

320 STEPHENS HALL
UNIVERSITY OF CALIFORNIA

March 16, 2016

J. DANIEL HARE
Chair, Academic Council

Subject: Report of the Joint Committee of the Administration and Academic Senate on Faculty Discipline

Dear Dan,

The Divisional Council (DIVCO) of the Berkeley Division discussed the Report of the Joint Committee of the Administration and Academic Senate on Faculty Discipline with input from our divisional committees on Faculty Welfare (FWEL); Diversity, Equity, and Campus Climate (DECC); and Privilege and Tenure (P&T). Because of the compressed review period, we did not have time to review the report in as great a depth or with as great a care as it deserves. We take this opportunity to remind the Office of the President that, given the importance of the issues addressed in the report, it should allow sufficient time for thoughtful advice and consultation. This is a key component of shared governance.

The discussion in DIVCO underscored the following salient points.

We echoed P&T's recommendation to summarize the Title IX and any subsequent disciplinary process in a clear, user-friendly format:

P&T strongly believes that the report would benefit from an annotated flow chart that maps out the different ways that SHSV [sexual harassment/sexual violence] reports can progress. This could also be done or augmented with hypothetical case studies and associated timelines.

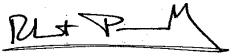
DIVCO and the reporting committees also welcomed clarification of the "three-year rule" which is often mischaracterized as a "statute of limitations." We support the report's recommendation to educate department chairs and other administrators about their reporting responsibilities, and the implications and practical effects of the three-year rule.

While we agree with many of the points raised in the P&T commentary, we also note that some of the issues raised in its report might be addressed in the revised policy on sexual violence and sexual harassment (SVSH). The committee did not, however, have

sufficient time to fully analyze the report in the context of the policy document. Going forward, it might be useful for the report to provide links directly to the relevant definitions and provisions in the SVSH policy, as appropriate.

Given the truncated timeline for divisional review, I am forwarding commentary from FWEL and P&T in its entirety, rather than a synthesis of our divisional position, as is customary. DECC did not have sufficient time to draft a written report, and thus presented an oral report to DIVCO.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Powell', with a stylized flourish at the end.

Robert Powell
Chair, Berkeley Division of the Academic Senate
Professor of Political Science

Encls. (2)

cc: Chancellor Nicholas Dirks
Executive Vice Chancellor and Provost Claude Steele
Wanda Ellison Crockett, Interim Chief Ethics, Risk and Compliance Officer and
Deputy Associate Chancellor / Chief Operations Officer
Donna Jones, Chair, Committee on Diversity, Equity, and Campus Climate
Mark Gergen, Chair, Committee on Faculty Welfare
Vern Paxson, Chair, Committee on Privilege and Tenure
Andrea Green Rush, Executive Director staffing Committee on Privilege and
Tenure
Diane Sprouse, Senate Analyst, Committee on Diversity, Equity, and Campus
Climate and Interim Senate Analyst, Committee on Faculty Welfare

March 10, 2016

TO: CHAIR, BERKELEY DIVISION OF THE ACADEMIC SENATE

Re: Report on Joint Committee on Faculty Discipline

Dear Ben,

The Faculty Welfare Committee endorses the recommendations in the Report of the Joint Committee on Faculty Discipline. We find the Report does a commendable job in clearing up some misconceptions about the ability of the Administration to take effective and quick action when a faculty member is accused of misconduct that warrants quick action. The recommended changes will improve an already sound system.

As the Report explains, the Administration has the power to place a faculty member on involuntary leave outside the discipline process during an investigation, if circumstances warrant. We concur in the recommendation to replace the current rule in APM-016, which imposes a 10-day deadline to file charges after placing a faculty member on involuntary paid leave, with a rule requiring that the faculty member be given notice of the reasons for the involuntary leave, including the allegations being investigated, within 5-working days of the imposition of the leave. It is in the interest of both the faculty member who is accused of violating the Code of Conduct and the University that the Administration has an opportunity to fully investigate an accusation before filing charges. Notice of the allegation within 5 days adequately protects the interests of the accused.

Under APM-015 and Senate Bylaw 336.B.4 disciplinary action may not be commenced against a faculty member if more than three years have passed between the time when the “Chancellor knew or should have known about the alleged violation” and the faculty member being given notice of the proposed disciplinary action. This so-called “three-year rule” simultaneously protects faculty from having to defend themselves from stale claims while ensuring the Administration has an opportunity to investigate allegations and take disciplinary action when warranted. The Report recommends the rule be clarified so that it is clear that the clock begins to run only when a violation is reported to an “academic administrator at the level of department chair or above or additionally, for an allegation of sexual violence, sexual assault, or sexual harassment, when the allegation is first reported to the campus Title IX Officer.” A sexual violence or sexual harassment claim might still fall through the cracks if a department chair (or higher administrator) fails to report a claim to the campus Title IX Officer. The Report recommends educating chairs and higher administrators of their reporting obligation to address this risk. We concur.

We concur in the Report’s recommendations that a standard format be developed for transmitting data on complaints of sexual violence or sexual harassment to UCOP, and that this data be transmitted periodically. We underscore the recommendation that the data exclude information that would identify the parties. We also concur in the recommendation that records of charges of violations of the Code of Conduct, and actions

taken in response to charges, be maintained in a manner that maintains confidentiality while enabling Administrators to determine if a faculty member accused of violating the Code of Conduct has faced earlier charges.

March 9, 2016

Dear Ben,

Please find appended P&T's comments on the Joint Committee report, per your request from last month.

Best wishes,

Vern

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On behalf of:

Steve Beissinger
Mary E. Berry
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Martin Head-Gordon
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Samuel Otter

Comments from UCB P&T on Report of the Joint Committee on Faculty Discipline

UCB Privilege & Tenure Committee members read and extensively discussed the draft Report on SVSH. Overall, P&T finds it to be a well-done and quite helpful document - comprehensive and thoughtful, doing an effective job of addressing a difficult set of issues. We do however have a number of comments and concerns.

* P&T strongly believes that the report would benefit from an annotated flow chart that maps out the different ways that SHSV reports can progress. This could also be done or augmented with hypothetical case studies and associated timelines. Doing so would help address some of the points we frame below.

* Regarding the discussion of Title IX procedures, the text should clarify the key distinction between an "investigation" versus a "formal investigation", and use a different term for the former (perhaps "initial complaint"). What determines when an initial complaint becomes a formal investigation? What are the procedures and standards for this determination?

* The report often uses the term "investigation" without the qualifier "formal". These instances should be disambiguated to make it clear whether the reference is to an initial complaint versus a formal investigation. For example, I.A.2 (page 2) states:

Consider including Senate faculty and/or other non-Title IX
Officers to augment teams at the time of the Title IX investigation

where it's not clear what level of investigation this refers to.

* I.A.4 (page 3) states: "At the beginning of a formal investigation, provide all parties with a clear written description of the Title IX and faculty discipline processes and notice of rights related to the process". Does this mean that for investigations not yet determined to be formal, the parties are not necessarily notified?

* The report should clarify what sort of information is conveyed, and by whom, at what other points in the process. How routinely are complainants and respondents brought up to date?

* Related to this, Appendix A lists eight recommendations made by the 2014 Presidential Task Force on Preventing and Responding to Sexual Violence and Sexual Assault, including (#8, p. 31):

Provide equitable respondent support services to faculty accused
of sexual violence or misconduct.

The report should describe progress on this important recommendation, beyond the current note ("Respondent support services were instituted for undergraduate students in July 2015. Work continues, by way of the Joint Committee, on faculty investigations, adjudication, and sanctions, to be followed by the same approach for staff.").

* We find it quite concerning that the reported dismissal/alternative settlement rates are so high. If possible, these should be distinguished between cases dismissed as unsubstantiated versus those resolved by some form of alternative settlement. The former would imply that many claims are brought without merit - though an alternative explanation would be the unhappy possibility that Title IX offices do not diligently assess initial complaints.

* Related to this, we found the analogy with the criminal justice process (page 17) unconvincing (apples-and-oranges) and somewhat apologist.

* We appreciate the need for some sort of review process concerning the imposition of interim measures such as involuntary leave. If P&Ts are expected to serve in this capacity, then this raises several issues that the Report should identify:

- (1) What standard of evidence does P&T use in its determination?
- (2) What evidence does P&T consider to make its determination?
- (3) What sort of time frame accords with "expedited"?

It appears to us that if expedited means turned around within a couple of weeks (which seems like the minimum that can be promised; maybe not even that during Summer), then the process would need to be something along the lines of: P&T operates for these appeals in a manner similar to a prima facie determination. A quorum of the Committee reads a set of documents; does not consider further evidence; and does not conduct any interviews. The Committee holds a private meeting to determine whether based on those documents the interim measure appears warranted. The decision gets written up in a timely fashion and returned to the Title IX office, the respondent, and perhaps the complainant.

Regarding the documents considered, where do these come from? The Title IX office, plus a write-up provided by the respondent explaining the grounds for their appeal?

* The text as written indicates that only the imposition of involuntary leave qualifies for such an expedited determination, but it would seem that other forms of interim measures should, too, such as no-contact or mandatory counseling. (Also, it was not clear to us just what involuntary leave entails - a campus stay-away?)

* I.A.3 on page 3 states:

Require Title IX Officers to inform the Chancellor or designee for faculty discipline

whenever the Title IX Office begins an investigation of a faculty respondent

The text should clarify (1) whether this refers to initial complaints or only formal investigations, (2) just what information is conveyed regarding the nature of the allegations and the identities of the parties.

* It was not clear the degree to which Title IX offices will facilitate tracking patterns of behavior, of either individuals or particular work environments such as departments. Will the reports conveyed to the Chancellor per the previous item have enough information to enable this?

* While we agree with the benefits of designating non-mandatory-reporter contacts, we identified three potential concerns.

(1) What resources and training will these contacts have? Under what circumstances would they become mandatory reporters?

(2) If the contact is a regular faculty member, as suggested, then they will at some point return to the regular pool of faculty. When they do, under what circumstances might they become obliged to report incidents they initially learned in their earlier role? (One possibility to address this concern would be to employ emeriti for this service.)

(3) A given situation (e.g., department) will need multiple contacts to avoid conflict-of-interest issues and ensure confidentiality.

* I.D.2 (page 5) states:

delays occur throughout the disciplinary process, including in administrative offices, for reasons beyond anyone's control

".. beyond anyone's control" comes across somewhat apologist in tone, since surely other delays also arise that could be avoided with different prioritizations by some of the parties.

* Regarding the three-year rule, I.D.2.c (page 6) states:

The three-year period begins when the Administration learns of the allegation.

...

ii. In addition, for an allegation of SVSH, the Administration is considered to have learned of the allegation when it is first reported to the Title IX Officer.

Does this mean when an "initial complaint" is made, or when a "formal investigation" begins? If the former, and the Title IX office concludes not to proceed to formal investigation, this would appear to undermine grievants who initially make a limited complaint but then much later return to the complaint to pursue it more vigorously.

* I.C.2.a (page 5) states

... replace the 10-day deadline to file charges after placing a faculty respondent on involuntary paid leave with provisions that are reasonable and realistic

We agree with this goal, but feel that this needs some sort of manageable bound for how long the process will take, particularly when burdensome interim measures are imposed.

* I.E.2 (page 8) mentions an "indefinite timeframe" for retaining records of discipline. It's not fully clear just what "indefinite" means, though presumably it's for at least the period of employment. (Also, a formatting glitch: this paragraph should be indented further.)

*In general, the report would benefit from a more explicit structure. We found the current outline organization difficult to work with. It would help to (1) number each subsection in full (e.g., "I.C.2.a" rather than just "a"), and (2) include a table of contents.

Additional points as of March 13, 2016:

* It would be valuable for the report to discuss the appeals process available to complainants at different stages, including the "initial complaint" stage. Statistics on the number and nature of such appeals should be kept and made available in some fashion.

* Some way of conducting "test complaints" should be considered as a way of auditing the effectiveness of / barriers present in the reporting procedures. It is worrisome that there does not appear to be a way of ensuring that the early stages of the procedure do not unduly dismiss well-founded complaints.