

University Policy 6.4: Prohibited Discrimination, Protected Status (Including Sexual) Harassment

Introduction

I am the Director of the Office of Workforce Policy & Labor Relations (WPLR.) I have administered Policy 6.4 since 2002 and am fully familiar with its procedures and cases brought under it in the employment and educational contexts. As of now, that Policy covers claims, among others, of sexual harassment, violence and assault between and among faculty, staff and students arising in the workplace and in certain educational settings, *except* such claims made against students. These types of claims are now considered offenses under the Campus Code of Conduct and are subject to an administrative process modeled after the criminal justice system administered by the Office of the Judicial Administrator.

Resolution 7 provides a mechanism to transfer investigation and adjudication of allegations of sexual assault and violence from the processes under the Code to the processes under Policy 6.4 as amended (until such time as the Code is amended to fulfill requirements of Title IX) with full input and engagement by the Assembly and its constituent assemblies as stakeholders in that process. This memorandum will provide background information that supports a permanent transfer of adjudicating cases of student sexual harassment and violence to the processes of Policy 6.4 under the policy stakeholder process.

Scope and Overview of Policy 6.4

University Policy 6.4 prohibits discrimination and harassment in employment and educational opportunities based on protected status (such as gender (including pregnancy), sex, race, color, ethnic or national origin, age, creed, religion, color, sexual orientation, gender identity or expression, military or veteran status, actual or perceived disability, ex-offender status and individual genetic information) and offers a procedure to resolve claims against faculty, staff and student-employees. This is an administrative procedure by a trained and experienced investigator to determine what occurred and whether the complainant has a meritorious case under policy guidelines. This determination is provided to the complainant and respondent (the accused) for review and comment before the relevant dean or vice-president of the involved college or unit makes the final decision of what sanctions to impose, if any. Thereafter, the parties have appeal rights, generally under applicable grievance procedures.

Note: Currently, under a separate policy, Policy 6.3, Sexual Violence, claims of sexual assault and sexual violence may be handled at the victim's request via the criminal process (CUPD), the Campus Code process for student against student claims, or Policy 6.4 for claims against faculty, staff, and student employees by other faculty, staff, or students). The victim may also choose not to file a complaint at all.

Policy 6.4 Process

If someone chooses to handle a claim under University Policy 6.4 as a claim of protected status harassment or discrimination, they may choose to have the claim resolved in one of three ways. This memorandum will focus on the investigative method that would apply to contested cases of sexual harassment, assault and violence involving claims against other students.¹ Of course, the victim of sexual violence may use the criminal process afforded by the police, the proposed process under Policy 6.4 (currently the process under the Code) or file no complaint at all. This memorandum addresses the case where the victim files a complaint under Policy 6.4.

Policy 6.4, in sum, provides a formal investigative procedure to determine whether a claimant has a meritorious case and, if so, whether sanctions are appropriate, followed by the availability of an appeal.² A case is first initiated by a written complaint filed with WPLR outlining the incident(s) in question, the individual(s) involved, and the remedy requested. Thereafter, WPLR will conduct a fair and detailed fact-finding investigation that includes the following:

- a. Collecting all facts in connection with the alleged incident, including separately interviewing the complainant and the accused, as well as any witnesses deemed necessary to determine the facts.
- b. Where the claim is against a faculty member arising out of a subordinate-supervisory relationship between student and faculty, an independent, trained Cornell faculty member is appointed by the Dean of Faculty to co-investigate the complaint with WPLR.
- c. Allowing the accused to reply to all charges made in the formal complaint.
- d. Reminding all involved that the process is confidential and that retaliation is strictly prohibited.
- e. Reviewing pertinent documentation to support/refute the charges – emails, text messages, memoranda, etc.
- f. Determine, by a preponderance of the evidence, 1) what the facts in the matter are, 2) whether or not there is merit to the complaint, 3) whether or not there is a violation under policy, and recommendations for next steps. *A determination of a policy violation does not automatically mean discipline will be imposed, such as termination of employment.* The recommended steps are determined by the facts of each case with the remedy requested by the complainant taken into consideration.
- g. The report is submitted to the Dean of the college or the VP of the administrative unit; both the complainant and the accused receive a copy of the report and have up to 30 days to respond with comments.

¹ Note, under Policy 6.4 for other cases there are two alternatives: mediation and resolution by the unit or college in a workplace matter using performance management. Mediation is not appropriate for sexual violence cases under the DCL.

² I am shocked to hear that at the Assembly meeting of March 12, 2012, Policy 6.4 was described as a “shocking policy” with no evidence, “an administrator declares guilt” and there is no appeal. This characterization is wrong on all counts.

- h. Adversarial hearings (including confrontation, cross-examination by the parties, and active advocacy by attorneys) are not permitted during the investigation process, though the complainant and accused may seek the advice of personal attorneys and advisors. Such representatives may attend their own clients/ or advisees' investigative interview, but may not respond to questions for their clients or advisees, and may not pose questions to their clients/advisees.
- i. If there are no objections to the report, the appropriate dean, vice president, or equivalent unit head will review the report and may accept, modify, or reject either the determination of facts or the recommended sanctions and/or remedial action. **Note: WPLR, as investigator, does not make the final decision of whether or not discipline is imposed.**
- j. If a student complainant wishes to contest a final decision that alleged sexual harassment did *not* occur, the appeal must be made within 10 days to the VP for Human Resources (for a claim against a staff member) or the provost (for a claim against a faculty member.)
- k. If the accused contests the sanctions, he or she may appeal using the applicable grievance process.³

2) Chief changes made in 2011 to comply with "Dear Colleague" Letter (DCL): [underlined sections below]

- That while complaints may be handled through mediation, informal resolution, or formal investigation, in cases involving allegations of sexual violence, mediation is not appropriate, even on a voluntary basis, and will not be used to resolve sexual violence complaints.
- Made explicit the standard that was always in place that the standard of proof shall be by a preponderance of the evidence.
- Added a new appeal process for student complainants where the final decision by the dean or vice president is that the case does not have merit.

Proposed Modifications to Policy 6.4 Under Consideration to Cover Claims of Sexual Harassment, Assault and Violence Made Against Students (collectively "Sexual Violence Claims")

Sexual Violence Claims are now determined under the Code of Conduct by an administrative process modeled on the criminal justice system and administered by the Office of the Judicial Administrator ("JA.") The following modifications to Policy 6.4 are being considered by the Title IX Coordinators and Executive Group to accommodate Sexual Violence Claims brought under the Policy 6.4 process. The proposed modifications will be subject to the policy review and stakeholder process and will include review and input from the UA and its constituent assemblies.

³Note: If the faculty member contends that the disputed behavior was protected by academic freedom, or arose out of the nature of the subordinate-supervisory relationship between student and faculty, he or she may appeal to the Committee on Academic Freedom.

- i. The JA shall be the designated investigator for all Sexual Violence Claims and shall follow the procedures under Policy 6.4 rather than the Code. The rationale for this designation is based on the qualifications, experience, training and skills of the JA to investigate and decide the facts of a case involving Sexual Violence Claims against students. That office also has extensive experience in resolving such claims and recommending sanctions (if any) based on Code provisions, cases decided by boards and similar cases resolved by agreement with the approval of board chairs.
- ii. Determinations made by the JA under the Policy 6.4 process would be referred to a newly established decision-maker such as a former faculty Review or Hearing Board chair to make a final determination, including discipline, if any. The rationale for this appeal process is that such former chairs have the qualifications, experience, training and skills to assess the evidence submitted by the JA and impose appropriate sanctions, if any, based on their Review or Hearing Board service and familiarity with the sensitive issues and concerns in such cases.
- iii. Adopt the relevant provisions of Policy 6.3, Sexual Assault, into Policy 6.4 and in other resource and public information sources, and eliminate Policy 6.3 as a stand-alone policy.
- iv. Maintain the offenses of sexual harassment, violence and assault in the Code but transfer the adjudication processes for such claims to the process, as modified, in Policy 6.4.
- v. Provide a procedure to resolve the relatively few cases involving multiple allegations to be heard in multiple processes (e.g., hazing heard under the Code and sexual harassment under Policy 6.4, as amended.)

Summary:

I am confident that the process under Policy 6.4 can and will work to fairly and justly adjudicate Sexual Violence Claims as it has in every other context, including claims made by students of sexual harassment against faculty. The investigator, whether it is WPLR or the JA, is an experienced attorney who is skilled in uncovering facts from disputed evidence and weighing all the evidence. The investigator examines the witnesses very carefully, including all forms of appropriate examination using open-ended, leading and cross-examination questioning not by an adversary to be sure, but by an independent and neutral party whose only mission is to determine from the credible evidence just what occurred.⁴ And the respondent has a fair chance to confront the allegations/evidence against him or her, and to offer his or her own evidence with advice of counsel, if desired, as discussed above. The burden of proof is on the complainant to show more likely than not that conduct

⁴ I find no reason to believe that an attorney for an accused whose sole objective is to prevail for his or her client will be more likely to uncover the truth than the independent investigator whose sole mission is to determine the facts from the credible evidence using cross-examination and other investigatory techniques.

occurred that would establish a meritorious case – a “tie” from the evidence is not sufficient to establish a meritorious case. While there is no trial-type hearing under Policy 6.4, the parties are given a fair hearing. The preponderance of the evidence standard coupled with the investigative process under Policy 6.4, have worked fairly in sexual harassment cases involving faculty, staff and students, during my tenure and, as others have said, since the inception of Policy 6.4 in 1996.

In addition, there will be an independent appeal and review process by individuals who are also experienced and trained in Sexual Violence Claims and who can decide to accept, modify or reject the findings of the investigator and impose just and appropriate sanctions, if any.

Finally, Counsel’s Office has opined – and I agree based on my personal experience in administering Policy 6.4 since October 2002 – that:

Since its adoption in 1996, Policy 6.4 has provided a fair, effective, and prompt process for all parties involved. It also presently meets all legal requirements for all units of the University.⁵

That policy process can continue to operate fairly, effectively and promptly in cases of Sexual Violence Claims against students. I look forward to hearing from the Assembly, its constituent assemblies and others during the stakeholder process.

I am available to discuss any of these issues with you; please contact me to make an appointment.

⁵ For the reasons advanced by Nelson Roth and Jim Mingle, I do not support Professor Bowman’s proposed amendment to Resolution 7 adding so-called “due process rights owed by a public university” to respondents in cases under Policy 6.4.