



University Senate TRANSMITTAL FORM

Senate Document #:	12-13-30
PCC ID #:	N/A
Title:	Review of the Evidentiary Standards in the <i>Code of Student Conduct</i>
Presenter:	Jason Speck, Chair, Senate Student Conduct Committee (SCC)
Date of SEC Review:	November 25, 2013
Date of Senate Review:	December 10, 2013
Voting (highlight one):	<ol style="list-style-type: none"> 1. On resolutions or recommendations one by one, or 2. In a single vote 3. To endorse entire report 4. For information only
Statement of Issue:	<p>In December 2011, the Senate approved the Student Conduct Committee's (SCC) report and recommendations on Senate Document #11-12-10, "Updates to Procedural Requirements Pertaining to Sexual Harassment and Sexual Violence." President Loh approved the report and recommendations on January 17, 2012. One of the approved recommendations was a request from the SCC to be charged in Fall 2012 with revisiting the <i>Code of Student Conduct</i> regarding the changes made to comply with the directives in the Department of Education Office of Civil Rights' (OCR) "Dear Colleague Letter" of April 2011. In order to bring the University into compliance with the directives outlined in the OCR letter, the burden of proof requirements in the <i>Code of Student Conduct</i> were changed to include "preponderance of the evidence" (e.g., it is more likely than not that the incident occurred) instead of "clear and convincing" (e.g., it is highly probably or reasonably certain that the incident occurred) as the evidentiary standard in proceedings for complaints of sexual misconduct (including sexual harassment, sexual assault, and other forms of sexual violence or misconduct). As requested, the SCC was charged in November 2012 with reviewing the evidentiary standards in the <i>Code of Student Conduct</i>.</p>
Relevant Policy # & URL:	V-1.00(B) University of Maryland Code of Student Conduct http://www.president.umd.edu/policies/v100b.html

Recommendation:	Due to the fact that there is no evidence that having two different standards of evidence in the <i>Code of Student Conduct</i> is having a negative impact on the review and processing procedures for non-academic misconduct cases, the SCC recommends that no changes to the standards of evidence in the <i>Code of Student Conduct</i> be made at this time. It is the opinion of the SCC that instigating a major new change to the <i>Code of Student Conduct</i> would not be prudent while the expansion of the <i>Code of Student Conduct's</i> application off-campus is still being implemented, and that changing <i>the Code of Student Conduct</i> without clear justification would present a burden on the Office of Student Conduct (OSC) and the honor board system. It may be pertinent to have the SCC revisit this issue in one or two years.
Committee Work:	The SCC began working on this charge in Fall 2012. The SCC consulted with the OSC regarding this issue. In addition, the SCC reviewed the standards of evidence in codes of student conduct at the University's peer institutions in the Big Ten Conference. The SCC also reviewed data provided by the OSC regarding the number of non-academic misconduct cases processed and reviewed during the past five academic years. The SCC learned that there were 0 charges of sexual assault and 0 charges of sexual harassment processed by the OSC or the Office of Rights & Responsibilities during the 2012-2013 academic year. Ultimately, the SCC found no basis for recommending any potential changes to the <i>Code of Student Conduct</i> based on an undue burden, the difficulty in training honor boards for multiple standards, or any other justification.
Alternatives:	To not accept the report of the Student Conduct Committee.
Risks:	There are no associated risks.
Financial Implications:	There are no financial implications.
Further Approvals Required:	N/A

Senate Student Conduct Committee

Report – Senate Document 12-13-30

Review of the Evidentiary Standards in the *Code of Student Conduct*

November 2013

BACKGROUND

In December 2011, the University Senate approved the Student Conduct Committee's (SCC) report and recommendations on Senate Document #11-12-10, "Updates to Procedural Requirements Pertaining to Sexual Harassment and Sexual Violence" (Appendix 1). President Loh approved the report and recommendations on January 17, 2012. One of the approved recommendations was a request from the committee to be charged in Fall 2012 with revisiting the *Code of Student Conduct* regarding the changes made to comply with the directives in the Department of Education Office of Civil Rights' (OCR) "Dear Colleague Letter" of April 2011.

In order to bring the University into compliance with the directives outlined in the OCR letter, the committee recommended revising the burden of proof requirements in the *Code of Student Conduct* to include "preponderance of the evidence" (e.g., it is more likely than not that the incident occurred) instead of "clear and convincing" (e.g., it is highly probably or reasonably certain that the incident occurred) as the evidentiary standard in proceedings for complaints of sexual misconduct (including sexual harassment, sexual assault, and other forms of sexual violence or misconduct). The change to the *Code of Student Conduct* was made immediately following the President's approval in January 2012.

The *Code of Student Conduct* now has two different standards of evidence, depending on the type of case, which is fairly uncommon for an institution of higher education. Therefore, the SCC submitted a letter to the Senate Executive Committee (SEC) asking that it be charged with exploring whether this situation is in the best interest of the Office of Student Conduct (OSC) and the University (Appendix 2).

CURRENT PRACTICES

For violations of the *Code of Student Conduct*, the burden of proof is on the complainant, who must establish the guilt of the respondent by clear and convincing evidence. However, in disciplinary conferences and hearings under section 10(q) of the *Code of Student Conduct*, which allege violation of VI-1.20(A) University of Maryland Sexual Misconduct Policy, the complainant must establish the guilt of the respondent by a preponderance of the evidence.

Students who violate the *Code of Student Conduct* may participate in a disciplinary conference conducted by the Director of Student Conduct or a designee, or may undergo a hearing before a Conference Board, Residence Board, or the Central Board. Appealed cases may go on to the Appellate Board, an Ad Hoc Board, or the Senate Student Conduct Committee.

COMMITTEE WORK

The SCC received an official charge from the SEC in November 2012 (Appendix 3). The SEC asked the committee to review the *Code of Student Conduct* and consult with a representative

from the OSC regarding this issue. The SCC was also asked to consult with the Senate Student Affairs Committee regarding the potential impact that any changes to the *Code of Student Conduct* would have on students at the University. In addition, the SCC was asked to review the standards of evidence in codes of student conduct at our peer institutions, and to consult with the University's Office of Legal Affairs. Finally, the SCC was asked to recommend whether the *Code of Student Conduct* should be revised to make the standard of evidence for all cases consistent.

The SCC began reviewing this issue at the end of Fall 2012. During the Spring 2013 semester, the committee submitted a request for a deadline extension, which was granted by the SEC (Appendix 4). The committee completed its work on this charge during the Fall 2013 semester.

As requested, the committee reviewed the *Code of Student Conduct* and consulted with the Director of Student Conduct about the standards of evidence used for cases of academic and non-academic misconduct. The committee also reviewed data provided by the OSC regarding the number of non-academic misconduct cases processed and reviewed during the past five academic years. In particular, the committee examined the number of non-academic misconduct cases that were processed and reviewed during the 2012-2013 academic year, which included new referrals, as well as cases carried over from the previous reporting period:

During the 2012-2013 academic year, there were 387 campus cases of non-academic misconduct. Of the 387 cases received by OSC, the majority were resolved in Disciplinary Conferences with staff members. Of the total number of 387 cases, 175 respondents were charged under the *Code of Student Conduct*; 14 hearings went before the Central Board, which included 22 respondents. The remaining cases were either deferred (98), dismissed (84), or were pending resolution at the end of May 2013.

During the 2012-2013 academic year, there were 211 resident cases of non-academic misconduct. Of the 211 cases received by the Department of Resident Life's Office of Rights & Responsibilities, 115 were resolved in Disciplinary Conferences, 11 were heard by the Resident Board, 19 were dismissed, 21 were deferred, 7 were rescinded back to Community Staff for adjudication, and 38 referrals were received near the end of the Spring 2013 semester and were pending adjudication at the end of May 2013.

The committee learned that there were 0 charges of sexual assault and 0 charges of sexual harassment processed by the OSC or the Office of Rights & Responsibilities during the 2012-2013 academic year. As such, the committee has no basis for recommending any potential changes to the *Code of Student Conduct* based on an undue burden, the difficulty in training honor boards for multiple standards, or any other justification.

The committee also looked at the evidentiary standards used at peer institutions, confirming that all institutions use a "preponderance of the evidence" standard for cases of sexual misconduct, as directed by OCR. Many of the University's peers in the Big Ten Conference use "preponderance of the evidence" as the standard for all cases (including Michigan State University, University of Minnesota, The Ohio State University, University of Nebraska, Purdue University, Penn State University, University of Illinois at Urbana-Champaign, University of Iowa, and Northwestern University). The remaining Big Ten Institutions have split standards of evidence, depending on the type of case presented. For example, like our University, the University of Michigan uses a "preponderance of the evidence" standard for sexual misconduct cases and a "clear and convincing" standard for all other cases. Information regarding our Big Ten peer institutions' standards of evidence can be found in Appendix 5.

RECOMMENDATION

Due to the fact that there is no evidence that having two different standards of evidence in the *Code of Student Conduct* is having a negative impact on the review and processing procedures for non-academic misconduct cases, the SCC recommends that no changes to the standards of evidence in the *Code of Student Conduct* be made at this time. It is the opinion of the committee that instigating a major new change to the *Code of Student Conduct* would not be prudent while the expansion of the *Code of Student Conduct*'s application off-campus is still being implemented, and that changing the *Code of Student Conduct* without clear justification would present a burden on the OSC and the honor board system. It may be pertinent to have the committee revisit this issue in one or two years.

APPENDICES

Appendix 1 – SCC Report on “Updates to Procedural Requirements Pertaining to Sexual Harassment and Sexual Violence” (Senate Doc #11-12-10) (December 2011)

Appendix 2 – Letter of Request to be Charged from the SCC (November 1, 2012)

Appendix 3 – Charge from the Senate Executive Committee (November 16, 2012)

Appendix 4 – Extension Request Letter from the SCC (March 5, 2013)

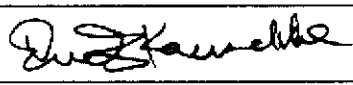
Appendix 5 – Peer Institution Research (Big Ten Conference)



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SENATE LEGISLATION APPROVAL

Date:	December 12, 2011
To:	Wallace D. Loh
From:	Eric Kasischke Chair, University Senate 
Subject:	Updates to Procedural Requirements Pertaining to Sexual Harassment and Sexual Violence
Senate Document #:	11-12-10

I am pleased to forward for your consideration the attached legislation entitled, "Updates to Procedural Requirements Pertaining to Sexual Harassment and Sexual Violence." Nan Ratner, Chair of the Student Conduct Committee, presented the proposal. The University Senate approved the proposal at its December 8, 2011 meeting.

We request that you inform the Senate Office of your decision as well as any subsequent action related to your conclusion.

Enclosure: Updates to Procedural Requirements Pertaining to Sexual Harassment and Sexual Violence

Senate Document # 11-12-10

EK/rm

Cc: Ann Wylie, Senior Vice President & Provost
Reka Montfort, Executive Secretary and Director, University Senate
Juan Uriagereka, Associate Provost for Faculty Affairs
Terry Roach, Executive Assistant to the President
Janet Turnbull, President's Legal Office
Elizabeth Beise, Associate Provost for Academic Planning & Programs
Sylvia B. Andrews, Academic Affairs
Andrea Goodwin, Director, Office of Student Conduct

Approved: _____



Wallace D. Loh
President

Date: _____

1/17/12



University Senate TRANSMITTAL FORM

Senate Document #:	11-12-10
PCC ID #:	N/A
Title:	Updates to Procedural Requirements Pertaining to Sexual Harassment and Sexual Violence
Presenter:	Nan Ratner, Chair, Senate Student Conduct Committee
Date of SEC Review:	November 29, 2011
Date of Senate Review:	December 8, 2011
Voting (highlight one):	On resolutions or recommendations one by one, or In a single vote To endorse entire report
Statement of Issue:	In April 2011, the US Department of Education’s Office for Civil Rights (OCR) distributed a “Dear Colleague Letter” providing guidance to institutions regarding sexual harassment and sexual violence disciplinary proceedings and appeals processes. As a recipient of Federal financial assistance, the University needs to comply with the directives issued in the letter. In order to be in compliance, the burden of proof requirement and appeals process must be revised in the <i>Code of Student Conduct</i> to include “preponderance of the evidence” instead of “clear and convincing” as the evidentiary standard in proceedings. Additionally, the OCR letter recommends that schools provide an appeals process for findings or remedy, and that they do so for both parties involved. Currently, the <i>Code of Student Conduct</i> provides an appeal to the respondent (accused student) only.
Relevant Policy # & URL:	http://www.president.umd.edu/policies/v100b.html
Recommendation:	The Student Conduct Committee (SCC) recommends that the University make the changes to the <i>Code of Student Conduct</i> necessary to bring the University into compliance with the directives outlined in the OCR letter. The specific changes to the <i>Code</i> are outlined in the attached report. The SCC wishes to reserve the right to revisit the <i>Code</i> and the recommendations in one year, at the beginning of the Fall 2012 semester. If this recommendation is approved, the SCC requests that it be charged

	by the SEC to perform this review in Fall 2012.
Committee Work:	<p>The SCC reviewed this issue during the Fall 2011 semester. The committee consulted with the Office of Student Conduct and the President’s Legal Office, to ensure that any proposed changes to the <i>Code of Student Conduct</i> would be appropriate for the University. The committee stayed abreast of developments within the Senate Equity, Diversity, & Inclusion (EDI) Committee, as the EDI Committee worked on two similar charges related to the University’s Sexual Harassment Policy. The SCC received information regarding peer institution research on evidentiary standards and researched national responses to the OCR letter and its guidance.</p> <p>At its meeting on November 8, 2011, following deliberation, the SCC voted unanimously in favor of recommending the University make the changes to the <i>Code of Student Conduct</i> necessary to be in compliance with the directives outlined in the OCR letter.</p>
Alternatives:	The University could continue to use “clear and convincing evidence” for cases of student-on-student sexual harassment and sexual violence, as outlined in the <i>Code of Student Conduct</i> ; the University would then not be in compliance with the OCR.
Risks:	There are no associated risks. However, if this recommendation is not endorsed, the University could face penalties (unspecified) from the OCR.
Financial Implications:	There are no related financial implications.
Further Approvals Required: <i>(*Important for PCC Items)</i>	Senate Approval, Presidential Approval.

Senate Student Conduct Committee

Senate Document 11-12-10

Updates to Procedural Requirements Pertaining to Sexual Harassment and Sexual Violence

November 2011

BACKGROUND:

In April 2011, the US Department of Education's Office for Civil Rights (OCR) distributed a "Dear Colleague Letter" providing guidance to institutions regarding sexual harassment and sexual violence disciplinary proceedings and appeals processes (Appendix 5). This letter outlined an institution's current responsibilities under Title IX for dealing with complaints of sexual harassment and sexual violence. As a recipient of Federal financial assistance, the University of Maryland needs to comply with the directives issued in the letter. In order to be in compliance, the burden of proof requirement and appeals process must be revised in the *Code of Student Conduct* to include "preponderance of the evidence" (i.e., it is more likely than not that the sexual harassment or violence occurred) instead of "clear and convincing" (i.e., it is highly probable or reasonably certain that the sexual harassment or violence occurred) as the evidentiary standard in proceedings. Additionally, the OCR letter recommends that institutions provide an appeals process for findings or remedies, and that they do so for both parties involved.

The OCR letter explains that the "preponderance of the evidence" evidentiary standard is the standard of proof established for violations of civil rights laws, and is thus "the appropriate standard for investigating allegations of sexual harassment or violence" (US Department of Education, Office for Civil Rights. 2011, April 4. Dear Colleague Letter, p. 11). The letter states that grievance procedures that use "clear and convincing" standards for cases of sexual harassment and sexual violence are not equitable under Title IX.

According to the National Institute of Justice (NIJ), "Surveys of college students confirm that many sexual assaults are not reported to the police. Researchers asked students why they did not report the incidents to law enforcement officers. The most commonly reported response—offered by more than half the students—was that they did not think the incident was serious enough to report. More than 35 percent said they did not report the incident because they were unclear as to whether a crime was committed or that harm was intended" (<http://nij.gov/>).

In response to the OCR letter, a Sexual Violence Policy Working Group was formed at the University and charged with the following:

- 1) Review and Evaluate current policy and practice;
- 2) Evaluate OCR Guidance;
- 3) Recommend policy changes consistent with OCR guidance;
- 4) Recommend changes in practice to ensure compliance.

The members of the Sexual Violence Policy Working Group include:

- John Zacker, Assistant Vice President of Student Affairs, CHAIR
- Allison Bennett, Coordinator, Sexual Assault Response and Prevention, Health Center
- Roger Candelaria, Campus Compliance Officer, Office of Diversity Education & Compliance

- Kevin Glover, Athletic Department
- Andrea Goodwin, Director, Office of Student Conduct
- Major Chris Jagoe, Department of Public Safety
- Diane Krejsa, Legal Counsel
- Keira Martone, Manager of Resident Office of Rights and Responsibilities in the Department of Resident Life
- Steve Petkas, Associate Director, Department of Resident Life
- Matt Supple, Director, Department of Fraternity and Sorority Life

Following deliberation between the end of the Spring 2011 semester and the Fall 2011 semester, the Sexual Violence Policy Working Group developed a proposal for the University Senate with proposed changes to the *Code of Student Conduct*.

CURRENT PRACTICE:

The *Code of Student Conduct* (University of Maryland Policy V-1.00(B)) defines prohibited conduct by students and the review process for violations and appeals. Title IX of the Education Amendments of 1972 prohibits sex-based discrimination at educational institutions that receive Federal funding. The OCR maintains that sexual harassment and sexual violence interfere with a student's right to an education free of discrimination.

Currently, the evidentiary standard used in the *Code of Student Conduct* for all disciplinary cases is "clear and convincing." Additionally, the *Code of Student Conduct* currently provides an appeal to the respondent (accused student) only.

COMMITTEE WORK:

The Senate Student Conduct Committee (SCC) was charged (Appendix 3) by the Senate Executive Committee (SEC) with reviewing the proposal, "Updates to Procedural Requirements Pertaining to Sexual Harassment and Sexual Violence" on October 3, 2011 (Appendix 4). The SEC asked the SCC to make recommendations on whether the University of Maryland *Code of Student Conduct* should be revised.

The SEC asked the SCC to consult with the Office of Student Conduct (OSC) and the subcommittee charged with proposing revisions to the *Code of Student Conduct*. Dr. Andrea Goodwin, Director of the OSC and a member of the subcommittee, sits on the SCC and provided input throughout the review process. A member of the University's Office of Legal Affairs also sat on the subcommittee charged with proposing revisions to the *Code of Student Conduct*. The committee received the proposed revisions on October 25, 2011 (Appendix 1).

The SCC stayed abreast of developments within the Senate's Equity, Diversity, and Inclusion (EDI) Committee during its review process, as the EDI Committee was similarly charged with reviewing two proposals (Senate Docs 11-12-05 and 11-12-09) related to the University's Sexual Harassment Policy (VI-1.20(A) UNIVERSITY OF MARYLAND POLICY AND PROCEDURES ON SEXUAL HARASSMENT). The SCC determined that the proposed changes to the *Code of Student Conduct* will have minimal, if any, impact on the University of Maryland *Code of Equity, Diversity, and Inclusion*, as the *Code of Student Conduct* deals solely with cases of student-on-student sexual harassment and sexual violence.

The SCC reviewed how the University's peer institutions have implemented the changes suggested in the OCR letter. The SCC found that two institutions, Eastern Michigan University and Notre Dame College in Ohio, were recently under investigation and received letters with guidelines for handling allegations of sexual assault (Ashburn, E. 2010, December 10. Education Dept. Tells 2 Colleges to Revamp Sexual-Harassment Policies. *The Chronicle of Higher Education*. Retrieved online from <http://chronicle.com/>).

Additionally, the Sexual Violence Policy Working Group provided a list of peer institution evidentiary standards, which it had used when originally researching this issue (Appendix 2). Standards were reviewed at both public and private institutions across the nation. The list includes all of the University of Maryland's peers, including University of California, Berkeley, University of Illinois at Urbana-Champaign, University of California, Los Angeles (UCLA), the University of North Carolina at Chapel Hill, and University of Michigan, Ann Arbor. Of the twenty-three institutions reviewed, only one uses anything other than "preponderance of the evidence" for cases of sexual harassment and sexual violence. Most use a "preponderance of the evidence" standard for all violations. Therefore, the University of Maryland is atypical in using "clear and convincing" as an evidentiary standard. According to the OSC, even within the University System of Maryland (USM), most institutions use a "preponderance of the evidence" standard.

The committee also researched criticism of the Education Department's sexual harassment guidance, noting that the American Association of University Professors (AAUP) has written and sent at least two letters of criticism to the OCR. The AAUP asserts that lowering the standard of evidence to a "preponderance of the evidence" would make it "more likely that faculty members will be unfairly accused and found guilty, their careers ruined" (2011, August 18. AAUP Renews Criticism of Education Dept.'s Sexual Harassment Guidance. *The Chronicle of Higher Education*. Retrieved online from <http://chronicle.com/>).

The SCC considered whether the proposed evidentiary standard of "preponderance of the evidence" should apply to all violations of the *Code of Student Conduct*, in addition to complaints of sexual harassment and sexual violence. Additionally, the SCC considered whether the proposed change to the appeals procedures—that schools provide an appeals process for **both** parties—should apply to all violations of the *Code of Student Conduct*.

RECOMMENDATIONS:

At its meeting on November 8, 2011, the SCC voted unanimously in favor of recommending that the University make the changes to the *Code of Student Conduct* necessary to get to the University in compliance with the directives outlined in the OCR letter. However, the committee wishes to reserve the right to revisit the *Code* and the recommendations in one year, at the beginning of the Fall 2012 semester. If approved, the SCC requests that it be charged by the SEC as such.

Therefore, in order for the University to be in compliance with the United States Department of Education Office for Civil Rights, the Senate Student Conduct Committee recommends that the attached policy changes be made to the *Code of Student Conduct* (Appendix 1). The recommended changes are outlined below:

1) The SCC recommends that the following section be added to the *Code of Student Conduct*, in order to reflect OCR compliance:

BURDEN OF PROOF²⁹

32. Except as provided below, the burden of proof shall be upon the complainant, who must establish the guilt of the respondent by clear and convincing evidence³⁰. In disciplinary conferences and hearings under section 9(p) of this *Code* which allege violation of VI-1.30(A) UMCP Procedures on Sexual Assault and/or VI-1.20(A) University of Maryland Policy and Procedures on Sexual Harassment, the burden of proof shall be upon the complainant, who must establish the guilt of the respondent by a preponderance of the evidence.³¹

The SCC recommends that items 42 and 43 of the Appeals section in the *Code of Student Conduct* be updated as follows, in order to comply with OCR:

APPEALS

42. Except as provided below, any determination made pursuant to this *Code* resulting in expulsion or suspension⁴⁶ may be appealed by the respondent to the Senate Committee on Student Conduct. Appeals regarding violations of VI-1.30(A) UMCP Procedures on Sexual Assault and/or VI-1.20(A) University of Maryland Policy and Procedures on Sexual Harassment may be made by either party.⁴⁷ The Senate Committee shall also hear appeals from denials of petitions to void disciplinary records, pursuant to Part 52 of this *Code*.

43. Except as provided below, final decisions of residence boards, the Central Board and ad hoc boards, not involving the sanctions specified in Part 42, may be appealed by the respondent to the Appellate Board.⁴⁸ Appeals regarding violations of VI-1.30(A) UMCP Procedures on Sexual Assault and/or VI-1.20(A) University of Maryland Policy and Procedures on Sexual Harassment may be made by either party.⁴⁹

The SCC recommends that the following three items be added to the Annotations section of the *Code of Student Conduct*, in order to reflect OCR compliance:

ANNOTATIONS

29. On April 4, 2011, the United States Department of Education, Office of Civil Rights issued a "significant guidance document" to provide universities with information to assist them in meeting their obligations under Title IX of the Education Amendments of 1972 ("Title IX"). This document is known as the "OCR Dear Colleague Letter". According to the OCR Dear Colleague Letter, Title IX requires that the burden of proof in sexual harassment cases, including sexual assault, be "preponderance of the evidence." Prior to the issuance of the OCR Dear Colleague Letter, the burden of proof under the Code was "clear and convincing evidence". According to the OCR Dear Colleague Letter, Title IX also requires that both parties in disciplinary hearings in sexual harassment cases, including sexual assault, be provided the same appeal rights, if any.

30. "Clear and convincing" means "the evidence should be 'clear' in the sense that it is certain, plain to the understanding and unambiguous, and 'convincing' in the sense that it is so reasonable and persuasive as to cause [one] to believe it." *Wills v. State of Maryland*, 329 Md. 370, 374 (1993), quoting Maryland Civil Practice Jury Instruction Section 1:8b (1984). It does not call for "unanswerable" or "conclusive" evidence. *Attorney Grievance Commission v. Harris*, 366 Md. 376, 389 (2001). To be clear and convincing means that it is substantially more likely than not that the allegations are in fact true but that it "need not be established with absolute certainty". *Vogel v. State*, 315 Md. 458, 473 (1989). The burden is "more than a mere

preponderance of the evidence [the burden of proof in ordinary civil cases] but not beyond a reasonable doubt [the standard in criminal cases]. *Berkey v. Delia*, 287 Md. 302, 319-20 (1980).

31. "Preponderance of the evidence" means it is "more likely than not" that the violation occurred as alleged. To meet a burden of proof by a preponderance of the evidence, means that "the scales tipped in the direction" of one of the parties. "When the scales are 'in a state of even balance,' the party with the burden of proving its case by a preponderance of the evidence loses. *Wills v. State of Maryland*, 329 Md. 370, 374 (1993), quoting *Potts v. Armour & Co.*, 183 Md 483, 490 (1944). See Maryland Civil Pattern Jury Instructions Section 1:8a (1984).

APPENDICES:

Appendix 1 – Recommended Policy Changes to the *Code of Student Conduct*

Appendix 2 – Peer Institution Evidentiary Standards Research

Appendix 3 – Charge from the Senate Executive Committee, October 3, 2011

Appendix 4 – Proposal from the Office of Student Conduct, September 12, 2011

Appendix 5 – Dear Colleague Letter from the Office for Civil Rights, April 4, 2011

Proposed Revisions October | 2011

V-1.00(B) UNIVERSITY OF MARYLAND CODE OF STUDENT CONDUCT

Approved by the Board of Regents January 25, 1980; amended effective September 4, 1990; December 18, 2001; April 22, 2004; November 18, 2005; April 5, 2006; March 10, 2011

Note: Different procedures and penalties are applicable in cases involving allegations of academic dishonesty. Please refer to the *Code of Academic Integrity*, available from the Office of Student Conduct (301-314-8204).

Footnotes which appear throughout the *Code of Student Conduct* refer to the Annotations listed at the end of this appendix.

RATIONALE

1. The primary purpose for the imposition of discipline in the University setting is to protect the campus community. Consistent with that purpose, reasonable efforts will also be made to foster the personal and social development of those students who are held accountable for violations of University regulations.¹

DEFINITIONS

2. When used in this *Code*:²
 - (a) The term “aggravated violation” means a violation which resulted or foreseeably could have resulted in significant damage to persons or property or which otherwise posed a substantial threat to the stability and continuance of normal University or University-sponsored activities.
 - (b) The term “distribution” means sale or exchange for personal profit.
 - (c) The term “group” means a number of persons who are associated with each other and who have not complied with University requirements for registration as an organization.
 - (d) The terms “institution” and “University” mean the University of Maryland, College Park.
 - (e) The term “organization” means a number of persons who have complied with University requirements for registration.
 - (f) The term “reckless conduct” means action which any member of the University community can be expected to know would create a clear risk of harm to persons or property, or would disrupt the lawful activities of others, including studying, teaching, research, and University administration.³
 - (g) The term “student” means a person taking or auditing courses at the institution either on a full- or part-time basis.⁴
 - (h) The term “University premises” means buildings or grounds owned, leased, operated, controlled or supervised by the University.

- (i) The term “weapon” means any object or substance designed to inflict a wound, cause injury, or incapacitate, including, but not limited to, all firearms, pellet guns, switchblade knives, knives with blades five or more inches in length.
- (j) The term “University-sponsored activity” means any activity on or off campus which is initiated, aided, authorized or supervised by the University.
- (k) The terms “will” or “shall” are used in the imperative sense.

INTERPRETATION OF REGULATIONS

- 3. Disciplinary regulations at the University are set forth in writing in order to give students general notice of prohibited conduct. The regulations should be read broadly and are not designed to define misconduct in exhaustive terms.

INHERENT AUTHORITY

- 4. The University reserves the right to take necessary and appropriate action to protect the safety and well-being of the campus community.⁵

STUDENT PARTICIPATION

- 5. Students are asked to assume positions of responsibility in the University judicial system in order that they might contribute their skills and insights to the resolution of disciplinary cases. Final authority in disciplinary matters, however, is vested in the University administration and in the Board of Regents.

STANDARDS OF DUE PROCESS

- 6. Students subject to expulsion, suspension⁶ or disciplinary removal from University housing⁷ will be accorded a conduct board hearing as specified in Part 30 of this *Code*. Students subject to less severe sanctions will be entitled to an informal disciplinary conference,⁸ as set forth in Parts 33 and 34.
- 7. The focus of inquiry in disciplinary proceedings shall be the guilt or innocence of those accused of violating disciplinary regulations. Formal rules of evidence shall not be applicable, nor shall deviations from prescribed procedures necessarily invalidate a decision or proceeding, unless significant prejudice to a student respondent or the University may result.⁹

VIOLATIONS OF LAW AND DISCIPLINARY REGULATIONS

- 8. Students may be accountable to both civil authorities and to the University for acts which constitute violations of law and of this *Code*.¹⁰ Disciplinary action at the University will normally proceed during the pendency of criminal proceedings

and will not be subject to challenge on the ground that criminal charges involving the same incident have been dismissed or reduced.

PROHIBITED CONDUCT

9. The following misconduct is subject to disciplinary action:
- (a) Intentionally or recklessly causing physical harm to any person on University premises or at University-sponsored activities, or intentionally or recklessly causing reasonable apprehension of such harm.
 - (b) Unauthorized use, possession or storage of any weapon on University premises or at University-sponsored activities.
 - (c) Intentionally initiating or causing to be initiated any false report, warning or threat of fire, explosion or other emergency on University premises or at University-sponsored activities.
 - (d) Off-campus misconduct which:
 - i. is a criminal offense off campus, resulting in conviction, if such an offense would constitute a violation of this *Code* had it occurred on University premises. No student convicted of a misdemeanor under this section shall be subject to expulsion or full suspension unless the offense constitutes an “aggravated violation” as defined in Part 2(a) of this *Code*. The University shall not pursue disciplinary action when a non-aggravated misdemeanor does not pose a threat to the stability of the campus or campus community; provided, however,
 - ii. rioting, assault, theft, vandalism, fire setting, or other serious misconduct related to a University-sponsored event, occurring on – or off-campus, that results in harm to persons or property or otherwise poses a threat to the stability of the campus or campus community may result in disciplinary action regardless of the existence, status, or outcome of any criminal charges in a court of law related to misconduct associated with a University-sponsored event.
 - (e) Knowingly violating the terms of any disciplinary sanction imposed in accordance with this *Code*.
 - (f) Intentionally or recklessly misusing or damaging fire safety equipment.
 - (g) Unauthorized distribution or possession for purposes of distribution of any controlled substance or illegal drug¹¹ on University premises or at University-sponsored activities.
 - (h) Use or possession of any controlled substance or illegal drug on University premises or at University-sponsored activities.¹²
 - (i) Intentionally furnishing false information to the University.
 - (j) Making, possessing, or using any forged, altered, or falsified instrument of identification on University premises, or at University-sponsored activities; making, possessing, or using any forged, altered, or falsified University document, on or off-campus.

- (k) Intentionally and substantially interfering with the freedom of expression of others on University premises or at University-sponsored activities.¹³
- (l) Theft of property or of services on University premises or at University-sponsored activities; knowing possession of stolen property on University premises or at University-sponsored activities.
- (m) Intentionally or recklessly destroying or damaging the property of others on University premises or at University-sponsored activities.
- (n) Engaging in disorderly or disruptive conduct on University premises or at University-sponsored activities which interferes with the activities of others, including studying, teaching, research, and University administration.*
- (o) Failure to comply with the directions of University officials, including campus police officers, acting in performance of their duties.
- (p) Violation of published University regulations or policies, as approved and compiled by the Vice President for Student Affairs.¹⁴ Such regulations or policies may include the residence hall contract, as well as those regulations relating to entry and use of University facilities, sale of alcoholic beverages, use of vehicles** and amplifying equipment, campus demonstrations, and misuse of identification cards.
- (q) Use or possession of any alcoholic beverage under the age of 21 on University premises or at University-sponsored activities; knowingly providing alcoholic beverages to a person known to be under the age of 21 on University premises or University-sponsored activities. ***
- (r) Unauthorized use or possession of fireworks on University premises.

* The response of fire, police, or emergency personnel to a non-frivolous call, or action taken by them on their own initiative pursuant or non-pursuant to policy is not considered a disruption or reckless action within the meaning of this section.

** Parking and traffic violations may be processed in accordance with procedures established by the Vice President for Student Affairs.

*** This charge may be deferred under Part 29 of this *Code* consistent with procedures outlined in the *Promoting Responsible Action in Medical Emergencies Policy*.

SANCTIONS

10. Sanctions for violations of disciplinary regulations consist of:

- (a) **EXPULSION:** permanent separation of the student from the University. Notification will appear on the student's transcript. The student will also be barred from the University premises (expulsion requires administrative review and approval by the President and may be altered, deferred or withheld).

- (b) **SUSPENSION:** separation of the student from the University for a specified period of time. Permanent notification will appear on the student's transcript. The student shall not participate in any University-sponsored activity and may be barred from University premises. Suspended time will not count against any time limits of the Graduate School for completion of a degree. (Suspension requires administrative review and approval by the Vice President for Student Affairs and may be altered, deferred or withheld).
 - (c) **DISCIPLINARY PROBATION:** the student shall not represent the University in any extracurricular activity or run for or hold office in any student group or organization. Additional restrictions or conditions may also be imposed. Notification will be sent to appropriate University offices, including the Office of Campus Programs.
 - (d) **DISCIPLINARY REPRIMAND:** the student is warned that further misconduct may result in more severe disciplinary action.
 - (e) **RESTITUTION:** the student is required to make payment to the University or to other persons, groups, or organizations for damages incurred as a result of a violation of this *Code*.
 - (f) **OTHER SANCTIONS:** other sanctions may be imposed instead of or in addition to those specified in sections (a) through (e) of this part. For example, students may be subject to dismissal from University housing for disciplinary violations which occur in the residence halls. Likewise, students may be subject to restrictions upon or denial of driving privileges for disciplinary violations involving the use or registration of motor vehicles. Work or research projects may also be assigned.
11. Violations of sections (a) through (g) in Part 9 of this *Code* may result in expulsion from the University¹⁵, unless specific and significant mitigating factors are present. Factors to be considered in mitigation shall be the present demeanor and past disciplinary record of the offender, as well as the nature of the offense and the severity of any damage, injury, or harm resulting from it.
12. Violations of sections (h) through (l) in Part 9 of this *Code* may result in suspension from the University, unless specific and significant mitigating factors as specified in Part 11 are present.
13. Repeated or aggravated violations of any section of this *Code* may also result in expulsion or suspension or in the imposition of such lesser penalties as may be appropriate.
14. Any decision to impose a sanction less than suspension or expulsion for University-sponsored event-related misconduct as defined in Part 9(d)(ii) of this *Code* must be supported by written findings signed by the Vice President for Student Affairs. A student suspended under this section shall not be admitted to any other institution in the University of Maryland System during the term of the suspension. A student expelled under this section shall not be admitted to any

other institution in the System for at least one year from the effective date of the expulsion.

15. Attempts to commit acts prohibited by this *Code* shall be punished to the same extent as completed violations.¹⁶
16. Penalties for off-campus misconduct shall not be more severe than for similar on-campus conduct.

INTERIM SUSPENSION¹⁷

17. The Vice President for Student Affairs or a designee may suspend a student for an interim period pending disciplinary proceedings or medical evaluation, such interim suspension to become immediately effective without prior notice, whenever there is evidence that the continued presence of the student on the University campus poses a substantial threat to him or herself or to others or to the stability and continuance of normal University functions.
18. A student suspended on an interim basis shall be given an opportunity to appear personally before the Vice President for Student Affairs or a designee within five business days from the effective date of the interim suspension in order to discuss the following issues only:
 - (a) the reliability of the information concerning the student's conduct, including the matter of his or her identity;
 - (b) whether the conduct and surrounding circumstances reasonably indicate that the continued presence of the student on the University campus poses a substantial threat to him or herself or to others or the stability and continuance of normal University functions.

OFFICE OF STUDENT CONDUCT

19. The Office of Student Conduct directs the efforts of students and staff members in matters involving student discipline. The responsibilities of the office include:
 - (a) Determination of the disciplinary charges to be filed pursuant to this *Code*.
 - (b) Interviewing and advising parties¹⁸ involved in disciplinary proceedings.
 - (c) Supervising, training, and advising all conduct boards.
 - (d) Reviewing the decisions of all conduct boards.¹⁹
 - (e) Maintenance of all student disciplinary records.
 - (f) Development of procedures for conflict resolution.
 - (g) Resolution of cases of student misconduct, as specified in Parts 33 and 34 of this *Code*.
 - (h) Collection and dissemination of research and analysis concerning student conduct.

- (i) Submission of a statistical report each semester to the campus community, reporting the number of cases referred to the office, the number of cases resulting in disciplinary action, and the range of sanctions imposed.²⁰

CONDUCT PANELS

- 20. Hearings or other proceedings as provided in the *Code* may be held before the following boards or committees:
 - (a) **CONFERENCE BOARDS**, as appointed in accordance with Part 34 of this *Code*.
 - (b) **RESIDENCE BOARDS**, as established and approved by the Vice President for Student Affairs.²¹ Students residing in group living units owned, leased, operated or supervised by the University may petition the Vice President for authority to establish conduct boards. Such boards may be empowered to hear cases involving violations of the *Code*, as prescribed by the Vice President for Student Affairs.
 - (c) **THE CENTRAL BOARD** hears cases involving disciplinary violations which are not referred to Residence Boards or resolved in accordance with Parts 33 and 34 of this *Code*. The Central Board is composed of five students, including at least two graduate students when a graduate student case is being heard.
 - (d) **THE APPELLATE BOARD** hears appeals from Residence Boards, the Central Board, and ad hoc boards, in accordance with Part 43 of this *Code*. The Appellate Board is composed of five full-time students, including at least two graduate students.
 - (e) **AD HOC BOARDS** may be appointed by the Director of Student Conduct when a Conference Board, a Residence Board, the Central Board, the Appellate Board or the Senate Adjunct Committee are unable to obtain a quorum or are otherwise unable to hear a case.²² Each ad hoc board shall be composed of three members, including at least one student.
 - (f) **THE SENATE COMMITTEE ON STUDENT CONDUCT** hears appeals as specified in Part 42 of this *Code*. The committee also approves the initial selection of all conduct board members, except members of conference and ad hoc boards.²³
- 21. The presiding officer of each conduct board and of the Senate Adjunct Committee on Student Conduct may develop bylaws which are not inconsistent with any provision in this *Code*. Bylaws must be approved by the Director of Student Conduct.²⁴

SELECTION AND REMOVAL OF BOARD MEMBERS

- 22. Members of the various conduct boards are selected in accordance with procedures developed by the Director of Student Conduct.

Proposed Revisions October | 2011

23. Members of conference and ad hoc boards are selected in accordance with Parts 34 and 20(e), respectively.
24. Prospective members of the Central Board and the Appellate Board are subject to confirmation by the Senate Committee on Student Conduct.
25. Members of the Senate Committee on Student Conduct are selected in accordance with the bylaws of the University Senate.
26. Prior to participating in board or committee deliberations, new members of the Senate Committee on Student Conduct and all conduct boards, except conference and ad hoc boards, will participate in one orientation session by the Office of Student Conduct.
27. Student members of any conduct board or committee who are charged with any violation of this *Code* or with a criminal offense²⁵ may be suspended from their judicial positions by the Director of Student Conduct during the pendency of the charges against them. Students convicted for any such violation or offense may be disqualified from any further participation in the University judicial system by the Director of Student Conduct. Additional grounds and procedures for removal may also be set forth in the bylaws of the various conduct panels.

CASE REFERRALS

28. Any person²⁶ may refer a student or a student group or organization suspected of violating this *Code* to the Office of Student Conduct. Allegations of off-campus event-related misconduct must be supported by a report, statement, or accusation from a law enforcement agency in whose jurisdiction the misconduct is alleged to have occurred. Persons making such referrals are required to provide information pertinent to the case and will normally be expected to appear before a conduct board as the complainant.²⁷

DEFERRAL OF PROCEEDINGS

29. The Director of Student Conduct may defer disciplinary proceedings for alleged violations of this *Code* for a period not to exceed 90 days. Pending charges may be withdrawn thereafter, dependent upon the good behavior of the respondent. Students subject to conditional relief from disciplinary charges under the *Promoting Responsible Action in Medical Emergencies Policy* may also be required to successfully complete an approved alcohol intervention program prior to the withdrawal of charges.

HEARING REFERRALS

30. Staff members in the Office of Student Conduct will review referrals to determine whether the alleged misconduct might result in expulsion, suspension, or

Proposed Revisions October | 2011

disciplinary removal from University housing.²⁸ Students subject to those sanctions shall be accorded a hearing before the appropriate conduct board. All other cases shall be resolved in the Office of Student Conduct after an informal disciplinary conference, as set forth in Part 33 and 34 of this *Code*.

31. Students referred to a conduct board hearing may elect instead to have their case resolved in accordance with Parts 33 and 34. The full range of sanctions authorized by this *Code* may be imposed, although the right of appeal shall not be applicable.

BURDEN OF PROOF²⁹

32. Except as provided below, the burden of proof shall be upon the complainant, who must establish the guilt of the respondent by clear and convincing evidence³⁰. In disciplinary conferences and hearings under section 9(p) of this *Code* which allege violation of VI-1.30(A) UMCP Procedures on Sexual Assault and/or VI-1.20(A) University of Maryland Policy and Procedures on Sexual Harassment, the burden of proof shall be upon the complainant, who must establish the guilt of the respondent by a preponderance of the evidence³¹.

Comment [AG1]: This section was added to reflect the OCR compliance

DISCIPLINARY CONFERENCES³²

33. Students subject to or electing to participate in a disciplinary conference in the Office of Student Conduct are accorded the following procedural protections:
 - (a) Written notice of charges at least three days prior to the scheduled conference.
 - (b) Reasonable access to the case file³³ prior to and during the conference.
 - (c) An opportunity to respond to the evidence against them and to call appropriate witnesses on their behalf.
 - (d) The option to be accompanied and assisted by a representative, who may be an attorney. Representatives have the right to make opening and closing statements, to advise their clients during the course of the proceedings, and to petition for recesses. All representatives are subject to the restrictions of Parts 36 and 37 of this *Code*.
34. Disciplinary conferences shall be conducted by the Director of Student Conduct or a designee.³⁴ Complex or contested cases may be referred by the Director to a conference board, consisting of one member of the Central Board, one member of the Appellate Board, and a staff member in the Division of Student Affairs. Conference Board members shall be selected on a rotating basis by the Director of Student Conduct.

HEARING PROCEDURES

35. The following procedural guidelines shall be applicable in disciplinary hearings:

- (a) Respondents shall be given notice of the hearing date and the specific charges against them at least five days in advance and shall be accorded reasonable access to the case file, which will be retained in the Office of Student Conduct.
- (b) The presiding officer of any board may subpoena witnesses upon the motion of any board member or of either party and shall subpoena witnesses upon request of the board advisor. Subpoenas must be approved by the Director of Student Conduct and shall be personally delivered or sent by certified mail, return receipt requested. University students and employees are expected to comply with subpoenas issued pursuant to this procedure, unless compliance would result in significant and unavoidable personal hardship or substantial interference with normal University activities.³⁵

If the Director of Student Conduct or his or her designee determines that a fair hearing cannot be held without the testimony of a particular witness, and, after good faith attempts are made, the witness either fails to or refuses to appear, the disciplinary hearing will be postponed until the witness agrees to appear or the charges will be dismissed.
- (c) Respondents who fail to appear after proper notice will be deemed to have pleaded guilty to the charges pending against them.
- (d) Hearings will be closed to the public, except for the immediate members of the parties' families and their representatives, if applicable. An open hearing may be held, at the discretion of the presiding officer, if requested by both parties.
- (e) The presiding officer of each board shall exercise control over the proceedings to avoid needless consumption of time and to achieve the orderly completion of the hearing. Except as provided in section (o) of this Part, any person, including the respondent, who disrupts a hearing may be excluded by the presiding officer or by the board advisor.
- (f) Hearings may be tape recorded or transcribed. If a recording or transcription is not made, the decision of the board must include a summary of the testimony and shall be sufficiently detailed to permit review by appellate bodies and by staff members in the Office of Student Conduct.
- (g) Any party or the board advisor may challenge a board member on the grounds of personal bias. Board members may be disqualified upon majority vote of the remaining members of the board, conducted by secret ballot,³⁶ or by the Director of Student Conduct.
- (h) Witnesses shall be asked to affirm that their testimony is truthful and may be subject to charges of perjury, pursuant to Part 9(i) of this *Code*.
- (i) Prospective witnesses, other than the complainant and the respondent, may be excluded from the hearing during the testimony of other witnesses. All parties, the witnesses, and the public shall be excluded during board deliberations.

- (j) Formal rules of evidence shall not be applicable in disciplinary proceedings conducted pursuant to this *Code*.³⁷ The presiding officer of each board shall give effect to the rules of confidentiality and privilege, but shall otherwise admit all matters into evidence which reasonable persons would accept as having probative value in the conduct of their affairs. Unduly repetitious or irrelevant evidence may be excluded.³⁸
- (k) Both parties shall be accorded an opportunity to question those witnesses who testify at the hearing.
- (l) Affidavits shall not be admitted into evidence unless signed by the affiant and witnessed by a University employee, or by a person designated by the Director of Student Conduct.
- (m) Board members may take judicial notice of matters which would be within the general experience of University students.³⁹
- (n) Board advisors may comment on questions of procedure and admissibility of evidence and will otherwise assist in the conduct of the hearing. Advisors will be accorded all the privileges of board members, and the additional responsibilities set forth in this *Code*, but shall not vote. All advisors are responsible to the Director of Student Conduct and shall not be excluded from hearings or board deliberations by any board or by the presiding officer of any board.
- (o) The Director of Student Conduct may appoint a special presiding officer to any board in complex cases or in any case in which the respondent is represented by an attorney. Special presiding officers may participate in board deliberations, but shall not vote.⁴⁰
- (p) A determination of guilt shall be followed by a supplemental proceeding in which either party and the board advisor may submit evidence or make statements concerning the appropriate sanction to be imposed. The past disciplinary record⁴¹ of the respondent shall not be supplied to the board by the advisor prior to the supplementary proceeding.
- (q) Final decisions of all conduct panels shall be by majority vote of the members present and voting. A tie vote will result in a recommended acquittal in an original proceeding. A tie vote in an appellate proceeding will result in an affirmation of the original decision.
- (r) Final decisions of all boards, except conference boards, shall be accompanied by a brief written opinion.

ATTORNEYS AND REPRESENTATIVES

36. Representatives of both complainants and respondents in hearings pursuant to this *Code* have the right to call witnesses to testify, to question in person all witnesses who appear at the hearing, to voice timely objections, to make opening and closing statements, to petition for recesses in the proceedings and to zealously and lawfully assert their client's position under the *Code of Student Conduct*.⁴² All presenters and representatives who participate in disciplinary hearings and disciplinary conferences shall not:

- (a) Intentionally engage in conduct to disrupt a hearing;
 - (b) Intentionally attempt to improperly influence an officer of the Office of Student Conduct, a hearing advisor or member of a conduct board;
 - (c) Intentionally fail to obey a reasonably definite and specific order by a presiding officer;
 - (d) Knowingly make a false statement of material fact, law or representation of the *Code* to other participants in a hearing;
 - (e) Knowingly fail to disclose a material fact in a hearing when disclosure is necessary to avoid assisting a future criminal or fraudulent act;
 - (f) Knowingly offer false evidence, falsify evidence, counsel or induce witnesses to testify falsely, or offer improper inducements to testify;
 - (g) Recklessly and unlawfully obstruct another party's access to evidence, or alter, destroy or conceal material not protected by privilege having potential evidentiary value;
 - (h) If the representative is an attorney, otherwise fail to follow any obligations under relevant standards of professional responsibility in matters pertaining to the representation.
- 37.
- (a) Any participant in a hearing may refer complaints about suspected violations of the provisions of Part 36 of this *Code* to the Senate Committee on Student Conduct.
 - (b) Within a reasonable time after such referral, the chairperson of the Senate Committee on Student Conduct will review the complaint. After review the chairperson shall dismiss complaints which are anonymous, manifestly frivolous, which cannot be reasonably construed to allege a violation of Part 36, or are based on hearsay alone. Those which are not dismissed will be referred to the full Committee which will convene a hearing no sooner than 10 business days after sending a copy of the evidence presented to the representative named in the complaint. The hearing shall be held under the relevant rules and procedures governing disciplinary hearings outlined in Parts 35-37 of this *Code*.
 - (c) A client shall not be compelled either directly or through their representative to waive the attorney-client privilege.
 - (d) Representatives found responsible for violations of the provisions of Part 36 may be suspended from the privilege of representation for such time as the Committee may deem appropriate. In addition, the Committee may refer their findings to the Attorney Grievance Commission, or other appropriate disciplinary body.
 - (e) Appeals from decisions of the Senate Committee on Student Conduct regarding violations under Part 36 may be made by parties found responsible. Appeals should be made in writing to the Senate Campus Affairs Committee within 10 business days of receipt of the letter notifying the party of the decision. Appeals will be conducted in accordance with the standards for the hearing of student disciplinary appeals. Decisions of the Campus Affairs Committee regarding these appeals shall be final.

STUDENT GROUPS AND ORGANIZATIONS

- 38. Student groups and organizations may be charged with violations of this *Code*.
- 39. A student group or organization and its officers may be held collectively⁴³ or individually responsible when violations of this *Code* by those associated with⁴⁴ the group or organization have received the tacit or overt consent or encouragement of the group or organization or of the group's or organization's leaders, officers, or spokespersons.
- 40. The officers or leaders or any identifiable spokespersons⁴⁵ for a student group or organization may be directed by the Vice President for Student Affairs or a designee to take appropriate action designed to prevent or end violations of this *Code* by the group or organization or by any persons associated with the group or organization who can reasonably be said to be acting in the group's or organization's behalf. Failure to make reasonable efforts to comply with the Vice President's directive shall be considered a violation of Part 9(o) of this *Code*, both by the officers, leaders or spokespersons for the group or organization and by the group or organization itself.
- 41. Sanctions for group or organization misconduct may include revocation or denial of recognition or registration, as well as other appropriate sanctions, pursuant to Part 10(f) of this *Code*.

APPEALS

- 42. Except as provided below, any determination made pursuant to this *Code* resulting in expulsion or suspension⁴⁶ may be appealed by the respondent to the Senate Committee on Student Conduct. Appeals regarding violations of VI-1.30(A) UMCP Procedures on Sexual Assault and/or VI-1.20(A) University of Maryland Policy and Procedures on Sexual Harassment may be made by either party.⁴⁷ The Senate Committee shall also hear appeals from denials of petitions to void disciplinary records, pursuant to Part 52 of this *Code*.
- 43. Except as provided below, final decisions of residence boards, the Central Board and ad hoc boards, not involving the sanctions specified in Part 42, may be appealed by the respondent to the Appellate Board.⁴⁸ Appeals regarding violations of VI-1.30(A) UMCP Procedures on Sexual Assault and/or VI-1.20(A) University of Maryland Policy and Procedures on Sexual Harassment may be made by either party.⁴⁹
- 44. Requests for appeals must be submitted in writing to the Office of Student Conduct within seven business days from the date of the letter providing notice of the original decision. Failure to appeal within the allotted time will render the original decision final and conclusive.⁵⁰

Comment [AG2]: This section has been added to comply with OCR

Comment [AG3]: This section has been added to comply with OCR

Proposed Revisions October | 2011

45. A written brief in support of the appeal must be submitted to the Office of Student Conduct within 10 business days from the date of the letter providing notice of the original decision. Failure to submit a written brief within the allotted time will render the decision of the lower board final and conclusive.⁵¹
46. Appeals shall be decided upon the record of the original proceeding and upon written briefs submitted by the parties. De novo hearings shall not be conducted.
47. Appellate bodies may:
 - (a) Affirm the finding and the sanction imposed by the original board.
 - (b) Affirm the finding and reduce, but not eliminate, the sanction, in accordance with Parts 48 and 48(a).
 - (c) Remand the case to the original board, in accordance with Parts 47 and 47(b).
 - (d) Dismiss the case, in accordance with Parts 48 and 48(c).
48. Deference shall be given to the determinations of lower boards.⁵²
 - (a) Sanctions may only be reduced if found to be grossly disproportionate to the offense.
 - (b) Cases may be remanded to the original board if specified procedural errors or errors in interpretation of University regulations were so substantial as to effectively deny the respondent a fair hearing, or if new and significant evidence became available which could not have been discovered by a properly diligent respondent before or during the original hearing.⁵³ On remand, no indication or record of the previous conduct hearing will be introduced or provided to members of the new conduct panel, except to impeach contradictory testimony at the discretion of the presiding officer. The board will be directed by the committee not to repeat the specified errors that caused the remand.
 - (c) Cases may be dismissed only if the finding is held to be arbitrary and capricious.⁵⁴
 - (d) Decisions of the Appellate Board shall be recommendations to the Director of Student Conduct.⁵⁵ Decisions of the Senate Committee on Student Conduct shall be recommendations to the Vice President for Student Affairs. Decisions altering the determinations of all hearing boards and the Senate Committee on Student Conduct shall be accompanied by a brief written opinion.
49. The imposition of sanctions will normally be deferred during the pendency of appellate proceedings, at the discretion of the Director of Student Conduct.

DISCIPLINARY FILES AND RECORDS

50. Case referrals may result in the development of a disciplinary file in the name of the respondent, which shall be voided if the respondent is found innocent of the charges.⁵⁶ The files of respondents found guilty of any of the charges against them will be retained as a disciplinary record for three years from the date of the letter providing notice of final disciplinary action.⁵⁷ Disciplinary records may be retained for longer periods of time or permanently, if so specified in the sanction.
51. Disciplinary records may be voided⁵⁸ by the Director of Student Conduct for good cause, upon written petition of respondents. Factors to be considered in review of such petitions shall include:
 - (a) the present demeanor of the respondent.
 - (b) the conduct of the respondent subsequent to the violation.
 - (c) the nature of the violation and the severity of any damage, injury, or harm resulting from it.
52. Denials of petitions to void disciplinary records shall be appealable to the Senate Committee on Student Conduct, which will apply the standard of review specified in Part 48 and 48(c). The requirements for appeals as set forth in Part 44 and 45 shall be applicable.⁵⁹
53. Disciplinary records retained for less than 90 days or designated as “permanent” shall not be voided without unusual and compelling justification.⁶⁰

ANNOTATIONS

1. The University is not designed or equipped to rehabilitate or incapacitate persons who pose a substantial threat to themselves or to others. It may be necessary, therefore, to remove those individuals from the campus and to sever the institutional relationship with them, as provided in this *Code of Student Conduct* and by other University regulations.*

Any punishment imposed in accordance with the *Code* may have the value of discouraging the offender and others from engaging in future misbehavior. In cases of minor disciplinary violations, the particular form of punishment may also be designed to draw upon the educational resources of the University in order to bring about a lasting and reasoned change in behavior. The underlying rationale for punishment need not rest on deterrence or “reform” alone, however. A just punishment may also be imposed because it is “deserved” and because punishment for willful offenses affirms the autonomy and integrity of the offender. The latter concept was expressed by D.J.B. Hawkins in his essay “Punishment and Moral Responsibility” in *7 Modern Law Review* 205:

The vice of regarding punishment entirely from the points of view of reformation and deterrence lies precisely in forgetting that a just punishment is deserved. The punishment of men then ceases to be essentially different from the training of animals, and the way is open for the totalitarian state to undertake the forcible improvement of its citizens without regard to whether their conduct has made them morally liable to social coercion or not. But merit and demerit, reward and punishment, have a different significance as applied to men and as applied to animals. A dog may be called a good dog or a bad dog, but his goodness or badness can be finally explained in terms of heredity and environment. A man, however, is a person, and we instinctively recognize that he has a certain ultimate personal responsibility for at least some of his actions. Hence merit and demerit, reward and punishment, have an irreducible individual significance as applied to men. This is the dignity and the tragedy of the human person.

A similar view was expressed by Justice Powell, dissenting in *Goss v. Lopez* (42 L. Ed. 2d 725, 745):

Education in any meaningful sense includes the inculcation of an understanding in each pupil of the necessity of rules and obedience thereto. This understanding is no less important than learning to read and write. One who does not comprehend the meaning and necessity of discipline is handicapped not merely in his education but throughout his subsequent life. In an age when the home and church play a diminishing role in shaping the character and value judgments of the young, a heavier responsibility falls upon the schools. When an immature student merits censure for his conduct, he is rendered a disservice if appropriate sanctions are not applied.

2. An effort is made in the *Code* to use a simplified numbering and lettering system, without use of Roman numerals or subsets of letters and numbers. Any part of the *Code* can be found by reference to one number and one letter [e.g., Part 10a explains the meaning of expulsion].
3. Culpable conduct should include conscious acts posing a substantial risk or harm to others (e.g. throwing a heavy object out a tenth floor window above a sidewalk). If the act itself, however, is unintended (e.g. one is distracted by a noise while climbing a flight of stairs and drops a heavy object) the individual may have failed to use reasonable care, but is not normally deserving of the moral stigma associated with a “conviction” for a disciplinary offense.
4. Former students may be charged for violations which allegedly occurred during their enrollment at the University.

Proposed Revisions October | 2011

5. Colleges and universities are not expected to develop disciplinary regulations which are written with the scope of precision of a criminal *Code*. Rare occasions may arise when conduct is so inherently and patently dangerous to the individual or to others that extraordinary action not specifically authorized in the rules must be taken.
6. The terms “suspension” and “interim suspension” are to be distinguished throughout the *Code* and are not interchangeable.
7. Disciplinary removal from University housing should be distinguished from administrative removal for violations of the residence contract. The latter does not leave students with a disciplinary record and does not come under the purview of this *Code*.
8. The standard set forth here represents the minimal procedural protection to be accorded to students charged with most disciplinary violations. Students who are subject to lengthy suspensions or to expulsion may be entitled to more formal procedures, including a hearing with a right to cross-examine the witnesses against them. *Goss v. Lopez*, 419 U.S. 565 (1975).
9. The Supreme Court has recently rejected the theory that state schools are bound by principles of federal administrative law requiring agencies to follow their own regulations. *Board of Curators, University of Missouri v. Horowitz* 55 L.Ed 2d 124, 136. See, generally, “Violation by Agencies of Their Own Regulations” 87 *Harvard Law Review* 629 (1974).
10. Respondents in disciplinary proceedings may be directed to answer questions concerning their conduct. Students who refuse to answer on grounds of the Fifth Amendment privilege may be informed that the hearing panel could draw negative inferences from their refusal which might result in their suspension or dismissal. If the student then elects to answer, his/her statements could not be used against him/her in either state or federal court. *Garrity v. New Jersey*, 385 U.S 493 (1967). See also *Furutani v. Ewigleben*, 297 F. Supp. 1163 (N.D.Cal. 1969).
11. The “controlled substances” or “illegal drugs” prohibited in this section are set forth in Schedules I through V in the Maryland Criminal Law Article 5-401 through 5-406 and 5-708 (Inhalants).
12. See Annotation 11.
13. Colleges and universities should be a forum for the free expression of ideas. In the recent past, however, unpopular speakers have been prevented from addressing campus audiences by students who effectively “shouted them down.” Both Yale and Stanford Universities have treated such actions (which are to be distinguished from minor and occasional heckling) as serious disciplinary violations. See the

Proposed Revisions October | 2011

“Report from the Committee on Freedom of Expression at Yale University” which is available in the Office of Student Conduct.

The following language from the Yale report may be used to elaborate upon the intent and scope of Part 9(k) of this *Code*.

- A. “There is no right to protest within a University building in such a way that any University activity is disrupted. The administration, however, may wish to permit some symbolic dissent within a building but outside the meeting room, for example, a single picket or a distributor of handbills.”
 - B. “[A] member of the audience may protest in silent, symbolic fashion, for example, by wearing a black arm band. More active forms of protest may be tolerated such as briefly booing, clapping hands or heckling. But any disruptive activity must stop [and not be repeated] when the chair or an appropriate University official requests silence.
 - C. “Nor are racial insults or any other ‘fighting words’ a valid ground for disruption or physical attack... The banning or obstruction of lawful speech can never be justified on such grounds as that the speech or the speaker is deemed irresponsible, offensive, unscholarly, or untrue.”
14. A compilation of published regulations which have been reviewed and approved by the Vice President shall be available for public inspection during normal business hours in the Office of Student Conduct.
 15. This Part and Parts 12 and 13 represent an attempt to give needed guidance to those who are assessing penalties. Moreover the direction of the guidance is toward imposition of more severe disciplinary sanctions in serious cases. Nonetheless, the language concerning “mitigating factors” is broad enough to give decision-makers considerable leeway to “do justice,” depending upon the facts in each case. The burden of establishing facts in mitigation should, of course, be upon the respondent.
 16. There does not seem to be any rational basis for imposing less severe penalties for attempts than for completed violations. The authors of the *Model Penal Code*, for example, have written that:

To the extent that sentencing depends upon the antisocial disposition of the actor and the demonstrated need for a corrective action, there is likely to be little difference in the gravity of the required measures depending on the consummation or the failure of the plan.
See LaFave, *Criminal Law Treatise* p. 453.
 17. These procedures are analogous to those found in the “emergency” disciplinary rules adopted by the Board of Regents in 1971 and are consistent with the formal

opinion of the Maryland Attorney General on this subject, dated January 23, 1969. See also *Goss v. Lopez*, 419 U.S. 565 (1975).

Nothing in this provision would prohibit the Vice President from modifying the terms of an interim suspension, so long as the hearing requirement specified in Part 18 was met. For example, a suspended student might be allowed to enter University premises solely for the purpose of attending classes.

18. Staff members in the Office of Student Conduct should endeavor to arrange a balanced presentation before the various conduct boards and may assist both complainants and respondents.
19. This language does not effect any change in previous policy concerning the powers of conduct boards. All board decisions, including those rendered by Conference Boards, shall be treated as recommendations.
20. See Annotation 1, *supra*. The deterrent effect of punishment is diminished if the community is unaware of the number and general nature of sanctions imposed. The Director of Student Conduct may, for example, arrange for publication of the statistical report in the campus press each semester.
21. Boards established pursuant to this section might include modified versions of the present “Greek” or residence hall boards.
22. It is intended that a quorum will consist of three members (out of five). The authority to appoint ad hoc boards should be broadly construed and might be especially useful, for example, when a conduct board or the Senate Committee is charged with hearing a case involving one of its own members. The final determination as to whether a panel is “unable to hear a case” should be within the discretion of the Director of Student Conduct.
23. The power of confirmation represents a significant grant of authority to the Senate Committee. Moreover, confirmation procedures will give committee members direct contact with board members and will also allow the committee to exercise more control over the quality of Conduct Board decisions.
24. Proposed bylaws must be submitted to the Attorney General for review.
25. It could be a public embarrassment for the University to have a student charged with or convicted of a serious crime sit in judgment over other students in disciplinary proceedings. The various state criminal *Codes* are usually so broad and archaic, however, that automatic suspension or removal should not result from any violation of any law (e.g., New York makes it a criminal misdemeanor for anyone “to dance continuously in a dance contest for 12 or more hours without respite”).

Proposed Revisions October | 2011

26. Case referrals should not be limited to members of the “campus community.” A student who assaults another person on campus should not escape University judicial action merely because the person assaulted was a visitor (or, as in a recent case, a former student who had just withdrawn from the University).
27. The Director of Student Conduct may appoint a trained volunteer from the campus community to serve as the complainant. It would be preferable, however, to employ a “community advocate” to present all disciplinary cases.

Several measures in the *Code* are designed to restore balance in disciplinary proceedings, even in those cases in which the complainant is inexperienced with administrative adjudication:

- (a) A hearing officer may be appointed in complex or serious cases. See Part 35(o).
 - (b) The role of attorneys or advisors may be restricted. See Parts 36 and 37, and Annotation 42.
 - (c) The “disciplinary conference” procedure is designed to eliminate adversary proceedings in minor cases. See Parts 33-34 and Annotation 32.
28. Staff members may consider the mitigating factors specified in Part 11 to determine the permissible sanction to be imposed if the respondent is found guilty of charges. For example, a student involved in a minor altercation might be charged pursuant to Part 9(a), but referred to a disciplinary conference, thereby precluding the possibility of expulsion or suspension for the alleged misconduct.

29. On April 4, 2011, the United States Department of Education, Office of Civil Rights issued a “significant guidance document” to provide universities with information to assist them in meeting their obligations under Title IX of the Education Amendments of 1972 (“Title IX”). This document is known as the “OCR Dear Colleague Letter”. According to the OCR Dear Colleague Letter, Title IX requires that the burden of proof in sexual harassment cases, including sexual assault, be “preponderance of the evidence.” Prior to the issuance of the OCR Dear Colleague Letter, the burden of proof under the Code was “clear and convincing evidence”. According to the OCR Dear Colleague Letter, Title IX also requires that both parties in disciplinary hearings in sexual harassment cases, including sexual assault, be provided the same appeal rights, if any.

Comment [AG4]: Added to reflect OCR compliance

30. “Clear and convincing” means “the evidence should be ‘clear’ in the sense that it is certain, plain to the understanding and unambiguous, and ‘convincing’ in the sense that it is so reasonable and persuasive as to cause [one] to believe it.” Wills v. State of Maryland, 329 Md. 370, 374 (1993), quoting Maryland Civil Practice Jury Instruction Section 1:8b (1984). It does not call for “unanswerable” or “conclusive” evidence. Attorney Grievance Commission v. Harris, 366 Md. 376, 389 (2001). To be clear and convincing means that it is substantially more likely than not that the allegations are in fact true but that it “need not be established

Proposed Revisions October | 2011

with absolute certainty". Vogel v. State, 315 Md. 458, 473 (1989). The burden is "more than a mere preponderance of the evidence [the burden of proof in ordinary civil cases] but not beyond a reasonable doubt [the standard in criminal cases]. Berkey v. Delia, 287 Md. 302, 319-20 (1980).

31. "Preponderance of the evidence" means it is "more likely than not" that the violation occurred as alleged. To meet a burden of proof by a preponderance of the evidence, means that "the scales tipped in the direction" of one of the parties. "When the scales are 'in a state of even balance,' the party with the burden of proving its case by a preponderance of the evidence loses. Wills v. State of Maryland, 329 Md. 370, 374 (1993), quoting Potts v. Armour & Co., 183 Md 483, 490 (1944). See Maryland Civil Pattern Jury Instructions Section 1:8a (1984).

Comment [AG5]: All of these sections are new to comply with OCR

32. The hearing procedures specified at Part 35 need not be followed in disciplinary conferences. Instead a disciplinary conference would normally consist of an informal, nonadversarial meeting between the respondent and a staff member in the Office of Student Conduct. Complainants would not be required to participate, unless their personal testimony was essential to the resolution of a dispositive factual issue in the case. Documentary evidence and written statements could be relied upon, so long as respondents are given access to them in advance and allowed to respond to them at the conference. Respondents would also be allowed to bring appropriate witnesses with them and might be accompanied by a representative, who may participate in discussions, although not in lieu of participation by the respondent.

The conference procedure is designed to reduce the steady growth of unnecessary legalism in disciplinary proceedings. The worst features of the adversary system (including the concept that judicial proceedings are a "contest" to be "won by clever manipulation of procedural rules) undermine respect for the rule of law. Colleges and universities can and should be a testing ground for development of carefully reasoned alternatives to current procedural excesses in the larger society.**

Procedures comparable to the disciplinary conference (referred to as "structured conversations") are suggested by David L. Kirp in his 1976 article "Proceduralism and Bureaucracy: Due Process in the School Setting" 38 *Stanford Law Review* 841.

The benefits of such conversations in the school setting may better be appreciated by contrasting them with the typical due process hearing. Hearings are designed to determine the facts of a particular controversy, and apply predetermined rules to the facts thus found. At that point, the function of the hearing is at an end. The wisdom of the underlying substantive rules has no relevance, nor is broader discussion of grievances generally encouraged, unless it is somehow pertinent to the dispute at hand.

Conversation knows no such limits. It too serves as a vehicle for resolving what are likely to be factually uncomplicated disputes, but it does more than that. It enables students to feel that they are being listened to and may encourage them to raise underlying grievances. It provides administrators with a relatively inexpensive vehicle for monitoring, and hence a basis for reshaping institutional relationships. The outcome of these 'orderly thoughtful conversations' may well be decisions different in their particulars from what might otherwise have been anticipated; repeated conversations which touch upon similar student grievances may ultimately lead disciplinarians to reassess whether control is so vital, and collaboration so improbable, as a means of assuring institutional order.

The conference procedure would not be used in any case which might result in any form of separation from the University. Accordingly, the procedure appears to meet or exceed the due process requirements set forth by the United States Supreme Court for cases involving suspensions of ten days or less. In *Goss v. Lopez* the Court held:

[W]e stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.

On the other hand, requiring effective notice and an informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect. He may then determine himself to summon the accuser, permit cross-examination, and allow the student to present his own witnesses. In more difficult cases, he may permit counsel. In any event, his discretion will be more informed and we think the risk of error substantially reduced (42 L. Ed. 725, 740).

33. The case file consists of materials which would be considered "education records," pursuant to the Family Educational Rights and Privacy Act. Personal notes of University staff members or complainants are not included.

34. Determinations made in accordance with Parts 33 and 34 are not appealable.
35. Internal subpoenas may be desirable, since cases have arisen in which complainants or respondents were unable to present an effective case due to the indifference and lethargy of potential witnesses. A student who refused to respond to a subpoena may be charged with a violation of Part 9(o) of the *Code*. The Director of Student Conduct should not approve a subpoena unless the expected testimony would be clearly relevant. Likewise, a subpoena designed to embarrass or harass a potential witness should not be authorized. The subpoena power specified here is not designed to reach documents or other materials.
36. Board members should be disqualified on a case basis only; permanent removal should be accomplished in accordance with Part 27. Board members should not be readily disqualified. The term “personal bias” involves animosity toward a party or favoritism toward the opposite party. See, generally, Davis, *Administrative Law Treatise* “Bias” Section 12.03.
37. The exclusionary rule generally does not apply to civil administrative proceedings. Furthermore, the University of Maryland is exempted by statute from the applicable portions of the Administrative Procedure Act. The Maryland Court of Appeals, however, has barred evidence from administrative proceedings where a respondent establishes that officials were improperly motivated to illegally seize the evidence. See *Sheetz v. City of Baltimore*, 315 Md. 208 (1989).
38. Testimony containing hearsay may be heard, if relevant. A final determination should not be based on hearsay alone.
39. Every statement or assertion need not be proven. For example, board members may take notice that many students commute to the University.
40. Student presiding officers are often at a disadvantage when the respondent is represented by an attorney. The proceedings might progress more rapidly and efficiently if a special presiding officer were appointed. Generally, a staff member in the Office of Student Conduct would be selected for such a responsibility, although other University employees with legal training might also be called upon.
41. Information pertaining to prior findings of disciplinary and residence hall violations might be reported, as well as relevant criminal convictions. Prior allegations of misconduct should not be disclosed.
42. The dynamics of a judicial hearing in a University setting are not the same as those of a courtroom. Strict adherence to the conventions of courtroom advocacy may not be in the best interest of clients in University judicial proceedings.

The presiding officer and the board advisor are authorized to take reasonable measures to maintain control over the proceedings in order to elicit relevant facts, to prevent the harassment of participants, to insure that proceedings are not disrupted and the interests of fairness are served. This may include regulating the timing, length and manner of presentations and objections, declaring recesses in the proceedings, and other appropriate actions. Presiding officers should have training and experience appropriate to the demands of the office.

Before hearings, presenters for both complainants and respondents shall be presented with a written statement approved by the Senate Committee on Student Conduct regarding their rights and obligations during hearings and the powers of the presiding officer to control behavior in hearings.

43. Punishment of one or several individuals for the acts of others should be avoided if the identities of the specific offenders can be readily ascertained.
44. Association does not require formal membership. Individuals who might reasonably be regarded as regular participants in group or organization activities may be held to be associated with the group or organization.
45. Leaders or spokespersons need not be officially designated or elected. For example, if a group or organization accepted or acquiesced in the act or statement of an individual associated with it, that individual might reasonably be regarded as a leader or a spokesman for the group or organization.
46. "Suspension" includes deferred suspension but not interim suspension or suspension which is withheld. See Annotation 6.
47. See Annotation 29.
48. Students left with a disciplinary record after a disciplinary conference may request that their record be voided, in accordance with Part 50. Denials may be appealed, pursuant to Part 52.
49. See Annotation 29.
50. The decision will be "final and conclusive" on the part of the conduct board, but will remain a recommendation to the Director of Student Conduct.
51. This Part is intended to discourage frivolous appeals. Respondents who are genuinely interested in pursuing an appeal can reasonably be expected to prepare a written brief.
52. Appellate bodies which do not give deference (i.e., a presumption of validity) to lower board decisions will distort the entire disciplinary system. Respondents would be encouraged to "test their strategy" and "perfect their technique" before

lower boards, since the matter would simply be heard again before a “real” board with final authority.

Lower board members usually have the best access to the evidence, including an opportunity to observe the witnesses and to judge their demeanor. Members of appellate bodies should be especially careful not to modify a sanction or to remand or dismiss a case simply because they may personally disagree with the lower board’s decision.

The opportunity to appeal adverse decisions has not been determined to be a requirement of constitutional “due process” in student disciplinary cases.*** There is presently no legal obstacle to adopting an amendment to the Code which would eliminate the appellate system altogether.

53. Respondents who obtain information at the hearing which might lead to new evidence are required to request an adjournment rather than wait to raise the matter for the first time on appeal.
54. An arbitrary and capricious decision would be a decision “unsupported by any evidence.” The cited language has been adopted by the Federal Courts as the proper standard of judicial review, under the due process clause, of disciplinary determinations made by the state boards or agencies. *See McDonald v. Board of Trustees of the University of Illinois*, 375 F. Supp. 95, 108 (N.D. Ill., 1974).
55. See Annotation 19.
56. Voided files will be so marked, shall not be kept with active disciplinary records, and shall not leave any student with a disciplinary record.
57. Disciplinary records may be reported to third parties, in accordance with University regulations and applicable state and federal law.
58. Void records shall be treated in the manner set forth in Annotation 56.
59. The scope of review shall be limited to the factors specified at Part 51. An inquiry into the initial determination of guilt or innocence is not permitted. For example, when considering the “nature” of the violation, pursuant to Part 51 (c), it is to be assumed that the violation occurred and that the respondent was responsible for it.
60. Some discretion must be retained to void even “permanent” disciplinary records. It may be unnecessary, for example, to burden a graduating senior with a lifelong stigma for an act committed as a freshman. Social norms also change rapidly. “Unacceptable” conduct in one generation may become permissible and commonplace in the next.

- * See the procedures for mandatory medical withdrawal developed by the Vice President for Student Affairs
- ** See Macklin Fleming, *The Price of Perfect Justice*: “in our pursuit of . . . perfectibility, we necessarily neglect other elements of an effective procedure, notably the resolution of controversies within a reasonable time at a reasonable cost, with reasonable uniformity . . . we impair the capacity of the legal order to achieve the basic values for which it is created, that is, to settle disputes promptly and peaceably, to restrain the strong, to protect the weak, and to conform the conduct of all the settled rules of law.”
- *** See the due process standard set forth in *Dixon v. Alabama*, 294 F.2nd 150, 158-159 (Fifth Cir., 1961), Cert. den 368 U.S. 930.

Appendix Two (Senate Doc #11-12-10)

Peer Institution Review – Standards of Evidence

School	Institution Type	Standard of Evidence
Berkeley	4 year-Public	Preponderance of Evidence
College of Charleston	4 year- Public	Preponderance of Evidence for all violations
Emory University	4 year- Private	Preponderance of Evidence for all violations
Florida Atlantic University	4 year-Public	Preponderance of Evidence for all violations
Georgia Tech	4 year- Public	Preponderance of Evidence for all violations
Illinois	4 year-Public	Preponderance of Evidence
James Madison University	4 year- Public	Preponderance of Evidence for all violations
Montclair State University	4 year- Public	Preponderance of Evidence for all violations
Northern Illinois University	4 year- Public	Preponderance of Evidence for all violations
Portland State University	4 year-Public	Preponderance of Evidence for all violations
Purdue University	4 year- Public	Preponderance of Evidence for all violations
UCLA	4 Year-Public	Preponderance of Evidence
UNC-Chapel Hill	4 year-Public	Beyond a reasonable doubt
Union College, NY	4 year -Private	Preponderance of Evidence
University of Delaware	4 year- Public	Preponderance of Evidence for all violations
University of Florida	4 year- Public	Preponderance of Evidence for all violations
University of Miami	4 year-Private	Preponderance of Evidence for all violations
University of Michigan-Ann Arbor	4 year-Public	Preponderance of the evidence for all community living standard violations in Housing; Clear and Convincing for statement violations
University of North Carolina- Charlotte	4 year- Public	Preponderance of Evidence for all violations
University of Texas at Arlington	4 year- Public	Preponderance of Evidence for all violations
University of Wisconsin- Madison	4 year- Public	Preponderance of Evidence for suspension, expulsion, sexual assault
Worcester State University	4 year -Public	Preponderance of Evidence for all violations
Wright State University	4 Year- Public	Preponderance of Evidence



**University Senate
CHARGE**

Date:	October 3, 2011
To:	Nan Ratner Chair, Student Conduct Committee
From:	Eric Kasischke Chair, University Senate 
Subject:	Updates to Procedural Requirements Pertaining to Sexual Harassment and Sexual Violence
Senate Document #:	11-12-10
Deadline:	March 30, 2012

The Senate Executive Committee (SEC) requests that the Student Conduct Committee review the attached proposal “Updates to Procedural Requirements Pertaining to Sexual Harassment and Sexual Violence” and make recommendations on whether the University of Maryland Code of Student Conduct V-1.00(B) should be revised.

The University’s Code of Student Conduct defines prohibited conduct by students and the review process for violations. Recently, the US Department of Education’s Office of Civil Rights (OCR) distributed a letter providing guidance to institutions regarding sexual harassment and sexual violence disciplinary proceedings and appeals processes. As a recipient of Federal financial assistance, we must comply with the directives issued in the letter. In order to be in compliance, our burden of proof requirement and appeals process must be revised in our Code of Student Conduct to include “preponderance of the evidence” instead of “clear and convincing” as the evidentiary standard in our proceedings. The SEC requests that the Student Conduct Committee review the proposal and recommend appropriate changes to the Code of Student Conduct.

Specifically, we ask that you:

1. Consult with the Office of Student Conduct and the subcommittee charged with proposing revisions to the Code of Student Conduct.
2. Consult with the University’s Office of Legal Affairs.
3. Consult with the Senate’s Equity, Diversity, and Inclusion (EDI) Committee on the impact that any changes to the Code of Student Conduct might have on the

University's Sexual Harassment Policy and the University of Maryland Code on Equity, Diversity, and Inclusion.

4. Review how our peer institutions have implemented the changes suggested in the OCR letter.
5. Consider whether the proposed evidentiary standard should apply to all violations of the Code of Student Conduct in addition to complaints of sexual harassment or violence.

We ask that you submit your report and recommendations to the Senate Office no later than March 30, 2012. If you have questions or need assistance, please contact Reka Montfort in the Senate Office, extension 5-5804.



University Senate PROPOSAL FORM

Name:	Andrea Goodwin
Date:	9/12/11
Title of Proposal:	Code of Student Conduct Revisions
Phone Number:	301-314-8206
Email Address:	agoodwin@umd.edu
Campus Address:	2118 Mitchell Building
Unit/Department/College:	Director, Office of Student Conduct
Constituency (faculty, staff, undergraduate, graduate):	Staff
Description of issue/concern/policy in question:	<p>In April, 2011, the US Department of Education's Office of Civil Rights issued a "Dear Colleague Letter" (attached) providing guidance to schools, including colleges and universities, regarding sexual harassment and sexual violence. Recipients of Federal financial assistance must comply with the directives issued in the letter including directives that pertain to disciplinary proceedings. In reviewing the <i>Code of Student Conduct</i>, it is clear that our policies, as currently stated, do not meet the procedural requirements outlined in the "Dear Colleague Letter." Specifically we are not in compliance with two major requirements:</p> <p style="padding-left: 40px;">1) Burden of Proof in University Disciplinary Proceedings</p> <p>In order for a grievance procedure to be consistent with the Office of Civil Rights requirements, the school must use a Preponderance of the Evidence Standard (<i>i.e.</i>, it is more likely than not that the sexual harassment or violence occurred.) Currently the University <i>Code of Student Conduct</i> requires us to utilize the "clear and convincing standard" (<i>i.e.</i>, it is highly probably or reasonably certain that that the sexual assault occurred) in all discipline cases.</p> <p style="padding-left: 40px;">2) Appeals</p> <p>OCR recommends that schools provide an appeals process and if a school provides for appeal of findings or remedy, it must do so for both parties. Currently, the University's <i>Code of Student Conduct</i> provides an appeal to the respondent (accused student) only.</p>

<p>Description of action/changes you would like to see implemented and why:</p>	<p>In order for the University of Maryland to be in compliance with the Office of Civil Rights, the <i>Code of Student Conduct</i> must be amended to reflect the requirements made explicit in the "Dear Colleague Letter." Attached is a draft revision of the changes to the <i>Code</i> that would be required to be in compliance with the Office of Civil Rights.</p> <p>I request that the Campus Senate Committee on Student Conduct approve changes to the <i>Code of Student Conduct</i> so that the University is in compliance with the Office of Civil Rights.</p>
<p>Suggestions for how your proposal could be put into practice:</p>	<p>The <i>Code of Student Conduct</i> can be amended.</p>
<p>Additional Information:</p>	<p>Attached is a copy of the "Dear Colleague Letter." Revisions to the <i>Code of Student Conduct</i> are currently being drafted and can be provided to the Campus Senate Committee on Student Conduct for review.</p>

Please send your completed form and any supporting documents to senate-admin@umd.edu or University of Maryland Senate Office, 1100 Marie Mount Hall, College Park, MD 20742-7541. Thank you!

U.S. Department of Education
Office for Civil Rights



Dear Colleague Letter: Sexual Violence
Background, Summary, and Fast Facts
April 4, 2011

Sexual Violence Statistics and Effects

- Acts of sexual violence are vastly under-reported.¹ Yet, data show that our nation's young students suffer from acts of sexual violence early and the likelihood that they will be assaulted by the time they graduate is significant. For example:
 - Recent data shows nearly 4,000 reported incidents of sexual battery and over 800 reported rapes and attempted rapes occurring *in our nation's public high schools*.² Indeed, by the time girls graduate from high school, more than one in ten will have been physically forced to have sexual intercourse in or out of school.³
 - When young women get to *college*, nearly 20% of them will be victims of attempted or actual sexual assault, as will about 6% of undergraduate men.⁴
- Victims of sexual assault are more likely to suffer academically and from depression, post-traumatic stress disorder, to abuse alcohol and drugs, and to contemplate suicide.⁵

Why is ED Issuing the Dear Colleague letter (DCL)?

Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. Sec.1681, *et seq.*, prohibits discrimination on the basis of sex in any federally funded education program or activity. ED is issuing the DCL to explain that the requirements of Title IX cover sexual violence and to remind schools⁶ of their responsibilities to take immediate and effective steps to respond to sexual violence in accordance with the requirements of Title IX. In the context of the letter, sexual violence means physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent. A number of acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, and sexual coercion.

¹ For example, see HEATHER M. KARJANE ET AL. SEXUAL ASSAULT ON CAMPUS: WHAT COLLEGES AND UNIVERSITIES ARE DOING ABOUT IT 3 (Nat'l. Institute of Justice, Dec. 2005).

² SIMONE ROBERS ET AL. INDICATORS OF SCHOOL CRIME AND SAFETY 104 (U.S. Dep't of Education & U.S. Dep't of Justice, Nov. 2010), *available at* <http://nces.ed.gov/pubs2011/2011002.pdf>.

³ EATON, D. K., KANN, L., KINCHEN, S., SHANKLIN, S., ROSS, J., HAWKINS, J., ET AL., YOUTH RISK BEHAVIOR SURVEILLANCE-UNITED STATES 2009, *Morbidity and Mortality Weekly Report*, 1-148.

⁴ CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT STUDY FINAL REPORT xiii, 5-5. (Nat'l. Criminal Justice Reference Service, Oct. 2007), *available at* <http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

⁵ For example, see WORLD HEALTH ORGANIZATION, WORLD REPORT ON VIOLENCE AND HEALTH 162-164 (Etienne G. Krug, et al. eds., 2002), *available at* http://whqlibdoc.who.int/publications/2002/9241545615_eng.pdf; CENTERS FOR DISEASE CONTROL, UNDERSTANDING SEXUAL VIOLENCE: FACT SHEET 1 (2011), *available at* http://www.cdc.gov/violenceprevention/pdf/SV_factsheet_2011-a.pdf.

⁶ "Schools" includes all recipients of federal funding and includes school districts, colleges, and universities.

What does the DCL do?

- Provides guidance on the unique concerns that arise in sexual violence cases, such as the role of criminal investigations and a school's independent responsibility to investigate and address sexual violence.
- Provides guidance and examples about key Title IX requirements and how they relate to sexual violence, such as the requirements to publish a policy against sex discrimination, designate a Title IX coordinator, and adopt and publish grievance procedures.
- Discusses proactive efforts schools can take to prevent sexual violence.
- Discusses the interplay between Title IX, FERPA, and the Clery Act⁷ as it relates to a complainant's right to know the outcome of his or her complaint, including relevant sanctions facing the perpetrator.
- Provides examples of remedies and enforcement strategies that schools and the Office for Civil Rights (OCR) may use to respond to sexual violence.

What are a school's obligations under Title IX regarding sexual violence?

- Once a school knows or reasonably should know of possible sexual violence, it must take immediate and appropriate action to investigate or otherwise determine what occurred.
- If sexual violence has occurred, a school must take prompt and effective steps to end the sexual violence, prevent its recurrence, and address its effects, whether or not the sexual violence is the subject of a criminal investigation.
- A school must take steps to protect the complainant as necessary, including interim steps taken prior to the final outcome of the investigation.
- A school must provide a grievance procedure for students to file complaints of sex discrimination, including complaints of sexual violence. These procedures must include an equal opportunity for both parties to present witnesses and other evidence and the same appeal rights.
- A school's grievance procedures must use the preponderance of the evidence standard to resolve complaints of sex discrimination.
- A school must notify both parties of the outcome of the complaint.

How can I get help from OCR?

OCR offers technical assistance to help schools achieve voluntary compliance with the civil rights laws it enforces and works with schools to develop approaches to preventing and addressing discrimination. A school should contact the OCR enforcement office serving its jurisdiction for technical assistance. For contact information, please visit ED's website at <http://wdcrocolp01.ed.gov/CFAPPS/OCR/contactus.cfm>.

A complaint of discrimination can be filed by anyone who believes that a school that receives Federal financial assistance has discriminated against someone on the basis of race, color, national origin, sex, disability, or age. The person or organization filing the complaint need not be a victim of the alleged discrimination, but may complain on behalf of another person or group. For information on how to file a complaint with OCR, visit <http://www2.ed.gov/about/offices/list/ocr/complaintintro.html> or contact OCR's Customer Service Team at 1-800-421-3481.

⁷ The Family Educational Rights and Privacy Act is at 20 U.S.C. Sec. 1232g, and the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act is at 20 U.S.C. Sec 1092(f).



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

April 4, 2011

Dear Colleague:

Education has long been recognized as the great equalizer in America. The U.S. Department of Education and its Office for Civil Rights (OCR) believe that providing all students with an educational environment free from discrimination is extremely important. The sexual harassment of students, including sexual violence, interferes with students' right to receive an education free from discrimination and, in the case of sexual violence, is a crime.

Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 *et seq.*, and its implementing regulations, 34 C.F.R. Part 106, prohibit discrimination on the basis of sex in education programs or activities operated by recipients of Federal financial assistance. Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX. In order to assist recipients, which include school districts, colleges, and universities (hereinafter "schools" or "recipients") in meeting these obligations, this letter¹ explains that the requirements of Title IX pertaining to sexual harassment also cover sexual violence, and lays out the specific Title IX requirements applicable to sexual violence.² Sexual violence, as that term is used in this letter, refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability. A number of different acts fall into the category of sexual violence, including rape,

¹ The Department has determined that this Dear Colleague Letter is a "significant guidance document" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), *available at*:

http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/012507_good_guidance.pdf. OCR issues this and other policy guidance to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that we enforce. OCR's legal authority is based on those laws and regulations. This letter does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations. If you are interested in commenting on this guidance, please send an e-mail with your comments to OCR@ed.gov, or write to us at the following address: Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, DC 20202.

² Use of the term "sexual harassment" throughout this document includes sexual violence unless otherwise noted. Sexual harassment also may violate Title IV of the Civil Rights Act of 1964 (42 U.S.C. § 2000c), which prohibits public school districts and colleges from discriminating against students on the basis of sex, among other bases. The U.S. Department of Justice enforces Title IV.

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sexual assault, sexual battery, and sexual coercion. All such acts of sexual violence are forms of sexual harassment covered under Title IX.

The statistics on sexual violence are both deeply troubling and a call to action for the nation. A report prepared for the National Institute of Justice found that about 1 in 5 women are victims of completed or attempted sexual assault while in college.³ The report also found that approximately 6.1 percent of males were victims of completed or attempted sexual assault during college.⁴ According to data collected under the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act (Clery Act), 20 U.S.C. § 1092(f), in 2009, college campuses reported nearly 3,300 forcible sex offenses as defined by the Clery Act.⁵ This problem is not limited to college. During the 2007-2008 school year, there were 800 reported incidents of rape and attempted rape and 3,800 reported incidents of other sexual batteries at public high schools.⁶ Additionally, the likelihood that a woman with intellectual disabilities will be sexually assaulted is estimated to be significantly higher than the general population.⁷ The Department is deeply concerned about this problem and is committed to ensuring that all students feel safe in their school, so that they have the opportunity to benefit fully from the school's programs and activities.

This letter begins with a discussion of Title IX's requirements related to student-on-student sexual harassment, including sexual violence, and explains schools' responsibility to take immediate and effective steps to end sexual harassment and sexual violence. These requirements are discussed in detail in OCR's *Revised Sexual Harassment Guidance* issued in 2001 (*2001 Guidance*).⁸ This letter supplements the *2001 Guidance* by providing additional guidance and practical examples regarding the Title IX requirements as they relate to sexual violence. This letter concludes by discussing the proactive efforts schools can take to prevent sexual harassment and violence, and by providing examples of remedies that schools and OCR may use to end such conduct, prevent its recurrence, and address its effects. Although some examples contained in this letter are applicable only in the postsecondary context, sexual

³ CHRISTOPHER P. KREBS ET AL., *THE CAMPUS SEXUAL ASSAULT STUDY: FINAL REPORT* xiii (Nat'l Criminal Justice Reference Serv., Oct. 2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>. This study also found that the majority of campus sexual assaults occur when women are incapacitated, primarily by alcohol. *Id.* at xviii.

⁴ *Id.* at 5-5.

⁵ U.S. Department of Education, Office of Postsecondary Education, Summary Crime Statistics (data compiled from reports submitted in compliance with the Clery Act), available at <http://www2.ed.gov/admins/lead/safety/criminal2007-09.pdf>. Under the Clery Act, forcible sex offenses are defined as any sexual act directed against another person, forcibly and/or against that person's will, or not forcibly or against the person's will where the victim is incapable of giving consent. Forcible sex offenses include forcible rape, forcible sodomy, sexual assault with an object, and forcible fondling. 34 C.F.R. Part 668, Subpt. D, App. A.

⁶ SIMONE ROBERS ET AL., *INDICATORS OF SCHOOL CRIME AND SAFETY: 2010* at 104 (U.S. Dep't of Educ. & U.S. Dep't of Justice, Nov. 2010), available at <http://nces.ed.gov/pubs2011/2011002.pdf>.

⁷ ERIKA HARRELL & MICHAEL R. RAND, *CRIME AGAINST PEOPLE WITH DISABILITIES, 2008* (Bureau of Justice Statistics, U.S. Dep't of Justice, Dec. 2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/capd08.pdf>.

⁸ The *2001 Guidance* is available on the Department's Web site at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>. This letter focuses on peer sexual harassment and violence. Schools' obligations and the appropriate response to sexual harassment and violence committed by employees may be different from those described in this letter. Recipients should refer to the *2001 Guidance* for further information about employee harassment of students.

harassment and violence also are concerns for school districts. The Title IX obligations discussed in this letter apply equally to school districts unless otherwise noted.

Title IX Requirements Related to Sexual Harassment and Sexual Violence

Schools' Obligations to Respond to Sexual Harassment and Sexual Violence

Sexual harassment is unwelcome conduct of a sexual nature. It includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual violence is a form of sexual harassment prohibited by Title IX.⁹

As explained in OCR's *2001 Guidance*, when a student sexually harasses another student, the harassing conduct creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the harassment is physical. Indeed, a single or isolated incident of sexual harassment may create a hostile environment if the incident is sufficiently severe. For instance, a single instance of rape is sufficiently severe to create a hostile environment.¹⁰

Title IX protects students from sexual harassment in a school's education programs and activities. This means that Title IX protects students in connection with all the academic, educational, extracurricular, athletic, and other programs of the school, whether those programs take place in a school's facilities, on a school bus, at a class or training program

⁹ Title IX also prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, even if those acts do not involve conduct of a sexual nature. The Title IX obligations discussed in this letter also apply to gender-based harassment. Gender-based harassment is discussed in more detail in the *2001 Guidance*, and in the 2010 Dear Colleague letter on Harassment and Bullying, which is available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

¹⁰ See, e.g., *Jennings v. Univ. of N.C.*, 444 F.3d 255, 268, 274 n.12 (4th Cir. 2006) (acknowledging that while not an issue in this case, a single incident of sexual assault or rape could be sufficient to raise a jury question about whether a hostile environment exists, and noting that courts look to Title VII cases for guidance in analyzing Title IX sexual harassment claims); *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 259 n.4 (6th Cir. 2000) ("[w]ithin the context of Title IX, a student's claim of hostile environment can arise from a single incident" (quoting *Doe v. Sch. Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 62 (D. Me. 1999))); *Soper v. Hoben*, 195 F.3d 845, 855 (6th Cir. 1999) (explaining that rape and sexual abuse "obviously qualify as...severe, pervasive, and objectively offensive sexual harassment"); see also *Berry v. Chi. Transit Auth.*, 618 F.3d 688, 692 (7th Cir. 2010) (in the Title VII context, "a single act can create a hostile environment if it is severe enough, and instances of uninvited physical contact with intimate parts of the body are among the most severe types of sexual harassment"); *Turner v. Saloon, Ltd.*, 595 F.3d 679, 686 (7th Cir. 2010) (noting that "[o]ne instance of conduct that is sufficiently severe may be enough," which is "especially true when the touching is of an intimate body part" (quoting *Jackson v. Cnty. of Racine*, 474 F.3d 493, 499 (7th Cir. 2007))); *McKinnis v. Crescent Guardian, Inc.*, 189 F. App'x 307, 310 (5th Cir. 2006) (holding that "the deliberate and unwanted touching of [a plaintiff's] intimate body parts can constitute severe sexual harassment" in Title VII cases (quoting *Harvill v. Westward Commc'ns, L.L.C.*, 433 F.3d 428, 436 (5th Cir. 2005))).

sponsored by the school at another location, or elsewhere. For example, Title IX protects a student who is sexually assaulted by a fellow student during a school-sponsored field trip.¹¹

If a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.¹² Schools also are required to publish a notice of nondiscrimination and to adopt and publish grievance procedures. Because of these requirements, which are discussed in greater detail in the following section, schools need to ensure that their employees are trained so that they know to report harassment to appropriate school officials, and so that employees with the authority to address harassment know how to respond properly. Training for employees should include practical information about how to identify and report sexual harassment and violence. OCR recommends that this training be provided to any employees likely to witness or receive reports of sexual harassment and violence, including teachers, school law enforcement unit employees, school administrators, school counselors, general counsels, health personnel, and resident advisors.

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. For example, if a student alleges that he or she was sexually assaulted by another student off school grounds, and that upon returning to school he or she was taunted and harassed by other students who are the alleged perpetrator's friends, the school should take the earlier sexual assault into account in determining whether there is a sexually hostile environment. The school also should take steps to protect a student who was assaulted off campus from further sexual harassment or retaliation from the perpetrator and his or her associates.

Regardless of whether a harassed student, his or her parent, or a third party files a complaint under the school's grievance procedures or otherwise requests action 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. As discussed later in this letter, the school's Title IX investigation is different from any law enforcement investigation, and a law enforcement investigation does not relieve the school of its independent Title IX obligation to investigate the conduct. The specific steps in a school's

¹¹ 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. Title IX also protects employees of a recipient from sexual harassment. For further information about harassment of employees, see *2001 Guidance* at n.1.

¹² This is the standard for administrative enforcement of Title IX and in court cases where plaintiffs are seeking injunctive relief. See *2001 Guidance* at ii-v, 12-13. The standard in private lawsuits for monetary damages is actual knowledge and deliberate indifference. See *Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629, 643, 648 (1999).

investigation will vary depending upon the nature of the allegations, the age of the student or students involved (particularly in elementary and secondary schools), the size and administrative structure of the school, and other factors. Yet as discussed in more detail below, the school's inquiry must in all cases be prompt, thorough, and impartial. In cases involving potential criminal conduct, school personnel must determine, consistent with State and local law, whether appropriate law enforcement or other authorities should be notified.¹³

Schools also should inform and obtain consent from the complainant (or the complainant's parents if the complainant is under 18 and does not attend a postsecondary institution) before beginning an investigation. If the complainant requests confidentiality or asks that the complaint not be pursued, the school should take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation. If a complainant insists that his or her name or other identifiable information not be disclosed to the alleged perpetrator, the school should inform the complainant that its ability to respond may be limited.¹⁴ The school also should tell the complainant that Title IX prohibits retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs.

As discussed in the *2001 Guidance*, if the complainant continues to ask that his or her name or other identifiable information not be revealed, the school should evaluate that request in the context of its responsibility to provide a safe and nondiscriminatory environment for all students. Thus, the school may weigh the request for confidentiality against the following factors: the seriousness of the alleged harassment; the complainant's age; whether there have been other harassment complaints about the same individual; and the alleged harasser's rights to receive information about the allegations if the information is maintained by the school as an "education record" under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 C.F.R. Part 99.¹⁵ The school should inform the complainant if it cannot ensure confidentiality. Even if the school cannot take disciplinary action against the alleged harasser because the complainant insists on confidentiality, it should pursue other steps to limit the effects of the alleged harassment and prevent its recurrence. Examples of such steps are discussed later in this letter.

Compliance with Title IX, such as publishing a notice of nondiscrimination, designating an employee to coordinate Title IX compliance, and adopting and publishing grievance procedures, can serve as preventive measures against harassment. Combined with education and training programs, these measures can help ensure that all students and employees recognize the

¹³ In states with mandatory reporting laws, schools may be required to report certain incidents to local law enforcement or child protection agencies.

¹⁴ Schools should refer to the *2001 Guidance* for additional information on confidentiality and the alleged perpetrator's due process rights.

¹⁵ For example, the alleged harasser may have a right under FERPA to inspect and review portions of the complaint that directly relate to him or her. In that case, the school must redact the complainant's name and other identifying information before allowing the alleged harasser to inspect and review the sections of the complaint that relate to him or her. In some cases, such as those where the school is required to report the incident to local law enforcement or other officials, the school may not be able to maintain the complainant's confidentiality.

nature of sexual harassment and violence, and understand that the school will not tolerate such conduct. Indeed, these measures may bring potentially problematic conduct to the school's attention before it becomes serious enough to create a hostile environment. Training for administrators, teachers, staff, and students also can help ensure that they understand what types of conduct constitute sexual harassment or violence, can identify warning signals that may need attention, and know how to respond. More detailed information and examples of education and other preventive measures are provided later in this letter.

Procedural Requirements Pertaining to Sexual Harassment and Sexual Violence

Recipients of Federal financial assistance must comply with the procedural requirements outlined in the Title IX implementing regulations. Specifically, a recipient must:

- (A) Disseminate a notice of nondiscrimination;¹⁶
- (B) Designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX;¹⁷ and
- (C) Adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints.¹⁸

These requirements apply to all forms of sexual harassment, including sexual violence, and are important for preventing and effectively responding to sex discrimination. They are discussed in greater detail below. OCR advises recipients to examine their current policies and procedures on sexual harassment and sexual violence to determine whether those policies comply with the requirements articulated in this letter and the *2001 Guidance*. Recipients should then implement changes as needed.

(A) Notice of Nondiscrimination

The Title IX regulations require that each recipient publish a notice of nondiscrimination stating that the recipient does not discriminate on the basis of sex in its education programs and activities, and that Title IX requires it not to discriminate in such a manner.¹⁹ The notice must state that inquiries concerning the application of Title IX may be referred to the recipient's Title IX coordinator or to OCR. It should include the name or title, office address, telephone number, and e-mail address for the recipient's designated Title IX coordinator.

The notice must be widely distributed to all students, parents of elementary and secondary students, employees, applicants for admission and employment, and other relevant persons. OCR recommends that the notice be prominently posted on school Web sites and at various

¹⁶ 34 C.F.R. § 106.9.

¹⁷ *Id.* § 106.8(a).

¹⁸ *Id.* § 106.8(b).

¹⁹ *Id.* § 106.9(a).

locations throughout the school or campus and published in electronic and printed publications of general distribution that provide information to students and employees about the school's services and policies. The notice should be available and easily accessible on an ongoing basis.

Title IX does not require a recipient to adopt a policy specifically prohibiting sexual harassment or sexual violence. As noted in the *2001 Guidance*, however, a recipient's general policy prohibiting sex discrimination will not be considered effective and would violate Title IX if, because of the lack of a specific policy, students are unaware of what kind of conduct constitutes sexual harassment, including sexual violence, or that such conduct is prohibited sex discrimination. OCR therefore recommends that a recipient's nondiscrimination policy state that prohibited sex discrimination covers sexual harassment, including sexual violence, and that the policy include examples of the types of conduct that it covers.

(B) Title IX Coordinator

The Title IX regulations require a recipient to notify all students and employees of the name or title and contact information of the person designated to coordinate the recipient's compliance with Title IX.²⁰ The coordinator's responsibilities include overseeing all Title IX complaints and identifying and addressing any patterns or systemic problems that arise during the review of such complaints. The Title IX coordinator or designee should be available to meet with students as needed. If a recipient designates more than one Title IX coordinator, the notice should describe each coordinator's responsibilities (*e.g.*, who will handle complaints by students, faculty, and other employees). The recipient should designate one coordinator as having ultimate oversight responsibility, and the other coordinators should have titles clearly showing that they are in a deputy or supporting role to the senior coordinator. The Title IX coordinators should not have other job responsibilities that may create a conflict of interest. For example, serving as the Title IX coordinator and a disciplinary hearing board member or general counsel may create a conflict of interest.

Recipients must ensure that employees designated to serve as Title IX coordinators have adequate training on what constitutes sexual harassment, including sexual violence, and that they understand how the recipient's grievance procedures operate. Because sexual violence complaints often are filed with the school's law enforcement unit, all school law enforcement unit employees should receive training on the school's Title IX grievance procedures and any other procedures used for investigating reports of sexual violence. In addition, these employees should receive copies of the school's Title IX policies. Schools should instruct law enforcement unit employees both to notify complainants of their right to file a Title IX sex discrimination complaint with the school in addition to filing a criminal complaint, and to report incidents of sexual violence to the Title IX coordinator if the complainant consents. The school's Title IX coordinator or designee should be available to provide assistance to school law enforcement unit employees regarding how to respond appropriately to reports of sexual violence. The Title IX coordinator also should be given access to school law enforcement unit investigation notes

²⁰ *Id.* § 106.8(a).

and findings as necessary for the Title IX investigation, so long as it does not compromise the criminal investigation.

(C) Grievance Procedures

The Title IX regulations require all recipients to adopt and publish grievance procedures providing for the prompt and equitable resolution of sex discrimination complaints.²¹ The grievance procedures must apply to sex discrimination complaints filed by students against school employees, other students, or third parties.

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.²² These requirements are discussed in greater detail below. If the recipient relies on disciplinary procedures for Title IX compliance, the Title IX coordinator should review the recipient's disciplinary procedures to ensure that the procedures comply with the prompt and equitable requirements of Title IX.²³

Grievance procedures generally may include voluntary informal mechanisms (e.g., mediation) for resolving some types of sexual harassment complaints. OCR has frequently advised recipients, however, that it is improper for a student who complains of harassment to be required to work out the problem directly with the alleged perpetrator, and certainly not without appropriate involvement by the school (e.g., participation by a trained counselor, a trained mediator, or, if appropriate, a teacher or administrator). In addition, as stated in the *2001 Guidance*, the complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process. Moreover, in cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis. OCR recommends that recipients clarify in their grievance procedures that mediation will not be used to resolve sexual assault complaints.

²¹ *Id.* § 106.8(b). Title IX also requires recipients to adopt and publish grievance procedures for employee complaints of sex discrimination.

²² These procedures must apply to all students, including athletes. If a complaint of sexual violence involves a student athlete, the school must follow its standard procedures for resolving sexual violence complaints. Such complaints must not be addressed solely by athletics department procedures. Additionally, if an alleged perpetrator is an elementary or secondary student with a disability, schools must follow the procedural safeguards in the Individuals with Disabilities Education Act (at 20 U.S.C. § 1415 and 34 C.F.R. §§ 300.500-300.519, 300.530-300.537) as well as the requirements of Section 504 of the Rehabilitation Act of 1973 (at 34 C.F.R. §§ 104.35-104.36) when conducting the investigation and hearing.

²³ A school may not absolve itself of its Title IX obligations to investigate and resolve complaints of sexual harassment or violence by delegating, whether through express contractual agreement or other less formal arrangement, the responsibility to administer school discipline to school resource officers or "contract" law enforcement officers. See 34 C.F.R. § 106.4.

Prompt and Equitable Requirements

As stated in the *2001 Guidance*, OCR has identified a number of elements in evaluating whether a school's grievance procedures provide for prompt and equitable resolution of sexual harassment complaints. These elements also apply to sexual violence complaints because, as explained above, sexual violence is a form of sexual harassment. OCR will review all aspects of a school's grievance procedures, including the following elements that are critical to achieve compliance with Title IX:

- Notice to students, parents of elementary and secondary students, and employees of the grievance procedures, including where complaints may be filed;
- Application of the procedures to complaints alleging harassment carried out by employees, other students, or third parties;
- Adequate, reliable, and impartial investigation of complaints, including the opportunity for both parties to present witnesses and other evidence;
- Designated and reasonably prompt time frames for the major stages of the complaint process;
- Notice to parties of the outcome of the complaint;²⁴ and
- An assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

As noted in the *2001 Guidance*, procedures adopted by schools will vary in detail, specificity, and components, reflecting differences in the age of students, school sizes and administrative structures, State or local legal requirements, and past experiences. Although OCR examines whether all applicable elements are addressed when investigating sexual harassment complaints, this letter focuses on those elements where our work indicates that more clarification and explanation are needed, including:

(A) Notice of the grievance procedures

The procedures for resolving complaints of sex discrimination, including sexual harassment, should be written in language appropriate to the age of the school's students, easily understood, easily located, and widely distributed. OCR recommends that the grievance procedures be prominently posted on school Web sites; sent electronically to all members of the school community; available at various locations throughout the school or campus; and summarized in or attached to major publications issued by the school, such as handbooks, codes of conduct, and catalogs for students, parents of elementary and secondary students, faculty, and staff.

(B) Adequate, Reliable, and Impartial Investigation of Complaints

OCR's work indicates that a number of issues related to an adequate, reliable, and impartial investigation arise in sexual harassment and violence complaints. In some cases, the conduct

²⁴ "Outcome" does not refer to information about disciplinary sanctions unless otherwise noted. Notice of the outcome is discussed in greater detail in Section D below.

may constitute both sexual harassment under Title IX and criminal activity. Police investigations may be useful for fact-gathering; but because the standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX. Conduct may constitute unlawful sexual harassment under Title IX even if the police do not have sufficient evidence of a criminal violation. In addition, a criminal investigation into allegations of sexual violence does not relieve the school of its duty under Title IX to resolve complaints promptly and equitably.

A school should notify a complainant of the right to file a criminal complaint, and should not dissuade a victim from doing so either during or after the school's internal Title IX investigation. For instance, if a complainant wants to file a police report, the school should not tell the complainant that it is working toward a solution and instruct, or ask, the complainant to wait to file the report.

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. Any agreement or Memorandum of Understanding (MOU) with a local police department must allow the school to meet its Title IX obligation to resolve complaints promptly and equitably. 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.²⁵ Moreover, nothing in an MOU or the criminal investigation itself should prevent a school from notifying complainants of their Title IX rights and the school's grievance procedures, or from taking interim steps to ensure the safety and well-being of the complainant and the school community while the law enforcement agency's fact-gathering is in progress. OCR also recommends that a school's MOU include clear policies on when a school will refer a matter to local law enforcement.

As noted above, the Title IX regulation requires schools to provide equitable grievance procedures. As part of these procedures, schools generally conduct investigations and hearings to determine whether sexual harassment or violence occurred. In addressing complaints filed with OCR under Title IX, OCR reviews a school's procedures to determine whether the school is using 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 *et seq.* Like Title IX,

²⁵ In one recent OCR sexual violence case, the prosecutor's office informed OCR that the police department's evidence gathering stage typically takes three to ten calendar days, although the delay in the school's investigation may be longer in certain instances.

Title VII prohibits discrimination on the basis of sex.²⁶ OCR also uses a preponderance of the evidence standard when it resolves complaints against recipients. For instance, OCR's Case Processing Manual requires that a noncompliance determination be supported by the preponderance of the evidence when resolving allegations of discrimination under all the statutes enforced by OCR, including Title IX.²⁷ OCR also uses a preponderance of the evidence standard in its fund termination administrative hearings.²⁸ Thus, 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.

Throughout a school's Title IX investigation, including at any hearing, 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.²⁹ 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

²⁶ See, e.g., *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003) (noting that under the "conventional rule of civil litigation," the preponderance of the evidence standard generally applies in cases under Title VII); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-55 (1989) (approving preponderance standard in Title VII sex discrimination case) (plurality opinion); *id.* at 260 (White, J., concurring in the judgment); *id.* at 261 (O'Connor, J., concurring in the judgment). The 2001 Guidance noted (on page vi) that "[w]hile *Gebser* and *Davis* made clear that Title VII agency principles do not apply in determining liability for money damages under Title IX, the *Davis* Court also indicated, through its specific references to Title VII caselaw, that Title VII remains relevant in determining what constitutes hostile environment sexual harassment under Title IX." See also *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) ("We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.").

²⁷ OCR's Case Processing Manual is available on the Department's Web site, at <http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.html>.

²⁸ The Title IX regulations adopt the procedural provisions applicable to Title VI of the Civil Rights Act of 1964. See 34 C.F.R. § 106.71 ("The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference."). The Title VI regulations apply the Administrative Procedure Act to administrative hearings required prior to termination of Federal financial assistance and require that termination decisions be "supported by and in accordance with the reliable, probative and substantial evidence." 5 U.S.C. § 556(d). The Supreme Court has interpreted "reliable, probative and substantial evidence" as a direction to use the preponderance standard. See *Steadman v. SEC*, 450 U.S. 91, 98-102 (1981).

²⁹ Access to this information must be provided consistent with FERPA. For example, if a school introduces an alleged perpetrator's prior disciplinary records to support a tougher disciplinary penalty, the complainant would not be allowed access to those records. Additionally, access should not be given to privileged or confidential information. For example, the alleged perpetrator should not be given access to communications between the complainant and a counselor or information regarding the complainant's sexual history.

statement without also allowing the complainant to review the alleged perpetrator’s statement.

While OCR does not require schools to permit parties to have lawyers at any stage of the proceedings, 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. Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment. OCR also recommends that schools provide an appeals process. If a school provides for appeal of the findings or remedy, it must do so for both parties. Schools must maintain documentation of all proceedings, which may include written findings of facts, transcripts, or audio recordings.

All persons involved in implementing a recipient’s grievance procedures (*e.g.*, Title IX coordinators, investigators, and adjudicators) must have training or experience in handling complaints of sexual harassment and sexual violence, and in the recipient’s grievance procedures. The training also should include applicable confidentiality requirements. In sexual violence cases, the fact-finder and decision-maker also should have adequate training or knowledge regarding sexual violence.³⁰ 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.

Public and state-supported schools must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant.

(C) Designated and Reasonably Prompt Time Frames

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

³⁰ For instance, if an investigation or hearing involves forensic evidence, that evidence should be reviewed by a trained forensic examiner.

occurred in a classroom during school hours with a single complainant.

(D) Notice of Outcome

Both parties must be notified, in writing, about the outcome of both the complaint and any appeal,³¹ *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. Title IX does not require the school to notify the alleged perpetrator of the outcome before it notifies the complainant.

Due to the intersection of Title IX and FERPA requirements, OCR recognizes that there may be confusion regarding what information a school may disclose to the complainant.³² FERPA generally prohibits the nonconsensual disclosure of personally identifiable information from a student's "education record." However, as stated in the *2001 Guidance*, FERPA permits a school to disclose to the harassed student information about the sanction imposed upon a student who was found to have engaged in harassment when the sanction directly relates to the harassed student. This includes an order that the harasser stay away from the harassed student, or that the harasser is prohibited from attending school for a period of time, or transferred to other classes or another residence hall.³³ Disclosure of other information in the student's "education record," including information about sanctions that do not relate to the harassed student, may result in a violation of FERPA.

Further, when the conduct involves a crime of violence or a non-forcible sex offense,³⁴ FERPA permits a postsecondary institution to disclose to the alleged victim the final results of a

³¹ As noted previously, "outcome" does not refer to information about disciplinary sanctions unless otherwise noted.

³² In 1994, Congress amended the General Education Provisions Act (GEPA), of which FERPA is a part, to state that nothing in GEPA "shall be construed to affect the applicability of title VI of the Civil Rights Act of 1964, title IX of Education Amendments of 1972, title V of the Rehabilitation Act of 1973, the Age Discrimination Act, or other statutes prohibiting discrimination, to any applicable program." 20 U.S.C. § 1221(d). The Department interprets this provision to mean that FERPA continues to apply in the context of Title IX enforcement, but if there is a direct conflict between the requirements of FERPA and the requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions. *See 2001 Guidance* at vii.

³³ This information directly relates to the complainant and is particularly important in sexual harassment cases because it affects whether a hostile environment has been eliminated. Because seeing the perpetrator may be traumatic, a complainant in a sexual harassment case may continue to be subject to a hostile environment if he or she does not know when the perpetrator will return to school or whether he or she will continue to share classes or a residence hall with the perpetrator. This information also directly affects a complainant's decision regarding how to work with the school to eliminate the hostile environment and prevent its recurrence. For instance, if a complainant knows that the perpetrator will not be at school or will be transferred to other classes or another residence hall for the rest of the year, the complainant may be less likely to want to transfer to another school or change classes, but if the perpetrator will be returning to school after a few days or weeks, or remaining in the complainant's classes or residence hall, the complainant may want to transfer schools or change classes to avoid contact. Thus, the complainant cannot make an informed decision about how best to respond without this information.

³⁴ Under the FERPA regulations, crimes of violence include arson; assault offenses (aggravated assault, simple assault, intimidation); burglary; criminal homicide (manslaughter by negligence); criminal homicide (murder and

disciplinary proceeding against the alleged perpetrator, regardless of whether the institution concluded that a violation was committed.³⁵ Additionally, a postsecondary institution may disclose to anyone—not just the alleged victim—the final results of a disciplinary proceeding if it determines that the student is an alleged perpetrator of a crime of violence or a non-forcible sex offense, and, with respect to the allegation made, the student has committed a violation of the institution’s rules or policies.³⁶

Postsecondary institutions also are subject to additional rules under the Clery Act. This law, which applies to postsecondary institutions that participate in Federal student financial aid programs, requires that “both the accuser and the accused must be informed of the outcome³⁷ of any institutional disciplinary proceeding brought alleging a sex offense.”³⁸ Compliance with this requirement does not constitute a violation of FERPA. Furthermore, the FERPA limitations on redisclosure of information do not apply to information that postsecondary institutions are required to disclose under the Clery Act.³⁹ Accordingly, postsecondary institutions may not require a complainant to abide by a nondisclosure agreement, in writing or otherwise, that would prevent the redisclosure of this information.

Steps to Prevent Sexual Harassment and Sexual Violence and Correct its Discriminatory Effects on the Complainant and Others

Education and Prevention

In addition to ensuring full compliance with Title IX, schools should take proactive measures to prevent sexual harassment and violence. OCR recommends that all schools implement preventive education programs and make victim resources, including comprehensive victim services, available. Schools may want to include these education programs in their (1) orientation programs for new students, faculty, staff, and employees; (2) training for students who serve as advisors in residence halls; (3) training for student athletes and coaches; and (4) school assemblies and “back to school nights.” These programs should include a

non-negligent manslaughter); destruction, damage or vandalism of property; kidnapping/abduction; robbery; and forcible sex offenses. Forcible sex offenses are defined as any sexual act directed against another person forcibly or against that person’s will, or not forcibly or against the person’s will where the victim is incapable of giving consent. Forcible sex offenses include rape, sodomy, sexual assault with an object, and forcible fondling. Non-forcible sex offenses are incest and statutory rape. 34 C.F.R. Part 99, App. A.

³⁵ 34 C.F.R. § 99.31(a)(13). For purposes of 34 C.F.R. §§ 99.31(a)(13)-(14), disclosure of “final results” is limited to the name of the alleged perpetrator, any violation found to have been committed, and any sanction imposed against the perpetrator by the school. 34 C.F.R. § 99.39.

³⁶ 34 C.F.R. § 99.31(a)(14).

³⁷ For purposes of the Clery Act, “outcome” means the institution’s final determination with respect to the alleged sex offense and any sanctions imposed against the accused. 34 C.F.R. § 668.46(b)(11)(vi)(B).

³⁸ 34 C.F.R. § 668.46(b)(11)(vi)(B). Under the Clery Act, forcible sex offenses are defined as any sexual act directed against another person forcibly or against that person’s will, or not forcibly or against the person’s will where the person is incapable of giving consent. Forcible sex offenses include forcible rape, forcible sodomy, sexual assault with an object, and forcible fondling. Non-forcible sex offenses include incest and statutory rape. 34 C.F.R. Part 668, Subpt. D, App. A.

³⁹ 34 C.F.R. § 99.33(c).

discussion of what constitutes sexual harassment and sexual violence, the school's policies and disciplinary procedures, and the consequences of violating these policies.

The education programs also should include information aimed at encouraging students to report incidents of sexual violence to the appropriate school and law enforcement authorities. Schools should be aware that victims or third parties may be deterred from reporting incidents if alcohol, drugs, or other violations of school or campus rules were involved.⁴⁰ As a result, schools should consider whether their disciplinary policies have a chilling effect on victims' or other students' reporting of sexual violence offenses. For example, OCR recommends that schools inform students that the schools' primary concern is student safety, that any other rules violations will be addressed separately from the sexual violence allegation, and that use of alcohol or drugs never makes the victim at fault for sexual violence.

OCR also recommends that schools develop specific sexual violence materials that include the schools' policies, rules, and resources for students, faculty, coaches, and administrators. Schools also should include such information in their employee handbook and any handbooks that student athletes and members of student activity groups receive. These materials should include where and to whom students should go if they are victims of sexual violence. These materials also should tell students and school employees what to do if they learn of an incident of sexual violence. Schools also should assess student activities regularly to ensure that the practices and behavior of students do not violate the schools' policies against sexual harassment and sexual violence.

Remedies and Enforcement

As discussed above, if a school determines that sexual harassment that creates a hostile environment has occurred, it must take immediate action to eliminate the hostile environment, prevent its recurrence, and address its effects. In addition to counseling or taking disciplinary action against the harasser, effective corrective action may require remedies for the complainant, as well as changes to the school's overall services or policies. Examples of these actions are discussed in greater detail below.

Title IX requires a school to take steps to protect the complainant as necessary, including taking interim steps before the final outcome of the investigation. The school should undertake these steps promptly once it has notice of a sexual harassment or violence allegation. The school should notify the complainant of his or her options to avoid contact with the alleged perpetrator and allow students to change academic or living situations as appropriate. For instance, the school may prohibit the alleged perpetrator from having any contact with the complainant pending the results of the school's investigation. When taking steps to separate the complainant and alleged perpetrator, a school should minimize the burden on the

⁴⁰ The Department's Higher Education Center for Alcohol, Drug Abuse, and Violence Prevention (HEC) helps campuses and communities address problems of alcohol, other drugs, and violence by identifying effective strategies and programs based upon the best prevention science. Information on HEC resources and technical assistance can be found at www.higheredcenter.org.

complainant, and thus should not, as a matter of course, remove complainants from classes or housing while allowing alleged perpetrators to remain. In addition, schools should ensure that complainants are aware of their Title IX rights and any available resources, such as counseling, health, and mental health services, and their right to file a complaint with local law enforcement.⁴¹

Schools should be aware that complaints of sexual harassment or violence may be followed by retaliation by the alleged perpetrator or his or her associates. For instance, friends of the alleged perpetrator may subject the complainant to name-calling and taunting. As part of their Title IX obligations, schools must have policies and procedures in place to protect against retaliatory harassment. At a minimum, schools must ensure that complainants and their parents, if appropriate, know how to report any subsequent problems, and should follow-up with complainants to determine whether any retaliation or new incidents of harassment have occurred.

When OCR finds that a school has not taken prompt and effective steps to respond to sexual harassment or violence, OCR will seek appropriate remedies for both the complainant and the broader student population. When conducting Title IX enforcement activities, OCR seeks to obtain voluntary compliance from recipients. When a recipient does not come into compliance voluntarily, OCR may initiate proceedings to withdraw Federal funding by the Department or refer the case to the U.S. Department of Justice for litigation.

Schools should proactively consider the following remedies when determining how to respond to sexual harassment or violence. These are the same types of remedies that OCR would seek in its cases.

Depending on the specific nature of the problem, remedies for the complainant might include, but are not limited to:⁴²

- providing an escort to ensure that the complainant can move safely between classes and activities;
- ensuring that the complainant and alleged perpetrator do not attend the same classes;
- moving the complainant or alleged perpetrator to a different residence hall or, in the case of an elementary or secondary school student, to another school within the district;
- providing counseling services;
- providing medical services;
- providing academic support services, such as tutoring;

⁴¹ The Clery Act requires postsecondary institutions to develop and distribute a statement of policy that informs students of their options to notify proper law enforcement authorities, including campus and local police, and the option to be assisted by campus personnel in notifying such authorities. The policy also must notify students of existing counseling, mental health, or other student services for victims of sexual assault, both on campus and in the community. 20 U.S.C. §§ 1092(f)(8)(B)(v)-(vi).

⁴² Some of these remedies also can be used as interim measures before the school's investigation is complete.

- arranging for the complainant to re-take a course or withdraw from a class without penalty, including ensuring that any changes do not adversely affect the complainant's academic record; and
- reviewing any disciplinary actions taken against the complainant to see if there is a causal connection between the harassment and the misconduct that may have resulted in the complainant being disciplined.⁴³

Remedies for the broader student population might include, but are not limited to:

Counseling and Training

- offering counseling, health, mental health, or other holistic and comprehensive victim services to all students affected by sexual harassment or sexual violence, and notifying students of campus and community counseling, health, mental health, and other student services;
- designating an individual from the school's counseling center to be "on call" to assist victims of sexual harassment or violence whenever needed;
- training the Title IX coordinator and any other employees who are involved in processing, investigating, or resolving complaints of sexual harassment or sexual violence, including providing training on:
 - the school's Title IX responsibilities to address allegations of sexual harassment or violence
 - how to conduct Title IX investigations
 - information on the link between alcohol and drug abuse and sexual harassment or violence and best practices to address that link;
- training all school law enforcement unit personnel on the school's Title IX responsibilities and handling of sexual harassment or violence complaints;
- training all employees who interact with students regularly on recognizing and appropriately addressing allegations of sexual harassment or violence under Title IX; and
- informing students of their options to notify proper law enforcement authorities, including school and local police, and the option to be assisted by school employees in notifying those authorities.

Development of Materials and Implementation of Policies and Procedures

- developing materials on sexual harassment and violence, which should be distributed to students during orientation and upon receipt of complaints, as well as widely posted throughout school buildings and residence halls, and which should include:
 - what constitutes sexual harassment or violence
 - what to do if a student has been the victim of sexual harassment or violence
 - contact information for counseling and victim services on and off school grounds
 - how to file a complaint with the school
 - how to contact the school's Title IX coordinator

⁴³ For example, if the complainant was disciplined for skipping a class in which the harasser was enrolled, the school should review the incident to determine if the complainant skipped the class to avoid contact with the harasser.

- what the school will do to respond to allegations of sexual harassment or violence, including the interim measures that can be taken
- requiring the Title IX coordinator to communicate regularly with the school’s law enforcement unit investigating cases and to provide information to law enforcement unit personnel regarding Title IX requirements;⁴⁴
- requiring the Title IX coordinator to review all evidence in a sexual harassment or sexual violence case brought before the school’s disciplinary committee to determine whether the complainant is entitled to a remedy under Title IX that was not available through the disciplinary committee;⁴⁵
- requiring the school to create a committee of students and school officials to identify strategies for ensuring that students:
 - know the school’s prohibition against sex discrimination, including sexual harassment and violence
 - recognize sex discrimination, sexual harassment, and sexual violence when they occur
 - understand how and to whom to report any incidents
 - know the connection between alcohol and drug abuse and sexual harassment or violence
 - feel comfortable that school officials will respond promptly and equitably to reports of sexual harassment or violence;
- issuing new policy statements or other steps that clearly communicate that the school does not tolerate sexual harassment and violence and will respond to any incidents and to any student who reports such incidents; and
- revising grievance procedures used to handle sexual harassment and violence complaints to ensure that they are prompt and equitable, as required by Title IX.

School Investigations and Reports to OCR

- conducting periodic assessments of student activities to ensure that the practices and behavior of students do not violate the school’s policies against sexual harassment and violence;
- investigating whether any other students also may have been subjected to sexual harassment or violence;
- investigating whether school employees with knowledge of allegations of sexual harassment or violence failed to carry out their duties in responding to those allegations;
- conducting, in conjunction with student leaders, a school or campus “climate check” to assess the effectiveness of efforts to ensure that the school is free from sexual harassment and violence, and using the resulting information to inform future proactive steps that will be taken by the school; and

⁴⁴ Any personally identifiable information from a student’s education record that the Title IX coordinator provides to the school’s law enforcement unit is subject to FERPA’s nondisclosure requirements.

⁴⁵ For example, the disciplinary committee may lack the power to implement changes to the complainant’s class schedule or living situation so that he or she does not come in contact with the alleged perpetrator.

- submitting to OCR copies of all grievances filed by students alleging sexual harassment or violence, and providing OCR with documentation related to the investigation of each complaint, such as witness interviews, investigator notes, evidence submitted by the parties, investigative reports and summaries, any final disposition letters, disciplinary records, and documentation regarding any appeals.

Conclusion

The Department is committed to ensuring that all students feel safe and have the opportunity to benefit fully from their schools' education programs and activities. As part of this commitment, OCR provides technical assistance to assist recipients in achieving voluntary compliance with Title IX.

If you need additional information about Title IX, have questions regarding OCR's policies, or seek technical assistance, please contact the OCR enforcement office that serves your state or territory. The list of offices is available at <http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm>. Additional information about addressing sexual violence, including victim resources and information for schools, is available from the U.S. Department of Justice's Office on Violence Against Women (OVW) at <http://www.ovw.usdoj.gov/>.⁴⁶

Thank you for your prompt attention to this matter. I look forward to continuing our work together to ensure that all students have an equal opportunity to learn in a safe and respectful school climate.

Sincerely,

/s/

Russlynn Ali
Assistant Secretary for Civil Rights

⁴⁶ OVW also administers the Grants to Reduce Domestic Violence, Dating Violence, Sexual Assault, and Stalking on Campus Program. This Federal funding is designed to encourage institutions of higher education to adopt comprehensive, coordinated responses to domestic violence, dating violence, sexual assault, and stalking. Under this competitive grant program, campuses, in partnership with community-based nonprofit victim advocacy organizations and local criminal justice or civil legal agencies, must adopt protocols and policies to treat these crimes as serious offenses and develop victim service programs and campus policies that ensure victim safety, offender accountability, and the prevention of such crimes. OVW recently released the first solicitation for the Services, Training, Education, and Policies to Reduce Domestic Violence, Dating Violence, Sexual Assault and Stalking in Secondary Schools Grant Program. This innovative grant program will support a broad range of activities, including training for school administrators, faculty, and staff; development of policies and procedures for responding to these crimes; holistic and appropriate victim services; development of effective prevention strategies; and collaborations with mentoring organizations to support middle and high school student victims.



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November 1, 2012

Dr. Martha Nell Smith
Chair, University Senate
3238 Tawes Hall
College Park, MD 20742-8878

Dear Dr. Smith:

In December 2011, the University Senate approved the Student Conduct Committee's (SCC) report and recommendations on Senate Document #11-12-10, "Updates to Procedural Requirements Pertaining to Sexual Harassment and Sexual Violence." Likewise, President Loh approved the report and recommendations on January 17, 2012. One of the approved recommendations included a request from the committee to be charged in Fall 2012 with revisiting the *Code of Student Conduct* regarding the changes made to comply with the directives in the Department of Education Office of Civil Rights' (OCR) "Dear Colleague Letter" of April 2011.

In order to bring the University into compliance with the directives outlined in the OCR letter, the committee recommended revising the burden of proof requirements in the *Code of Student Conduct* to include "preponderance of the evidence" (e.g., it is more likely than not that the sexual harassment or violence occurred) instead of "clear and convincing" (e.g., it is highly probably or reasonably certain that the sexual harassment or violence occurred) as the evidentiary standard in proceedings for complaints of sexual harassment and violence only. This change to the *Code* has been made. In doing so, however, the *Code* now has two different standards of evidence, depending on the type of case, which is uncommon for an institution of higher education. The committee would like to explore whether this situation is in the best interest of the Office of Student Conduct and the University.

The SCC respectfully requests to be charged by the SEC with performing this review as soon as possible.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jason Speck'.


Jason Speck
Chair, University Senate Student Conduct Committee

JS/cb

Cc: Reka Montfort, Director, University Senate
Andrea Goodwin, Director, Office of Student Conduct



University Senate CHARGE

Date:	November 16, 2012
To:	Jason Speck Chair, Student Conduct Committee
From:	Martha Nell Smith  Chair, University Senate
Subject:	Review of the Evidentiary Standards in the Code of Student Conduct
Senate Document #:	12-13-30
Deadline:	March 29, 2013

The Senate Executive Committee (SEC) requests that the Student Conduct Committee reexamine the evidentiary standards in order to guarantee consistency throughout the University of Maryland Code of Student Conduct (V-1.00(B)). The Senate and President Loh approved the committee's recommendation (Senate Doc. No. 11-12-10 - Approved December 2011) to amend the Code to comply with the directives in the Department of Education's Office of Civil Rights' (OCR) "Dear Colleague Letter." This recommendation revised the burden of proof requirements to include "preponderance of the evidence" as the evidentiary standard in proceedings for complaints of sexual harassment. However, this change has created two different standards of evidence depending on the type of case. Therefore, the SEC requests that the Student Conduct Committee consider whether this differentiation within the Code is in the best interest of the University.

Specifically, we ask that you:

1. Review the University of Maryland Code of Student Conduct V-1.00(B).
2. Consult with a representative from the University's Office of Student Conduct.
3. Consult with the Senate Student Affairs Committee regarding the potential impact that any changes to the code would have on students at the University.
4. Review the standards of evidence in codes of student conduct at our peer institutions.
5. Consult with the University's Office of Legal Affairs.
6. If appropriate, recommend whether the University of Maryland Code of Student Conduct V-1.00(B) should be revised to make the standard of evidence for all cases consistent.

We ask that you submit your report and recommendations to the Senate Office no later than March 29, 2013. If you have questions or need assistance, please contact Reka Montfort in the Senate Office, extension 5-5804.



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March 5, 2013

Dr. Martha Nell Smith
Chair, University Senate
3238 Tawes Hall
College Park, MD 20742-8878

Dear Dr. Smith:

I am writing on behalf of the Senate Student Conduct Committee (SCC) in regard to our charge for the "Review of the Evidentiary Standards in the *Code of Student Conduct*" (Senate Doc #12-13-30). The SCC was charged by the Senate Executive Committee (SEC) with this review in November 2012, following the committee's request to be charged as a result of the passage of Senate Doc #11-12-10 "Updates to Procedural Requirements Pertaining to Sexual Harassment and Sexual Violence" last December. The deadline for our charge is March 29, 2013. I am writing to respectfully request an extension for the committee's review of this complex topic.

As you know, one of the approved recommendations of the "Updates to Procedural Requirements Pertaining to Sexual Harassment and Sexual Violence" was a wish from the committee to be charged with revisiting the *Code of Student Conduct* regarding the changes made to comply with the directives in the Department of Education Office of Civil Rights' (OCR) "Dear Colleague Letter" of April 2011. In order to bring the University into compliance with the directives outlined in the OCR letter, the SCC had recommended revising the burden of proof requirements in the *Code* to include "preponderance of the evidence" (e.g., it is more likely than not that the sexual harassment or violence occurred) instead of "clear and convincing" (e.g., it is highly probably or reasonably certain that the sexual harassment or violence occurred) as the evidentiary standard in proceedings for complaints of sexual harassment and violence only. In making this change, however, the *Code* now has two different standards of evidence, depending on the type of case, which is uncommon for an institution of higher education.

Because of other pressing charges, including the "Expansion of Promoting Responsible Action in Medical Emergencies" and the "*Code of Student Conduct* Expansion of Jurisdiction," the SCC has not been able to conduct a thorough review of the evidentiary standards in the *Code* this year. The committee would like more time to explore whether the current situation is in the best interest of the Office of Student Conduct and the University.

We respectfully request an extension until December 13, 2013. Thank you for your consideration of this request.

Sincerely,

A handwritten signature in black ink, appearing to read "Jason Speck".

Jason Speck
Chair, University Senate Student Conduct Committee

Enclosure(s): Charge from SEC, November 16, 2012

Cc: Reka Montfort, Director, University Senate
Andrea Goodwin, Director, Office of Student Conduct

Big Ten Peer Institution Research

Institution	Standard of Evidence
Michigan State University	Preponderance of the Evidence
University of Minnesota	Preponderance of the Evidence
The Ohio State University	Preponderance of the Evidence
University of Nebraska	Preponderance of the Evidence
Purdue University	Preponderance of the Evidence
Penn State University	Preponderance of the Evidence
University of Illinois at Urbana-Champaign	Preponderance of the Evidence
University of Iowa	Preponderance of the Evidence
Northwestern University	Preponderance of the Evidence
Rutgers University	Clear & Convincing for academic integrity cases. Preponderance of the Evidence for conduct cases.
Indiana University	Preponderance of the Evidence for Title IX & VAWA cases. Clear & Convincing Evidence for all other cases.
University of Wisconsin	Preponderance of the Evidence for all sexual assault, dating violence, stalking and any non-academic misconduct case resulting in disciplinary probation or a lesser sanction. Clear and Convincing Evidence for suspension & expulsion cases.
University of Michigan	Preponderance of the evidence for sexual misconduct cases. Clear & Convincing Evidence for all other cases.