



U.S. DEPARTMENT OF EDUCATION

P.O. BOX 14620

WASHINGTON, DC 20044-4620

e-mail: OCR.DC@ed.gov

**OFFICE FOR CIVIL RIGHTS
SOUTHERN DIVISION**

**DISTRICT OF COLUMBIA OFFICE
District of Columbia, North Carolina, Virginia**

May 5, 2004

BY FACSIMILE AND U.S. MAIL

Dr. John J. DeGioia
President
Georgetown University
204 Healy Hall, Box 571789
37th & O Streets, N.W.
Washington, D.C. 20057

RE: OCR Complaint #11-03-2017

Dear Dr. DeGioia:

This letter is to notify you of the disposition of the above-referenced sex discrimination complaint filed by [REDACTED] (Complainant), on November 20, 2002, with the District of Columbia Office of the Office for Civil Rights (OCR), U.S. Department of Education (Department), against Georgetown University (the University). The Complainant alleged that after she filed a complaint of sexual assault with the University in April 2002, the complaint was not handled in an equitable manner. Specifically, the Complaint alleged that:

1. The University selectively applied the policy and procedures for discipline hearings as contained in the Student Code of Conduct, and when it did, it applied them differently to the Complainant and the perpetrator (Respondent).
2. The Complainant was discouraged from pursuing her complaint by the Director of Student Conduct (Director).
3. When the witnesses for the Complainant provided written statements to the Director, the Director deleted critical information from the statements before allowing them to be considered as evidence.

In addition, the Complainant stated that the University made a decision to expel the Respondent from the University for the incident, and thereafter, the Respondent appealed the University's decision. The Complainant stated that she was discriminated against during the appeals process when:

4. The University failed to allow her to represent herself during the appeals process.
5. The University reduced its initial sanction of expulsion to a 1-year suspension.

Our mission is to ensure equal access to education and to promote educational excellence throughout the Nation.

6. The University did not provide her the results of the appeal.

OCR is responsible for enforcing certain Federal civil rights statutes and regulations, including Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. (Title IX), and its implementing regulation, at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex by recipients of Federal financial assistance. The University is a recipient of such assistance from the Department. Therefore, the University must comply with Title IX and its implementing regulation.

Sexual harassment is a form of sex discrimination prohibited by the Title IX regulation. In cases where sexual harassment is found, a recipient has the obligation under Title IX to take appropriate action to prevent the harassment from reoccurring and to remedy the effects of the harassment. Moreover, the Title IX regulation at 34 C.F.R. § 106.8(b) states that a recipient must adopt and publish grievance procedures providing for prompt and equitable resolution of students' and employees' complaints alleging any action that would be prohibited by the regulation.

The University's Sexual Harassment Policies and Procedures

As an initial step in the investigation, OCR reviewed the University's policies and procedures governing complaints of sexual harassment and sexual assault. The general procedures are summarized below.

The University has separate procedures for resolving complaints of student on student or peer harassment, employee on employee harassment, and employee on student harassment. The University's Main Campus Sexual Misconduct and Sexual Assault Policy (Policy), which covers those forms of peer harassment that rise to the level of sexual assault or misconduct, is part of the Student Code of Conduct and is published in the Student Handbook. Also, the Office of Affirmative Action Programs has grievance procedures covering allegations of unlawful discrimination by employees, including sexual harassment of other employees. Finally, Georgetown College has a separate procedure for students complaining of sexual harassment by employees, which is published in the Undergraduate Bulletin and the Student Handbook.

At the time of the complaint, there was no procedure under these policies to address allegations of peer sexual harassment that did not rise to the level of sexual misconduct or assault. The Special Assistant to the President for Affirmative Action (Special Assistant) explained to OCR, however, that in practice the Office of Affirmative Action Programs (OAAP) resolved all complaints of employee and student sexual harassment except those complaints of sexual misconduct or assault that go through the formal disciplinary process administered by the Office of Student Conduct. The three procedures did not cross-reference one another, and the practice of the University to resolve the majority of sexual harassment complaints through the OAAP was not consistently explained to students. A student wishing to report peer harassment might have read the Student Code of Conduct and reasonably concluded that the only option available to her was to file a formal disciplinary complaint against the alleged harasser. A student not wishing to pursue a formal disciplinary complaint might therefore have chosen not to report the alleged harassment. Thus, OCR was concerned that a student wishing to file a complaint of peer

sexual harassment would not be aware of all of the reporting options available at the University. This was of concern because to comply with the Title IX regulation, grievance procedures used to resolve complaints of sexual harassment and other forms of sex discrimination must provide for prompt and equitable resolution of these complaints. In order to provide for prompt and equitable resolution, individuals covered by the grievance procedures must be informed where to find the grievance procedures and understand how to use them.

In addition, under each of the procedures, complaints of sexual harassment were resolved using a clear and convincing evidence standard, a higher standard than the preponderance of the evidence standard, which is the appropriate standard under Title IX for sex discrimination complaints, including those alleging sexual harassment. This raised concerns that it was more difficult than it should be for the University to hold students and employees responsible for acts of sexual harassment.

In response to OCR's concerns regarding the scope, context, and dissemination of its sexual harassment and sexual assault procedures, as well as the standard of proof a complainant must meet to obtain a finding of responsibility on the part of a respondent under those policies, the University provided the information summarized below, which resolves OCR's concerns with regard to the University's sexual harassment policies and procedures.

Scope

On December 12, 2003, the University provided OCR copies of the University's revised Sexual Harassment Policy and portions of the Student Code of Conduct prohibiting sexual assault in order to document that its sexual harassment policy makes explicit its application to all forms of peer sexual harassment. The revisions became effective following approval by the President's Executive Cabinet on February 20, 2004.

Standard of Proof

The University has provided OCR a copy of its revised 2003-2004 Student Code of Conduct, which requires the University, in determining whether a respondent is responsible for sexual harassment, sexual misconduct, or sexual assault, to apply a preponderance of the evidence (more likely than not) standard. The University informed OCR that the appropriate standard of proof for sexual harassment, misconduct, and assault cases is discussed with hearing board members during annual training and included in the Hearing Board Manual. Hearing board members receive additional training regarding issues specific to sexual assault and misconduct cases before becoming eligible to hear such cases.

Dissemination of Information

The University has developed and publicized a website for the purpose of making information about health and wellness issues, including sexual harassment and sexual assault, easily available to University students. The University informed OCR that the website is part of a broader, long-standing initiative by the University to ensure that students are physically and mentally safe and healthy during their time at the University

by providing avenues for regular and constant communication among the members of an interdisciplinary team of university officials involved with students, as well as by providing reporting mechanisms and resources to other faculty and staff who may have concerns about individual students.

The website has links to information about the issues of sexual assault and sexual harassment. The University has revised the information about each issue to note that sexual assault may be a form of sexual harassment and to cross-reference the University's policies and procedures on sexual assault and sexual harassment. In addition, the sexual assault policy includes the reporting option of filing a complaint under the sexual harassment grievance procedure as an alternative to filing a complaint of sexual assault or misconduct under the Student Code of Conduct.

Allegations

On April 11, 2002, the Complainant filed a sexual assault complaint under the University's Student Code of Conduct, alleging that the Respondent raped her on September 15 and 16, 2001. A hearing was held on April 29 and May 2, 2002, following which the Sexual Assault Hearing Board found the Respondent responsible and issued a sanction of expulsion from the University. The Respondent appealed the decision and on August 1, 2002, an Appeals Board affirmed the finding of responsibility, but reduced the sanction to a one-year suspension.

The Complainant raised numerous allegations about the hearing and appeal processes in her complaint. In the course of investigating the Complainant's allegations, OCR reviewed information provided by the University, witnesses, and the Complainant. OCR's analysis and conclusions regarding the allegations follow.

1. The Complainant stated that the University selectively applied the policy and procedures for Category C discipline hearings as contained in the Student Code of Conduct, and when it did, it applied them differently to the Complainant and the Respondent.

The Title IX regulation at § 106.31(b) states that a recipient shall not, on the basis of sex, treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of an aid, benefit, or service by the recipient, or subject any person to separate or different rules of behavior, sanctions, or other treatment.

Generally, in determining whether a violation of the regulation has occurred as a result of different treatment, OCR first ascertains whether the individual or group alleging discrimination was treated less favorably than an individual or group of another sex under similar circumstances. If OCR finds this to be true, then the recipient is given the opportunity to provide a legitimate nondiscriminatory reason for the different treatment. Finally, OCR examines this reason to determine if it is an excuse for discrimination.

The Complainant described a number of instances where she believed the discipline hearing policy and procedures were not applied or were applied differently to her than to the Respondent. After further investigating the allegation, OCR determined that some of the Complainant's concerns were based on alleged discriminatory different treatment

based on sex, prohibited by the Title IX regulation at 34 C.F.R. 106.31(b)(1)–(4), while others were more appropriately analyzed under the Title IX regulatory provision regarding grievance procedures at 34 C.F.R. 106.8(b). OCR's determinations regarding the specific instances follow.

a. The Complainant stated that she was limited to two character witnesses at the original hearing, while the Respondent was not.

The Complainant stated that, prior to the original hearing, she and the Respondent met with the Director and discussed the rules and procedures of the hearing process. She further stated that, during the meeting, the Director told her and the Respondent that each of them could introduce only two character witnesses at the hearing. The Complainant said that, despite being told this, the Respondent had four or five character witnesses, while she had only two. In an interview with OCR, the Director denied telling the Complainant or the Respondent that each could have only two character witnesses. The Director stated that she did not mention any limit on the number of witnesses that could testify on behalf of either party. She further pointed out that the witness form filled out by each party before the hearing did not limit the number of witnesses and contains five lines on which to write names of character witnesses.

OCR reviewed the section on witnesses contained in the Student Code of Conduct (Code) for Category C sexual assaults. While the Code requires that each party provide a list of witnesses to the Director two days prior to the hearing, it does not indicate a maximum number of witnesses that may testify on behalf of either party.

The Complainant and the Director differ in their descriptions of what the Director told the Complainant. However, the fact that neither the Code nor the witness form indicates a maximum number of witnesses permitted for either party supports the version of events described by the Director. Moreover, even if the Director had limited the number of witnesses introduced by the Complainant, the original Hearing Board found in favor of the Complainant. Based on the available information, OCR finds there is insufficient evidence to make a determination that the University treated the Complainant differently than the Respondent with regard to witnesses in violation of the Title IX regulation.

b. The Complainant stated that at the request of the Respondent, the original hearing was continued for a second day, contrary to the rules for judicial proceedings contained in the Student Code of Conduct.

According to the University By-laws of the Student Judicial Hearing Board System for Category B Sexual Misconduct and Category C Sexual Assault:

Parties may request that the Judicial Coordinator grant a continuance of a Hearing in instances where compelling reasons exist. Under normal circumstances the Judicial Coordinator has the responsibility for determining whether a continuance will be granted. At the discretion of the Judicial Coordinator a request for a continuance may be presented for the Hearing Board's consideration. Please note that the disciplinary matters are of the utmost concern to the Georgetown community, and continuance will not be granted for class or work-related activities where alternate arrangements can be made by the student. In addition, continuance will not be granted in instances where a

party has not been properly diligent in preparing their case. Continuances, when granted, are usually for one (1) week. The Judicial Coordinator is charged with the final responsibility for determining whether or not to grant a continuance (emphasis in the original).

The original hearing began on April 29, 2002, at approximately 6 p.m. OCR reviewed the transcript of the hearing, which indicates that, prior to the start of the hearing, the Respondent informed the Sexual Assault Hearing Board (Hearing Board) that he was ill and that he had medical documentation to certify his illness. As the time approached 11 p.m., the Respondent stated to the Board that it was late, he had a fever of 103°, and he needed to rest, and he requested a continuance of the hearing until the following day. The Respondent told the Board that because of these circumstances, he could not present his case appropriately.

In response to this information, the Board called a recess, discussed the Respondent's request, and granted a continuance because of his illness. The Board believed that his request was a compelling reason for a continuance, as required by the University By-laws, and agreed to reconvene on May 2, 2002, three days later. Prior to adjourning, the Board obtained, for the record, the Respondent's medical documentation from his physician certifying his illness.

OCR has determined that based on the University's By-laws, the Board had the authority to grant a continuance of the hearing if it identified a compelling reason to do so. OCR finds insufficient evidence to conclude that the Hearing Board's decision to grant the Respondent's request for a continuance was violative of the Title IX requirement that recipients resolve complaints of sex discrimination in a prompt and equitable manner.

c. The Complainant stated that the University failed to have a personal conference with the Respondent after the original hearing to discuss the outcome of the complaint, as required by the Student Code of Conduct, which resulted in a delay in the University notifying the Complainant about the outcome of the complaint.

With regard to Procedures for Deliberations (§ B.2), the University's Student Code of Conduct states: "On the business day following the Judicial Coordinator's receipt of the Hearing Board's decision, the Respondent(s) will be informed of the decision in a mandatory personal conference held with the Judicial Coordinator. A written Notice of Decision Form is provided to the Respondent(s) at that time."

The Complainant stated that immediately upon the conclusion of the hearing, the Respondent left for his out-of-state residence and requested that the University inform him of the outcome of the Hearing Board's deliberations in a telephone call. The Complainant claims that the University's granting of the Respondent's request resulted in a delay in notifying the Complainant of the outcome because, according to the Student Code of Conduct, the Respondent must be notified before the Complainant. The Complainant states that the requirement for a personal conference may not be met by a telephone call.

OCR determined that it is not clear from the Code whether a personal conference contemplates only a face-to-face meeting. However, even if a face-to-face meeting is mandated, OCR concludes there is insufficient evidence to find that the University

violated Title IX's requirement for prompt and equitable resolution of complaints when the Judicial Coordinator informed the Respondent of the Hearing Board's decision via a telephone call and then was able to notify the Complainant of the outcome on the same day the hearing concluded. By signing an Acknowledgement of Adjudication Outcome Form (Form) on May 2, 2002, the Complainant acknowledged that she had been informed of the decision reached in the original hearing.

d. The Complainant stated that prior to the original hearing, she and her parents requested a meeting with the President of the University, the Vice President of Student Affairs, and the Director of Student Conduct, and their requests were denied.

The Complainant stated that on April 30, 2002, during the continuance of the original hearing, when she contacted the Vice President of Student Affairs, he told her he did not believe it was appropriate to talk with them and directed her to speak with the Director of Student Conduct. She then attempted to meet with the President of the University, who relayed a message to her family that he was not the person they needed to meet with.

The Director of Student Conduct told OCR that she spoke with the Complainant's parents and the Respondent's mother separately by telephone prior to the original hearing. She said that the telephone meetings were at the separate request of both sets of parents. During the calls she explained the hearing process and responded to questions of the parents. In addition, the Director stated that she met separately with both sets of parents in person during the recess between the first and second days of the hearing. Again, the meetings were separately requested by the parents to discuss their concerns about the first day of the hearing.

The Complainant confirmed that the Director spoke with her parents, at their request, before the original hearing and during its recess. Although the President of the University and the Vice-President for Student Affairs may have declined to meet with the Complainant's parents and referred them to the Director, there is no evidence that either of these administrators met with the Respondent's parents at any time before or during the original hearing. Thus, there is insufficient evidence to support a finding that University officials treated the Complainant differently than the Respondent, in violation of Title IX, by referring her to meet with the Director to discuss questions about the student judicial process. Moreover, the failure of the Vice President or President to meet with the Complainant and her parents does not violate the "prompt and equitable" requirement of the Title IX regulations.

e. The Complainant stated that the Director permitted testimony on the second day of the hearing by one of the Respondent's witnesses who had not been present at the first day of the hearing, contrary to the Code of Student Conduct.

The transcript of the original hearing shows that prior to the date of the hearing, the Respondent requested that the Office of Student Conduct issue a Notice of Appearance to all factual witnesses he would call to testify on his behalf. Although, according to the Code, the parties have the responsibility of notifying their own witnesses of the date and time of the hearing, the Code also states that, when deemed necessary by the Office of Student Conduct, a Notice of Appearance will be issued. The Office of Student Conduct complied with the Respondent's request.

One of the Respondent's witnesses did not appear at the hearing on April 29. Prior to adjourning, after granting the Respondent's request for a continuance, the Hearing Board stated that witnesses who did not appear on April 29 to testify would not be allowed to testify when the hearing reconvened on May 2, 2002.

However, the Respondent's witness who did not appear on the first day appeared on May 2 to testify on behalf of the Respondent. The Complainant expressed her concern to the Board at that time because the witness had not appeared on April 29. The Respondent told the Board that his factual witness did not appear at the hearing on April 29 because he was not notified by anyone about the hearing. The Judicial Coordinator then stated at the hearing that she had, as an oversight, failed to notify this particular witness. The Hearing Board then took a recess to consider whether it should allow the testimony of this particular witness despite his absence on the first day of the hearing. The Hearing Board subsequently decided that, because of the oversight on the part of the Judicial Coordinator, and in fairness to the Respondent, they would allow the witness to testify on the second day.

In this instance, the University failed to follow its policy about witness testimony by permitting one of the Respondent's witnesses who was not present at the first day of the hearing to testify at the second day of the hearing. However, under the Code, a hearing board has discretion to hear evidence it feels is relevant, and the Hearing Board deliberated on the issue before exercising this discretion. OCR has determined that there is insufficient evidence to support a finding that the University violated Title IX's requirement to resolve complaints in an equitable manner by allowing the witness to testify at the second day of the hearing.

f. The Complainant stated that the University did not provide her a copy of the final results of the original hearing and the appeals hearing.

In order to meet the Title IX standard of promptness and equitability, a recipient must notify the parties regarding the outcome of a sexual harassment complaint or appeal to the extent permitted by the Family Education Rights and Privacy Act, which requires the consent of a student in order to release an education record. One exception to this requirement is in cases, as here, where the facts alleged constitute a crime of violence or nonforcible sex offense. In such cases, a University may release such an education record.

As stated above, the original hearing was held on April 29 and May 2, 2002. The University provided OCR a copy of an Acknowledgement of Adjudication Outcome Form (Form) signed by the Complainant on May 2, 2002, acknowledging that she had been informed of the decision reached in the original hearing. The appeals hearing was held on August 1, 2002. On August 5, the Complainant contacted the Associate Dean of Student Affairs (Associate Dean), who was serving as the acting Judicial Coordinator at that time, to learn the outcome of the appeals hearing. During this telephone conversation, the Complainant learned that the Appeals Board had upheld the original finding of responsible but had reduced the Respondent's academic dismissal sanction to a 1-year suspension from the University. The Associate Dean told OCR that she planned to meet with the Complainant to inform her of the appeals outcome, but the Complainant had a family emergency. Consequently, at the request of the Complainant, the Associate Dean faxed

the Acknowledgement of Adjudication Outcome Agreement to the Complainant at her out-of-state residence. As a result, the Associate Dean of Students signed the Form on behalf of the Complainant, acknowledging that she had been informed of the determination during the August 5, 2002, telephone call.

On August 8, 2002, the Complainant wrote the Director a letter requesting a written copy of both the original hearing results and the appeals hearing results. On August 15, 2002, the Director responded to the Complainant's request and explained it is not the practice of the Office of Student Conduct to provide complainants with written copies of the outcomes and the sanctions of its disciplinary proceedings. The Director further informed her that if she wanted to review the verbal information that had been provided to her, she should contact the Associate Dean to schedule a meeting.

The Student Code of Conduct, under Procedures for Deliberations for Judicial Hearing, states that the Judicial Coordinator will provide the respondent with a detailed written account of the Hearing Board's decision and rationale within 10 business days of the decision. The same procedures apply when the Judicial Coordinator informs the appellant of the appeals decision. Also, the University By-laws, under Distribution of the Decision, state that copies of the decision should be sent to other appropriate persons (i.e., Residence Life personnel for residential suspension or probation, the respondent's academic dean, and other University officials as deemed appropriate by the Office of Student Conduct). Neither the Code nor the By-laws require written notification of a complainant or appellee.

The University provided OCR with a copy of the Notice of Decision letter, dated May 3, 2002, informing the Respondent of the Hearing Board's decision; a letter dated May 16, 2002, providing the Respondent a detailed written account of the Board's decision; and a letter dated August 7, 2002, informing the Respondent of the Appeals Board's decision. The Complainant told OCR that the University informed her of the results of each of the hearings, although not in writing. Based on the above information, OCR finds insufficient evidence to determine that the University violated Title IX's regulatory requirement to resolve complaints in an equitable manner when it followed its procedure of notifying the Respondent of the outcome in writing, and the Complainant orally. However, OCR also notes that such a procedure of oral notification could make it difficult for the Complainant to fully understand the basis for the decision and thereby undermine confidence in the equitability of the University's procedures.

2. The Complainant alleged that the Director of Student Conduct discouraged her from pursuing her complaint.

On April 11, 2002, the Complainant reported the sexual assault to the University's Department of Public Safety (DPS), which investigated the allegations. Subsequently, the Complainant met with the Director of Student Conduct (Director) on April 17, 2002, to discuss the incident and the hearing process and to file her complaint. The Complainant stated that while explaining the incident to the Director, the Director told her that it would be a difficult hearing because it was a case of "he said, she said." The Complainant stated that she assured the Director that she was telling the truth, and the Director then stated, "But you're a woman scorned," and shrugged her shoulders. The Complainant further

stated that the Director told her that the case would be hard to win because it “wouldn’t hold up” in state court.

In an interview with OCR, the Director denied making most of the comments alleged by the Complainant. However, the Director did explain the context in which she made reference to the Complainant as a “woman scorned.” The Director told OCR that she was relating a comment made by the Respondent when she informed him of the sexual assault complaint filed against him by the Complainant. She further told OCR that she related the comment to the Complainant because, when she informed the Complainant that the Respondent denied the allegations in her complaint, the Complainant asked her for the Respondent’s explanation of why the Complainant would make such allegations if they were false. According to the Director, she told the Complainant that the Respondent alleged that she filed the complaint because she was “a woman scorned.” Neither the Complainant nor the Director could provide corroboration for either version of events, as there were no witnesses to this conversation. OCR also notes that the Complainant proceeded to file her complaint against the Respondent.

Based on the above information, OCR finds insufficient evidence to make a determination that the University discriminated against the Complainant by discouraging her from pursuing her complaint in violation of the grievance procedure requirements contained in the Title IX regulation.

3. The Complainant stated that when her witnesses provided written statements to the Director as required, the Director deleted critical information from the statements before allowing them to be considered as evidence by the Hearing Board.

The Complainant stated that the Director limited the content of some of her witnesses’ testimony at the hearing. Also, she stated that the Director edited statements provided to the Department of Public Safety (DPS) by her witnesses. The Complainant stated that the Director did not limit the use of written or oral testimony on behalf of the Respondent.

The Director denied that she deleted any critical information from witness statements before allowing them into evidence. She told OCR that there were three instances in which she did not permit the Hearing Board to consider certain evidence presented by the Complainant because to do so would have been substantial procedural error. First, the Director did not allow portions of a statement of one of the Complainant’s witnesses to be presented to the Hearing Board because the statement involved an unsubstantiated incident involving the Respondent. Second, the Director deleted portions of a statement given to the DPS office by the same witness, for the same reason. Third, the Director instructed the Director of Counseling and Psychological Services to revise his written statement before presenting it to the Hearing Board, so that it stated that he treated the Complainant for Posttraumatic Stress Syndrome through the use of psychotherapy and medication, but did not draw conclusions as to the cause of the Complainant’s Posttraumatic Stress Syndrome.

The Student Code of Conduct states that formal rules of evidence do not apply in judicial hearings and that the Judicial Coordinator, who reports to the Director of Student Conduct, can admit evidence that reasonable persons would accept as having relevance to the case.

OCR learned during the course of the investigation that the Director did not request that statements written by any of the Respondent's witnesses be revised. Thus, the University treated the Complainant and the Respondent differently under similar circumstance. However, the University stated that the reason the Director requested Complainant's witnesses revise their statements is because the Director believed that to admit certain portions of these statements would amount to substantial procedural error, leaving open grounds for appeal. The Student Code of Conduct gives the Judicial Coordinator discretion regarding the evidence that may be admitted during a hearing. Given this discretion, OCR has no reason to believe that the reason given for revision of the two statements was an excuse for discrimination.

Based on the above information, there is insufficient evidence to support a finding that the University discriminated against the Complainant on the basis of sex or violated Title IX's regulatory requirement of equitable resolution of complaints when the Director declined to admit portions of statements written by two of the Complainant's witnesses on the grounds that to do so would amount to procedural error.

4. The Complainant alleged that the University failed to allow her to represent herself during the appeals process.

The Complainant told OCR that, after learning the Respondent had filed an appeal, she spoke with the Director, who told her that, because one of the grounds for the appeal was substantial procedural error, the Director would be the Appellee representing the University and the Complainant would be a witness. The Complainant stated that, although she did testify at the hearing, she was not permitted to testify to the details of the sexual assault. The Complainant said she was asked only three questions by the Appeals Board during her testimony. The Complainant further stated that she was not allowed to have witnesses present to testify on her behalf.

The Director told OCR that she decided to represent the University in the appeals process in this case because one of the grounds on which the Respondent appealed was substantial procedural error in the University's conduct of the original hearing. The Student Code of Conduct and the University By-laws define substantial procedural error as one that has "substantially affected the hearing such that the respondent was denied a fair hearing; or the error prevented the person taking Administrative Action from making a fair decision." The Director stated that her job put her in the best position to defend the University's actions in this appeal.

The Director explained to OCR that, although the Student Code of Conduct mentions appeals in which the original complainant is the Appellee, as well as those in which the University is the Appellee, practically speaking, the University acts as the Appellee. The University stated that the Complainant was reluctant to participate in an appeals hearing when she was first informed that the Respondent had filed an appeal. The Complainant corroborates this. After being encouraged by the Director to participate as a witness, the Complainant provided a written statement in support of her position regarding the appeal, testified at the hearing, and was also allowed to present statements from witnesses. The Complainant told OCR that she did not present witness statements during the appeals hearing, however, because she learned that she would be a witness instead of the Appellee.

Neither the Student Code of Conduct nor the University By-laws suggest that the original complainant must be the Appellee in an appeals hearing. On the contrary, the University's procedure contemplates one of two scenarios: an appeal in which the University is the Appellee or an appeal in which the original complainant is the Appellee. Moreover, the Director's explanation as to why she decided to act as the Appellee in this case was legitimate and nondiscriminatory. OCR further finds that the Complainant had the opportunity to represent her perspective as a witness at the appeals hearing and could have provided witness statements to the same effect if she had chosen to do so. Thus, OCR finds insufficient evidence to support a finding that the University discriminated against the Complainant by not allowing her to represent herself during the appeals hearing.

5. The University discriminated against the Complainant by reducing the Respondent's sanction to a one-year suspension.

The original hearing on the sexual assault charge against the Respondent took place on April 29 and May 2, 2002. Finding the Complainant and her witnesses more credible than the Respondent and his witnesses, the Hearing Board found the Respondent responsible for Category C sexual assault (as well as for the lesser and included offense of Category B sexual misconduct and for a Category A alcohol violation). Before deliberating on the appropriate sanction, the Hearing Board was informed by the Judicial Coordinator that no other student at the University had been academically dismissed for being found responsible for a single instance of Category C sexual assault (one student had been academically dismissed after being found responsible for a second instance of Category C sexual assault). OCR interviewed three of the four members of the Hearing Board. They told OCR that they had been members of many other sexual assault hearing boards and were aware that academic dismissal (AD) had not previously been used as a sanction for a single incident of Category C sexual assault, but distinguished this case because of the seriousness of the facts. The members informed OCR that the sanction of AD was based, in significant part, on the following information:

- All members of the Hearing Board interviewed stated they found it significant that the Respondent was a New Student Orientation Advisor and the Complainant was a new student at the time of the rape. Several of the members mentioned that they felt this was an abuse of authority by the Respondent.
- Two of the members of the Hearing Board mentioned that alcohol was used by both parties the night of the rape, that the Complainant possibly was drugged by the Respondent, and that the Respondent knowingly and deliberately took advantage of the Complainant's incapacity.
- At least two of the members of the Hearing Board were concerned that the Respondent, at the original hearing, showed no understanding of the seriousness of what the Complainant alleged he had done and would repeat his behavior if he were permitted to return to the University.

Consistent with these considerations, the letter dated May 3, 2002, from the University to the Respondent, informing him of the outcome of the Hearing Board's deliberations, states

that the Hearing Board, in deciding on a sanction, looked to the University's goals of sanctioning within the University's disciplinary system. The University has three goals applicable to sanctioning decisions, set forth in the Student Code of Conduct. With regard to the first goal, promoting the respondent's self-reflection about his actions, the Hearing Board determined that the Respondent needed to be away from the University community to reflect on his actions. In considering this goal, the Hearing Board emphasized the egregious nature of the Respondent's actions and his lack of respect for the University's core values. With regard to the second goal, the Hearing Board stated that the Respondent's removal from the University community is important to reestablishing order in that community, while considering the common good, because it communicates the seriousness with which the community views sexual assault. With regard to the third goal, restoring the Respondent to good standing in the community if his return does not jeopardize the safety of the community, the Hearing Board stated that it considered allowing the Respondent to return to campus, but declined to permit it because the Respondent's "return would threaten not only the dignity and sense of safety of the Complainant, but also the Georgetown community."

The Respondent (now Appellant) appealed the result of the original hearing on the grounds that there had been substantial procedural error; there was new evidence that had not been considered by the Hearing Board; and the sanction of AD was substantially disproportionate. These grounds are the only three grounds for appeal listed in the Student Code of Conduct. The Appeals Board affirmed the Hearing Board's finding of responsibility for Category C sexual assault, but reduced the sanction from AD to a one-year suspension with no co-curricular restriction upon his return. In a letter to the Respondent/Appellant dated August 7, 2002, notifying him of its decision, the Appeals Board stated that it had found no evidence of substantial procedural error at the original hearing, nor was there new evidence that the Hearing Board had not considered. With regard to the Respondent/Appellant's contention that the sanction imposed by the Hearing Board was substantially disproportionate, the Appeals Board's letter stated only that "sanctions imposed by the original Hearing Board were consistent with the Student Code of Conduct," but that "a reduced sanction would serve the expressed purposes of the original Hearing Board." The Appeals Board did not explain further its decision to reduce the sanction.

OCR interviewed all four members of the Appeals Board. In explaining the reduced sanction, the Chair of the Appeals Board told OCR that there was concern among the Appeals Board members that the behavior of the Complainant and her father at the original hearing may have been disruptive enough to "compromise the process," obligating them to reverse the Hearing Board's finding of responsibility and require a new hearing. He stated that the reduced sanction was the Appeals Board's attempt to deal with some members' doubts about the process without reversing the Hearing Board's finding of responsibility. He did not explain why this was not discussed in the decision letter. None of the other members of the Appeals Board corroborated this statement during interviews. Rather, the other members of the Appeals Board stated that the sanction was reduced to bring it in line with precedents in other Category C sexual assault cases. Thus, while the decision letter stated that the original sanction was "consistent with the Student Code of Conduct," the Appeals Board seemed to be relying on the idea that the sanction was substantially disproportionate.

The other three members of the Appeals Board told OCR that their decision to reduce the Respondent/Appellant's sanction from AD to a one-year suspension was based on the fact that no other student at the University had been academically dismissed as a sanction for being found responsible for a single instance of Category C sexual assault. They stated that, in making this finding, they reviewed sanction precedents for Category C sexual assault for the last few years. These members all stated, however, that they had no information regarding the facts that prompted the precedents and so were unable to compare the facts of the Complainant's case with the facts of the previous cases to determine whether the sanction was disproportionate. Moreover, had the Appeals Board been provided factual information about the cases prompting the precedents, the facts would not have been comparable to the facts in this case because the precedents were decided under a previous definition of Category C sexual assault that included significantly less serious offenses in addition to instances that occurred with force and coercion, increasing the likelihood that those precedents involved dissimilar and less egregious facts than those in this case. The University confirmed OCR's concern that none of the sanctioning precedents were imposed for a sexual assault involving force and coercion, for which the Respondent was found responsible. This is a concern because under Title IX, where harassment is found, the University has the obligation to take appropriate action to prevent the harassment from reoccurring. In order to meet this standard, a sanction must be based on the specific facts of the case. Here, it appears that the Appeals Board looked for guidance to sanctions imposed in previous Category C sexual assault cases with facts less egregious than those in this case, and thus could not know whether the sanction would be likely to prevent the harassment from reoccurring.

When OCR asked the University to provide further information to clarify the Appeals Board's rationale for reducing the Respondent's sanction, three members of the Appeals Board came back together to provide a more detailed explanation of the thinking behind their decision. At the request of the Special Assistant, in a letter to her dated September 9, 2003, the Interim Associate Vice President of the University summarized the explanation of the Appeals Board. The letter states that the Appeals Board was guided by both the Code of Student Conduct definition of "substantial disproportionate sanction" and the sanctioning goals that underlie the student conduct system. The letter notes that the Student Handbook defines "substantial disproportionate sanction" as one that "appears to be excessive, given either the student's prior record or the usual sanction for the offense." The letter goes on to state that "the respondent's file revealed no prior serious disciplinary offenses";¹ thus, the Appeals Board "additionally considered each of the sanctioning goals and the Hearing Board's analysis of them."

The letter states, with respect to the first sanctioning goal – "to provide a mechanism within which offenders can reflect upon their actions and the impact of those actions on themselves and others" – that the Appeals Board members did not "share the view of the Original Hearing Board that a dismissal was necessarily required to serve either goal. It reasoned that a substantial period of suspension -- during which the respondent was fully

¹ A review of the Respondent/Appellant's disciplinary file reveals two prior alcohol offenses and a failure to comply in a timely way with the sanctions imposed as a result of one of these prior offenses. The Hearing Board found the Respondent responsible for a third alcohol violation as part of the conduct involved in the sexual assault. The Code of Student Conduct states, "Behaving under the influence of alcohol will be considered an aggravating circumstance when violations of the Student Code of Conduct occur, and sanctions will reflect the role of alcohol in the violation."

separated from the University -- is a very serious sanction that could potentially successfully accomplish both objectives.” With regard to the second sanctioning goal -- “reestablishment of order to the community” -- the letter states that “[t]he Appeals Board did not believe that the record supported the conclusion that the respondent’s return to the University would jeopardize the safety of the complainant or the community. The complainant did not report any continued or additional misconduct directed at her by the respondent after the incident, either before or after she initiated the proceedings.” According to the letter, “[t]he Appeals Board felt strongly that permitting the respondent’s return to the community would serve the third sanctioning goal – restoration of the offender to the community – a goal that the Hearing Board’s sanction had not accommodated,” and the Appeals Board believed that meeting the fourth sanctioning goal – restitution – was not possible in a meaningful way. The letter concluded by stating that the Appeals Board believed that “the sanction imposed by the Hearing Board in this case was a substantially disproportionate sanction because it appeared excessive in light of the student’s prior record and exceeded a sanction that would better and more fully serve the sanctioning goals” – i.e., a one-year suspension followed by a year of disciplinary probation, during which the Respondent would be expressly prohibited from all contact with the Complainant. The letter did not explain why, in their interviews with OCR, the members of the Appeals Board had failed to mention these reasons as the basis for their decision.

In response to this information, OCR requested that the University explain how the sanction imposed by the Appeals Board met the Title IX standard -- i.e., that it was appropriate to prevent the harassment from reoccurring and to remedy the effects of the harassment. In a letter to OCR dated December 12, 2003, the Special Assistant explained that, if and when the Respondent wishes to reenroll at the University, he must receive clearance to do so by the Office of Student Affairs, according to what the University describes as its normal procedures. In addition, the letter states that the Vice President for Student Affairs intends to require that the Respondent meet with him to discuss the conditions of his probation and the expectations for his behavior in order to receive this clearance. The Vice President of Student Affairs will notify the Respondent that any violation of the conditions of his probation will result in further disciplinary sanctions, which could include dismissal. The Respondent will be placed on disciplinary probation and prohibited from having any contact with the Complainant. The letter further states that the Vice President of Student Affairs intends to require the Respondent to meet regularly with a mentor designated by the Office of Student Conduct. Finally, the letter assures OCR that the University will promptly and appropriately investigate any allegation that the Respondent has violated his disciplinary probation and that “this type of disciplinary record would effectively disqualify any student, including the respondent, from being appointed by the Office of Student Affairs to a peer leadership position” of the sort held by the Respondent at the time of the harassment (and considered by the Hearing Board to have played a role in his accomplishing the harassment).

Although the University has provided information that addresses many of OCR’s concerns, OCR continues to have concerns about the Appeals Board’s reasons for reducing the Respondent’s sanction for sexual assault in this case and its commitment to ensuring that his sanction is enforced. The Appeals Board’s rationale for reducing the Respondent’s sanction remains unclear. The Appeals Board members offered two reasons during OCR’s interviews: The sanction did not conform to sanctions applied in previous

Category C sexual assault cases decided under a more lenient definition, and some members were concerned that the Complainant's behavior at the original hearing was disruptive. As to the first, the Appeals Board specifically found that the "sanctions imposed by the original Hearing Board were consistent with the Student Code of Conduct" and yet made its decision to reduce the sanction with no information about the circumstances of previous cases. As to the second, although the Chair of the Appeals Board offered this reason, none of the Board members corroborated this concern. In response to OCR's request for further information about the Appeals Board's rationale, the letter from the University, while indicating that the Appeals Board had considered both the Respondent's previous disciplinary offenses and the University's goals for sanctioning, did not explain why, in their interviews with OCR, the members of the Appeals Board had failed to mention these reasons as the basis for their decision.

Moreover, the Appeals Board, in its decision letter, in the interviews with OCR, and in the additional information provided at the request of OCR, cited no information particular to this Respondent on which it relied in concluding that the reduced sanction would meet the goals of sanctioning within its disciplinary system – that it would be sufficient to result in self-reflection by the Respondent, prevent such conduct by him in the future, or otherwise ensure the safety of the Complainant and the University community. Our review of the proceedings of both the original and the appellate hearings indicates that there was no change in the Respondent's attitude about or his understanding of the seriousness of the incident.

Nevertheless, the additional information provided by the University regarding the steps that will be put in place if and when the Respondent reenrolls at the University, as well as information regarding the scope, context, and dissemination of its sexual harassment and sexual assault procedures, could reasonably meet the Title IX requirement of preventing the harassment from reoccurring. This conclusion is based on the University's commitment to monitor closely the Respondent's adherence to the conditions of his reenrollment and probationary status, and to promptly investigate any allegation that the conditions are not being met.² Thus, we need draw no conclusion at this time as to whether the University discriminated against the Complainant by reducing the Respondent's sanction.

² OCR notes with concern the Complainant's statement that at a meeting with University officials in late fall of 2002, she reported that one of her friends saw the Respondent on campus visiting his girlfriend, after the Appeals Board's sanction had been imposed, in violation of his suspension. She further alleged that the University did not conduct an investigation to determine whether the Respondent was indeed on campus in violation of his sanction. She stated that she told officials at the meeting that she felt afraid and threatened by the Respondent's alleged presence on campus and asked if the University would take further action regarding this information. She stated that the officials told her that they could not do anything about the information because it was based on the word of one individual and it had occurred in the past. According to the Complainant, the officials told her that if she saw the Respondent on campus in the future, she could call the University police or the Office of Student Affairs if it was during regular business hours. The University disputes this, stating, first, that the Complainant did not report seeing the Respondent on campus and, later, that the Respondent may have been seen visiting his girlfriend in off-campus housing that is home to many of the University's students. OCR found credible evidence that the Complainant did raise this issue at a meeting with University officials on November 5, 2002, and that the University took no further action to determine the accuracy of this information. However, we were unable to determine whether the incident occurred on or off campus, and the University has provided assurances that it will effectively monitor the Respondent's behavior should he return to the University.

This concludes OCR's investigation of the above allegations, and we are closing this complaint effective the date of this letter. This determination letter addresses only the issues discussed herein and should not be construed to cover any other issues regarding compliance with Title IX that may exist.

The Complainant has been advised that no recipient or other person may harass, coerce, intimidate, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the laws OCR enforces, or because one has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under the laws OCR enforces. If any individual is harassed or intimidated because of filing a complaint or participating in an OCR investigation, the individual may file a complaint with OCR alleging such harassment or intimidation.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records. If OCR receives such a request, we will seek to protect, to the extent provided by law, personal information that, if released, could constitute an unwarranted invasion of personal privacy.

We appreciate the courtesy and cooperation that your staff extended throughout this investigation. If you have questions regarding this matter, please contact Ms. Deborah A. Kelly, the assigned Investigator, at (202) 208-7706.

Sincerely,



Sheralyn Goldbecker
Team Leader