

MEMORANDUM

TO: Codes and Judicial Committee

CC: Ashley Garry and Evan McGruder, Office of the Judicial Codes Counselor

FR: Eva Drago, Talia Shear, Rima Pancholi

RE: Recommended Changes to the Campus Code of Conduct

Date: April 13, 2011

1. Permit rebuttal by complainant.

Issue: Presently, accused persons hear the entirety of the complainant's argument prior to stating their position, enabling them to tailor their defense around the specific details mentioned. Accused persons are given the opportunity to defend precise points mentioned by complainants, whereas victims are not given the opportunity to respond to the accused person's allegations or defense. If the complainant believes the accused person is falsifying information, he or she does not have an opportunity to identify the fallacy for the hearing board.

Proposed Change to Title Three, Article III, E.6, Pg. 28:

Complainants shall have the right to rebut the accused person's and the witnesses' testimony. No complainants shall be denied the opportunity to question witnesses or to confront his or her attacker.

2. Allow complainant to deliver part of the closing.

Issue: At present, this is not directly prohibited in the Code; nevertheless, this right ought to be clearly guaranteed to complainants.

Proposed Change to Title Three, Article III, E.6, Pg. 28:

(c) Members of the Hearing Panel may question witnesses and adduce evidence, but this shall not preclude parties to the hearing from questioning witnesses or introducing evidence. No accused person shall be denied the opportunity to question witnesses or to confront his or her accusers. However, the Hearing Board Chair shall control the hearing. For example, to avoid the risk of intimidation, the Hearing Board Chair may require certain questioning to be conducted by written questions read aloud to the witness by the Hearing Board Chair. Additionally, complainants are permitted to deliver a portion of the closing. If an individual complainant does not testify, the Hearing Panel may proceed to decision only if it finds that the complainant's interests in not testifying outweigh the accused's interests in confronting his or her accuser. In any case, the accused can prevent the introduction of any written, recorded, or oral account of an earlier statement by a non-testifying complainant or victim, unless the Hearing Board Chair finds compelling circumstances of need for and reliability of such statement. If a witness critical to the proof of the charges or to the defense against those charges indicates to the Judicial Administrator or the accused that he or she refuses to testify, the Judicial Administrator or accused may ask the Hearing Board Chair to order the witness to testify. The Hearing Board Chair shall, in his or her sole discretion, grant or deny the request based on the balance of equities for the witness, the complainant, the accused, the victim, and the University. If a witness does not appear for a scheduled hearing, the Hearing Board Chair may decide whether to delay the hearing pending the witness's testimony.

3. Lower the burden of proof to “preponderance of the evidence”.

Issue: Cornell University has a zero-tolerance policy regarding all types of violence, including sexual violence. Cornell’s success rests on the high standards to which it holds students. Student conduct ought to be held to a higher than average standard, and therefore ought to be held to a lower standard of proof than in a criminal court. Presently, the victim bears an unequal burden of proof; complainants and accused persons ought to bear similar burdens, as would be achieved by lowering the burden of proof to 51%. The current standard leaves room for components of the rape culture, such as victim-blaming and assailant-excusing, to infiltrate the hearing.

Proposed Change to Title Three, Article III, E.9, Pg. 29:

(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 preponderance of the evidence, which is a more-likely-than-not standard. This represents a lower standard than the criminal law’s beyond-a-reasonable-doubt standard.

4. Provide symmetrical appeal rights for complainants and accused persons.

Issue: The Code provides accused persons with the opportunity to appeal the UHB's decision on the basis of misinterpreted or misapplied the Code or that the UHB failed to follow the procedures established by the Board of Trustees, the University Assembly, or the University Hearing Board and that the violation had a prejudicial effect on the outcome of the hearing. Essentially, the present rules acknowledge that the UHB may err in judgment or fail to follow established procedures, but assumes that the error would only ever favor complainants. The Code ought to provide complainants with the same appeal rights as accused persons.

Proposed Change to Title Three, Article III, F.1, Pg. 30:

(2) Appeals may be grounded only upon the complainant's belief that the remedy awarded the complainant is not commensurate with the injury, upon the Judicial Administrator's belief that the penalty is not commensurate with the violation, or upon the accused or complainant's belief that:

(a) the Hearing Panel violated the fair application of the procedures established by the Board of Trustees, the University Assembly, or the University Hearing Board, and such violation may have had a prejudicial effect upon the outcome of the hearing;

(b) the Hearing Panel committed a prejudicial error in interpreting this Code or rendered a decision clearly against the evidence;

(c) new evidence was discovered after the hearing and could not have readily been discovered before the hearing, and such evidence might have had an effect upon the outcome of the hearing; or

(d) the penalty and/or remedy imposed upon the accused is unjust.

5. Remove students from the UHB for sexual assault cases.

Issue: In order to maintain full anonymity for both complainants and accused persons, students should not sit on the Hearing Board for sexual assault cases. If student members of the UHB are either directly or indirectly familiar with one of the parties, his or her judgment may be impaired and subject to bias. Furthermore, strong peer group affiliations such as Greek life or participation in certain political organizations may create a bias for or against either party. Victims should not be subject to questioning by peers who they may later encounter in campus life. Such incidents may be triggering or embarrassing for students who have already endured a very emotional process. Additionally, because of their current standing as a member of the academic student body, they may be hesitant to deliver sentences that would challenge an accused person's academic standing because of an implicit bias in favor of the accused.

Proposed Change to Title Three, Article III, E.3, Pg. 26:

(1) In cases involving complaints against students or University-registered organizations, a Hearing Panel shall be composed of three faculty members and two non-faculty employees, all drawn from the University Hearing Board and University Review Board pool.

6. Cross-examination questions must be asked by UHB chair.

Issue: Outside attorneys often employ intimidation tactics when questioning victims. In order to mitigate the risk of either intentionally or unintentionally re-traumatizing or terrorizing the victim, upon request by any party involved in the hearing outside attorneys shall prepare a list of cross-examination questions and present it to the chair of the UHB. The chair will read the list of questions to the victim.

Proposed Change to Title Three, Article III, E.6, Pg. 28:

(c) Members of the Hearing Panel may question witnesses and adduce evidence, but this shall not preclude parties to the hearing from questioning witnesses or introducing evidence. No accused person shall be denied the opportunity to question witnesses or to confront his or her accusers. However, the Hearing Board Chair shall control the hearing. For example, to avoid the risk of intimidation, upon request from any member of proceedings, the Hearing Board Chair must require cross-examination questioning to be conducted by written questions read aloud to the witnesses and complainants by the Hearing Board Chair. If an individual complainant does not testify, the Hearing Panel may proceed to decision only if it finds that the complainant's interests in not testifying outweigh the accused's interests in confronting his or her accuser. In any case, the accused can prevent the introduction of any written, recorded, or oral account of an earlier statement by a nontestifying complainant or victim, unless the Hearing Board Chair finds compelling circumstances of need for and reliability of such statement. If a witness critical to the proof of the charges or to the defense against those charges indicates to the Judicial Administrator or the accused that he or she refuses to testify, the Judicial Administrator or accused may ask the Hearing Board Chair to order the witness to testify. The Hearing Board Chair shall, in his or her sole discretion, grant or deny the request based on the balance of equities for the witness, the complainant, the accused, the victim, and the University. If a witness does not appear for a scheduled hearing, the Hearing Board Chair may decide whether to delay the hearing pending the witness's testimony.

7. Limited information ought to be given to witnesses.

Issue: In a recent case, prior to the hearing a witness for the defense was given a copy of the complainant's police report relaying details of her sexual assault and asked by the defense attorney to read the document prior to giving his testimony. The witness had not observed the incident. Such actions are gross violations of the victim's privacy, and ought to be prevented through more stringent privacy protection measures.

Propose Changes to Title Three, Article III, E.7, Pg. 29:

(7) All hearings shall be private unless (a) the accused notifies the Judicial Administrator, no later than two business days before the hearing, that he or she wishes a public hearing and (b) the Hearing Board Chair determines that a public hearing would not result in undue intimidation of the complainant, the victim, or the witnesses. In cases of sexual harassment, abuse, assault, or rape, all hearings shall be private, with the accused having no option of requesting a public hearing; and in such cases, if either the accused, the complainant, the victim, or the Judicial Administrator requests that the proceedings be conducted in a fashion such that the accused and the complainant or victim be separated or such that the intimidation of the complainant or victim be otherwise reduced, the Hearing Board Chair, after determining appropriateness, shall make suitable arrangements to accomplish this. In the event of a public hearing, the Hearing Board Chair shall convene it in quarters that accommodate a reasonable number of the public, but may limit the number in the interest of preserving the decorum and dignity of the proceedings. Witnesses shall be excluded from all hearings, except for the period of their questioning. During only the period of their questioning, witnesses may be presented with pieces of evidence at the discretion of the Hearing Board Chair. Rationale must be provided as to the necessity of the witnesses seeing pieces of evidence. The accused, the complainant, the victim, or the Judicial Administrator may request that the piece of evidence be excluded from the witness's cross-examination in order to preserve the victim or complainant's privacy. All deliberations by the Hearing Panel and Hearing Board Chair shall be private.

8. Remove attorneys from sexual assault hearings.

Issue: Cornell's sexual assault hearing system ought to be a less burdensome alternative to the legal system for victims who wish to seek justice and hold their attackers accountable. The hearings are not legal trials, and therefore attorneys are not necessary. Permitting students to hire outside attorneys puts economically underprivileged accused students at a significant disadvantage which may affect the outcome of the hearing. The Judicial Codes Counselor represents accused persons who cannot afford to hire an outside attorney; if the Code acknowledges that the Codes Counselor can do a sufficient job presenting evidence on behalf of the defense, then the Codes Counselor ought to be sufficient for any student regardless of financial means. Furthermore, regulating the behavior of outside attorneys is difficult, and they may not be held accountable for inappropriate behavior during the hearing. Attorneys add an additional, unnecessary level of intimidation to an already difficult process. Victims who choose to confront their attackers should not be subjected to the unregulated behavior of outside attorneys.

Proposed change to Title Two, Article III, B.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, the~~ accused 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 accused has the right to be accompanied by the Judicial Codes Counselor to hear the evidence against the accused, to question witnesses, and to give evidence in the accused's own behalf.