

May 22, 2014

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To: University Senate

Re: Potential Changes in Student Conduct Code

We have put together a list of potential changes to the Student Conduct Code. This is an initial effort and we invite reactions, comments, or different proposals.

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I. Mandatory off-campus jurisdiction

A. Current provision

The current provision can be found at 571-021-0115 (Jurisdiction), subsection (2)(b) (Off-campus). It provides for the possibility of off-campus jurisdiction, but only on a discretionary basis and only if a violation of the Code would also have involved violence or fear of physical harm and also significant effects on the learning environment. These limitations are unnecessary and are inconsistent with the message that all sexual assaults are unacceptable behavior by students at our university.

B. Committee action, May 15, 2014

The relevant committee on May 15 agreed to our change, which in the case of sexual assaults stated jurisdiction clearly, made it mandatory for off-campus sexual assaults, removed the requirement to show an effect on the learning environment, and also (as the Administration recommended) removing the requirement that there be violence or fear of physical harm).

On pages 6 and 7 of our annotated Code, we proposed adding a simple, straightforward sentence to OAR 571-021-0115(2)(b):

[The University extends jurisdiction without exception to off-campus sexual misconduct that consists of unwanted penetration or nonconsensual personal contact as defined in OAR 571-021-0105(30).]

We also proposed amending OAR 571-021-0115(1)(b) by providing jurisdiction over actions by students that threaten the health or safety of “any person,” rather than only students or campus visitors. This change is also essential, as it makes the Code applicable to student sexual assaults on *non-students* off-campus.

The Senate’s Student Conduct and Community Standards Committee accepted both of our amendments, after long discussion and the consideration of various scenarios of off-campus sexual assaults. Unlike the original Administration proposal, sexual assaults off-campus will now be singled out for mandatory jurisdiction.

The Groves Report recommended expanding geographic coverage of the Student Conduct Code in the case of sexual assaults. Furthermore, Vice President Robin Holmes suggested an expansion somewhat more robust than that, but applicable to student conduct in general, not only sexual assaults. We created a simpler and even stronger expansion targeted to sexual assaults, which the committee adopted. It will now be considered by the University Senate on May 28, 2014.

C. Additional amendment needed

Although the Administration presented the Community Standards Committee with an amendment to section 571-021-0115 of the Code ensuring *jurisdiction* over incidents off-campus and the Committee adopted an even clearer and stronger amendment (see previous section), no amendment was offered regarding *violations* by students. Without adoption of an additional amendment to the next section of the Code (571-021-0120), the Code will be in the odd situation of having its jurisdictional provision at odds with its violations provision.

Section 571-021-0120(3)(h)(A) needs to be changed. Our suggested change is on page 10 of our annotated Code. It will simply bring this *violations* section in line with the changes the Committee has proposed to the *jurisdiction* section. That is, it allows complaints about the two kinds of sexual *assault* (unwanted penetration and nonconsensual personal contact) without further limitation, while continuing to apply the existing requirements (interference with academic performance, activity, or employment – or threat to health or safety – or on university premises) to other forms of sexual *harassment*.

II. Equality in procedural rights

A. In general

The current Code gives unbalanced procedural rights. A student accused of sexual misconduct (or another violation of the Code) is provided a list of nine important procedural rights, including the right to be informed of the complaint, the right to prepare a response, the right to call and confront witnesses, the right to have an advisor, FERPA privacy rights, disqualification of a decision-maker for bias, reasonable time to prepare for a hearing or conference, and the ability to choose a hearing before a panel or a conference with a single administrator. OAR 571-021-0140(5). The Code does not, however, give any procedural rights to a person who has been assaulted and has filed a complaint.

Consultant Allen Groves said in the “Groves Report” of December 16, 2013, that the “legal and policy” rights of the complainant must be “balanced” with those of the accused (page 17), but in fact, the Student Conduct Code does not grant any rights to the complainant. Groves wrote that during his visit to the University of Oregon campus he learned that, despite any provision in the code, the practice at UO has been to grant some of the rights granted to the accused (for example, the right to complain about bias in the decision-maker) and that a “script” for the formal hearing process provides “appropriate due process” to the complainant as well as the accused. However, no procedural rights are provided in the Code itself for a student complaining of sexual assault.

We propose a new subsection (571-021-0140(6)) to give a list of rights similar to those granted to the accused, plus the right to be protected against retaliation. See page 15 of our annotated Code.

We propose a similar change in 571-021-0205(1) (Administrative Conferences), to grant equivalent rights to a member of the University community complaining of sexual misconduct by a student. See page 21 of our annotated Code.

B. Notification

The current Code provides, logically, that the Office of Community Standards will send a notice of a complaint to the accused student. OAR 571-021-0200(2). The notice includes information on the right to be advised by a lawyer, another student, a faculty or administration member, or the Office of Student Advocacy.

The Code does not, however, provide that the complainant must be informed that the accused student has been notified (and thus the process has begun).

On page 19 of our annotated Code, we propose that the complainant be given a copy of that notice when it is sent to the accused student.

C. Advisors

The current Code provides in OAR 571-021-0140(5)(i) (Student Rights) (page 14 of our annotated Code) that an accused student has the right “[t]o have an adviser [sic] of their choice present at the hearing.” Subsection 571-021-0210(3) (Panel Hearings) further provides that a student accused of violating the Code may have an advisor. Furthermore, OAR 571-021-0200(2) indicates that an accused student may have a person from the Office of Student Advocacy as an advisor. This advisor is typically a third year law student supervised by an attorney.

As for a complaining student, the right to some sort of advisor is stated in subsection 571-021-0210(3) and (3)(c), but there is no provision saying that she may have a law student provided for free by the Office of Student Advocacy or another institution.

Consultant Allen Groves noted in the “Groves Report” of December 16, 2013, that the Office of Student Advocacy provides legal assistance to an accused student but not to a student who claims that she was raped or otherwise assaulted. (Groves Report, page 21.) Indeed, this is contained in OAR 571-021-0200(2)(d).

Our proposal (page 18 of our annotated Code) is to insert a new paragraph in 571-021-022(d) that gives the complaining student the opportunity to have a legal or other advisor and for the University to provide reasonable compensation to a nonprofit organization outside the University for such services.

Although funding a nonprofit organization may happen in practice, putting it in the Code should ensure that it continues. Furthermore, although the University does have a contract with a nonprofit, the University should also create a system where a sexual misconduct complainant would also have access to a free *legal* advisor comparable to the one provided to the accused through the Office of Student Advocacy. One possibility is for the University to locate such legal assistance in the University of Oregon Law School's Domestic Violence Clinic, which has a lawyer director who supervises third year law students who currently represent clients in court.

D. Cross-examination

In at least three different places the Code provides an accused student the right to cross-examine either the complainant or her witnesses. These are in OAR 571-021-0140(5)(e) (the right "[t]o call and confront relevant witnesses"), 571-021-0210(3)(e)(E) ("The Hearings Panel may permit advisors to question a person" under certain circumstances), and 571-021-0210(13) (Accused Students (not their advisors) and Complainants, may ask relevant questions of witnesses").

However, the April 2011 "Dear Colleague" letter from the Office of Civil Rights and the Groves Report at page 20 (including footnote 38) "strongly discourages" universities from allowing personal, oral cross-examination in sexual assault cases. It furthermore states that allowing such personal, oral cross-examination may constitute a "hostile environment" under Title IX.

Our proposals on pages 14-15 and 23-25 of our annotated Code would prohibit cross-examination of a complainant in a sexual assault case except with written permission by the complaining student after advice by independent legal counsel.

III. Decision-Making Issues

A. Choice of procedure

The current Code provides that an accused student can choose between an informal conference with the Director of Student Conduct or staff and a formal hearing before a Hearings Panel. OAR 571-021-0200(3)(c) and 0205(1). We propose amendments on page 20 of our annotated Code to give a complainant in a sexual assault case the right to demand a formal hearing before a Hearings Panel. It will be the exceptional case where a complainant would have a better experience in the formal hearing context so while the decision to opt for a hearing should be made available to the complainant, this should be done only if the complainant has had the opportunity to consult with independent legal counsel

B. Bias

The current Code provides in OAR 571-021-0205(1)(D) that the accused student may object to the Office of Community Standards on the ground that it is biased. We propose to give the complainant the same right. See page 21 of our annotated Code.

C. Statute of limitations

The current Code contains in OAR 571-021-0115(5) and (6) a six-month “statute of limitations” (time during which a complaint must be filed, or the claim abandoned) except for allegations of academic dishonesty or fraudulently obtaining a degree.

Our proposal (on page 8 of our annotated Code) is also to remove the six-month statute of limitations on filing a sexual misconduct complaint. The reason for this is because there are often long-lasting traumatic effects on victims of sexual misconduct. Removal of the six-month statute of limitations would thereby leave open the possibility of various disciplinary actions (as provided in OAR 571-021-0130) while the accused is a student and of degree revocation or negative notation in the transcript even after the person is no longer a student.

The Groves Report itself gave one example of problems with a six-month statute of limitations in its footnote 7 on page 4.

D. Burden of proof

The current Code in OAR 571-021-0140(5)(h) provides a special burden of proof before a student can be expelled from the University. That burden of proof is “clear and convincing information.” For other penalties, the standard is “preponderance of the information.”

The Student Conduct and Community Standards Committee has proposed to change the burden for expulsion to “preponderance of the information.” It is contained in its Notice of Motion for the Senate meeting on May 28, 2014, set out on the Senate website for that meeting.

This is arguably required by Title IX, as interpreted in the April 2011 “Dear Colleague” letter and as summarized on page 20 of the Groves Report. (The Groves Report uses the term “evidence” whereas the UO Code mostly uses the term “information.”)

E. Sanctions

The current Code in OAR 571-0210-0130 contains the possibility of a range of sanctions for violations of the Student Conduct Code. Several people are concerned about whether the sanctions normally used are appropriate or sufficient.

On pages 12 and 13 of our annotated Code, we propose two changes.

First, we propose to add the words “including sexual assault” to the occasions justifying more general grounds of more serious sanctions at the beginning of section 571-0210-0130. In that same initial paragraph we suggest changing “the community” to “anyone” because violations affecting the health, safety and well-being of anyone – not only those in the UO community – should cause consideration more serious sanctions.

Second, we propose amending paragraph (1)(h) of OAR 571-0210-0130 to discourage the sole use of the sanction of an educational activity where the accused has been found to have committed “sexual misconduct” that included “unwanted penetration” as defined in OAR 571-0210-0105 (30)(a). An educational activity sanction alone should not suffice where unwanted sexual penetration, the most serious form of sexual assault, has been established. To require a journal, workshop, community service, paper or similar assignment may be a valuable step, but to require it alone when unwanted penetration has been established trivializes the seriousness and trauma that the accused student has caused another person.

F. Mediation

The current Code allows for the use of mediation in all instances of Code violation.

On page 27 of our annotated Code, we propose amending OAR 571-021-0220 (1) that addresses the use of Mediation to resolve allegations of Student Conduct Code violations to exclude the use of mediation then sexual assault is alleged.

The Groves Report recommended in footnote 34 on page 18 that the Code be amended to exclude sexual misconduct from mediation, noting that the Office of Civil Rights stated in an April 2011 “Dear Colleague” letter that mediation is not appropriate for resolving sexual misconduct complaints. It may be appropriate for non-physical sexual harassment, but not for sexual assault.

IV. Clarifications of violations

A. Consent

On page 4 of our annotated Code, we propose adding “explicit” in front of the word “consent” in OAR 571-021-0105(30) (a) (B) and (b) (B) because the Code requires

“explicit consent.” OAR 571-021-1-0105 (13). The Student Conduct Committee voted to approve this change in its last meeting and it is contained in its Notice of Motion for the Senate meeting on May 28, 2014, set out on the Senate website for that meeting.

B. Single episode

On page 5 of our annotated Code, we propose adding a new subsection (d) to OAR 571-21-0105(30), namely:

[(d) A single episode of behavior that meets (a), (b), or (c) can be sufficient for a finding of sexual misconduct.]

For Title IX purposes “a single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment.” U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENT BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES n. 72 at p. 6 (2001, available at <http://www.ed.gov/offices/OCR/archives/pdf/shguide.pdf>).

If a single incident of sexual harassment may create a hostile environment for purposes of Title IX, it seems obvious that a single incident of nonconsensual personal sexual contact, assault, etc., could also constitute sexual “misconduct.”