receive a response regarding the outcome of the complaint; and (3) the parties may file an appeal, if applicable. Both parties should be given periodic status updates. Based on OCR experience, a

typical investigation takes approximately 60 calendar days following receipt of the complaint. Whether OCR considers complaint resolutions to be timely, however, will vary depending on the complexity of the investigation and the severity and extent of the harassment. For example, the resolution of a complaint involving multiple incidents with multiple complainants likely would take longer than one involving a single incident that occurred in a classroom during school hours with a single complainant.

TITLE III

E. Hearing Procedures

The University Hearing Board shall hold a hearing within 21 calendar days of receipt of charges by the Hearing Board Chair, unless the same be postponed by the Hearing Board Chair for good cause shown.

NOTE: Although the Code has a one year statute of limitations (during which time the complainant/JA must file formal charges), it does not separately specify: the time frame within which: (1) the school will conduct a full investigation of the complaint; (2) both parties receive a response regarding the dismissal of the complaint by the JA with no action (the Code does impose a two-day deadline for informing the complainant of a Summary Decision Agreement and a five-day deadline for sending parties copies of the UHB decision).

*D. **Criminal cases:** Schools should not wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation and, if needed, must take immediate steps to protect the student in the educational setting. For example, a school should not delay conducting its own investigation or taking steps to protect the complainant because it wants to see whether the alleged perpetrator will be found guilty of a crime. Although a school may need to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence, once notified that the police department has completed its gathering of evidence (not the ultimate outcome of the investigation or the filing of any charges), the school must promptly resume and complete its fact-finding for the Title IX investigation.*

A. Basic Policies on University Conduct Regulation in Relation to Public Law Enforcement

The following basic policies will apply in situations where misconduct violates both a University conduct regulation and the public law:

- 1. The following kinds of offenses are adjudicated in the public courts: all felonies, controlled substance offenses, motor vehicle moving violations, assaults upon a peace officer or resisting arrest, refusals by persons to identify themselves, as well as cases in which the complainant wishes to proceed in the courts and cases involving accused persons who are not members of the University community. Still, the Judicial Administrator has**

discretion to pursue even serious breaches of the law under the Campus Code of Conduct. **Timely dealing with alleged misconduct is vital. Nevertheless, the Judicial Administrator should consider whether justice counsels withholding the exercise of University jurisdiction until public officials have disposed of the case by conviction or otherwise.**

2. **When the Judicial Administrator determines that misconduct does not constitute a serious breach of the law and that the interests of justice would be served by handling such misconduct within the University jurisdiction, he or she shall:**
 - a. **attempt to exercise jurisdiction in a manner to avoid dual punishment for the same act;**
 - b. **cooperate with public officials so that the exercise of University jurisdiction ordinarily will not be followed by public prosecution of the individual's misconduct; and**
 - c. **withhold the exercise of University jurisdiction, when prompt public prosecution is anticipated or is under way, until public officials have disposed of the case by conviction or otherwise.**
3. **Policies covering conduct that violates both a University conduct regulation and the public law, where feasible, should be based on jurisdictional understandings and procedures jointly developed and periodically reviewed by University and local officials. To the maximum extent feasible, jurisdictional understandings shall be made known to the University community.**

NOTE: This section should probably be modified to include explicit mention of the University's obligation to pursue an alleged Title IX violation. The presidential override for grave misconduct does not satisfy this requirement. See Article II (C) 2 (b).

E. Schools must use preponderance of the evidence standard: The school must use a preponderance of the evidence standard to evaluate complaints. The Supreme Court has applied a preponderance of the evidence standard in civil litigation involving discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e etseq. Like Title IX, Title VII prohibits discrimination on the basis of sex. In order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard {i.e., it is more likely than not that sexual harassment or violence occurred). The 'clear and convincing' standard {i.e., it is highly probable or reasonably certain that the sexual harassment or violence occurred), currently used by some schools, is a higher standard of proof. Grievance procedures that use this higher standard are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX. Therefore, preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence.

E. Hearing Procedures

3. University Hearing Board

b. Hearing Procedures

(9) The Hearing Panel shall proceed to a decision as expeditiously as possible, and then shall notify the Judicial Administrator of its decision without delay. All decisions by the Hearing Panel shall be in writing, including a rationale and any dissenting opinions. The burden of proof on violation shall rest on the complainant, and the standard of proof on violation shall be clear and convincing evidence, which is a higher standard than the civil law's more-likely-than-not standard but a lower standard than the criminal law's beyond-a-reasonable-doubt standard.

NOTE: Must be changed for Title IX compliance. Community members (including the JA) have raised the question about whether it is appropriate and fair to have different burdens of proof for different offenses. Some of the many arguments in favor of having one standard for all offenses include 1) it's irrational to have different burdens of proof for different but equally serious offenses; 2) it makes no sense to tilt the system so heavily against the complainant; 3) the campus judicial system is not a criminal system and the policy reasons for a high burden of proof applicable to situations where potential loss of liberty is involved (i.e. going to jail if convicted of a crime) simply don't apply to a system attempting to adjudicate disputes primarily between student complainants and accused students. As noted by OCR, the preponderance of evidence standard is used by OCR for deciding Title IX complaints and by federal courts in deciding Title VII and other discrimination lawsuits. If the standard is sufficiently reliable for government agency and federal court adjudications, it should suffice for Campus Code proceedings; 4) Having dual standards could inappropriately burden the hearing boards in cases involving multiple charges some of which include allegations covered by Title IX.

F. The parties must have an equal opportunity to present relevant witnesses and other evidence: The complainant and the alleged perpetrator must be afforded similar and timely access to any information that will be used at the hearing. For example, a school should not conduct a pre-hearing meeting during which only the alleged perpetrator is present and given an opportunity to present his or her side of the story, unless a similar meeting takes place with the complainant; a hearing officer or disciplinary board should not allow only the alleged perpetrator to present character witnesses at a hearing; and a school should not allow the alleged perpetrator to review the complainant's statement without also allowing the complainant to review the alleged perpetrator's statement.

NOTE: The JA has made reference to an accused being allowed character witnesses and not the complainant (this practice stems from the UHB procedures - which allow character witnesses for accused students and is

silent regarding complainants - and a Review Board decision from 2002 that said the complainant does not need character witnesses because her character is not at issue). The Code does not contain any reference to this practice and the University Hearing Board must have comparable rules for both the complainant and the accused.

G. Lawyers: If a school chooses to allow the parties to have their lawyers participate in the proceedings, it must do so equally for both parties. Additionally, any school-imposed restrictions on the ability of lawyers to speak or otherwise participate in the proceedings should apply equally. OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing.

Article III. Judicial Participants

A. Complainant and Victim

- 1. Any student, member of the University faculty, or other employee of the University can allege a violation of this Code, of which he or she was the victim, by filing a complaint with the Judicial Administrator.**
- 2. In cases in which such formal complaint is made by one or more individuals, such individuals shall be designated as the complainants. In cases in which no such formal complaint has been made or pursued, and an investigation is initiated by the Judicial Administrator, the University community shall be designated as the complainant. However, in cases concerning violations against the interests of the University, "Cornell University" (the corporation) may be named as complainant.**
- 3. The complainant and the victim, whether or not he or she is a member of the University community, each shall have the right to be present at any relevant hearing. Each shall have the right to be accompanied at every stage by a personal advisor of that person's choice, but that advisor shall not be a witness and shall not participate in a hearing in the capacity of counsel. The Judicial Administrator shall provide to the complainant and the victim information about the University's Victim Advocate and other relevant resources, including information about how to file a police complaint.**

B. Defense Counsel or Advisor

- 1. When an accused appears before the Judicial Administrator, the University Hearing Board, the University Review Board, or other University officials acting in a judicial capacity, the accused has the right to be advised and accompanied at every stage by an individual of the accused's choice. Such counsel or advisor for the accused may be any member of the University community or general public, but shall not be a witness and, except for the Judicial Codes Counselor, shall not normally participate in a hearing in the capacity of counsel. However, for suspension or dismissal to be imposed, such**

counsel or advisor must have had a reasonable opportunity to participate fully in the hearings.

2. The accused shall have the right to act as his or her own counsel.

NOTE: These provision need to provide the same right to counsel for both the victim and the accused.

H. Notice of Outcome: Both parties must be notified, in writing, about the outcome of both the complaint and any appeal, i.e., whether harassment was found to have occurred. OCR recommends that schools provide the written determination of the final outcome to the complainant and the alleged perpetrator concurrently.

Hearing Procedures (10): The Judicial Administrator shall serve written notice of the decision of the Hearing Panel on the accused and the complainant within five business days of the Judicial Administrator's receipt of the written decision. The accused shall be provided with a full copy of the decision. The complainant shall be provided a copy of the decision with names of individuals and other identifying information redacted.

NOTE: Discuss whether this discrepancy should be addressed in Title IX cases.

I. Appeals: If a school provides for appeal of the findings or remedy, it must do so for both parties.

Current Code: F. Appeal Procedures

NOTE: should be clarified to advise that complainants in Title IX cases have the same appeal rights as accused.