Memo

TO: Codes and Judicial Committee
FR: Kevin Clermont, member
DA: April 24, 2011
RE: Sexual Harassment Changes

The federal Office of Civil Rights has issued a "Dear Colleague" letter that requires universities to level the pitch in *grievance procedures* for sexual harassment (including sexual violence). The CJC is now in a rush to implement this command by amending the Campus Code of Conduct, despite the absence of any deadline and despite the undeniable fact that implementation raises major issues, with all kinds of policy implications and drafting problems.

Background

I think we should proceed carefully for several reasons.

First, I find OCR's command to be ambiguous. If OCR really requires 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.

Second, I recognize that Cornell's University Counsel 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 Counsel's Office suffers from conflicts of interests that discourage it from standing on principle. (a) It does not want the hassle of resisting a federal agency, understandably enough. (b) It has no will to resist prevailing political winds in the absence of a considerable Cornell interest. (c) It serves a Cornell administration that has previously expressed opposition to a rights-based Campus Code. Thus, the University Counsel

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."

Third, I in fact do not think that OCR is at fault. OCR nowhere says that a disciplinary system must follow its new guidelines, but instead says that grievance procedures must. True, it 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 the University Counsel's failure to promulgate a separate set of grievance procedures, having chosen to shoehorn the Campus Code into service as fulfilment of its legal obligation to fashion grievance procedures.

Fourth, Cornell needs separate grievance procedures. There *should* be two systems: one being a disciplinary code, and one aimed at providing equal opportunity through grievances. On the one hand, the disciplinary code aims to educate individuals, and to punish when education does not work. Sexual harassment, however, is 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 is to develop a different path. On the other hand, the purpose of Title IX is to assure equal opportunity. Under its grievance procedures, the accuser and the University could impose civil-style remedies on the accused, in pursuit of amelioration and compensatory action. Indeed, many grievances will be complaints about the University 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 mainly mean unnecessary remedies. Thus, preponderance of the evidence is the appropriate standard in a grievance system.

Fifth, this failure of the University to issue separate grievance procedures could signify that the administration does not take sexual harassment *seriously enough*. But more certainly this failure is responsible for forcing our Campus Code to accommodate changes 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 either of two paths:

1. It can make the changes to the Campus Code that the University Counsel insists on. This will mean either that we have two procedures, one for many sorts of serious offenses and another less scrupulous one for targeted offenses, or 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

stand at the same level in a Campus Code proceeding. The purpose of the 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.

2. The CJC can toss the matter back to the University Counsel, so that Counsel can draw up grievance procedures for sexual harassment, just as it is supposed to do. 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." Under such procedures, Cornell could impose civil-style remedies.

Proposal

I favor and hence propose the latter route. Put simply, the aims of the Campus Code and those of the OCR grievance procedures are not compatible, and so Cornell should not mix them together to the detriment of both.

After the grievance procedures are in place, the CJC can make the few changes to the Campus Code that remain, or become, necessary or appropriate.