



320 STEPHENS HALL
UNIVERSITY OF CALIFORNIA

April 20, 2015

MARY GILLY
Chair, Academic Council

*Subject: Proposed Revised Presidential Policy on Sexual Harassment
and Sexual Violence*

Dear Mary,

On March 30, 2015, the Divisional Council (DIVCO) of the Berkeley Division discussed the proposed revised Presidential Policy on Sexual Harassment and Sexual Violence, informed by reports of the divisional committees on Diversity, Equity, and Campus Climate (DECC); Faculty Welfare (FWEL); Privilege and Tenure (P&T); Graduate Council (GC) and Undergraduate Council (UGC). While DIVCO welcomes the proposed revision as an improvement over the current policy, we agree with the reporting committees that a number of concerns should be addressed before the policy is adopted. Accordingly, to this letter I attach a compilation of divisional commentary on the proposed revision.

DIVCO believes that wider review and consultation will strengthen the proposed revision. Toward that end, we strongly urge the Office of the President to work with experts in this field, including UC law faculty, before circulating it for final review.

In closing, I note that much of the discussion in DIVCO, and in the DECC report, focused on campus-level issues and concerns. We believe that a strong, clear systemwide policy is necessary, but not sufficient to address this important matter. We underscore the need for each campus to develop an implementation plan tailored to local circumstances, and for the allocation of sufficient resources to support these efforts.

Sincerely,

A handwritten signature in black ink that reads 'P Papadopoulos'.

Panos Papadopoulos
Chair, Berkeley Division of the Academic Senate
Chancellor's Professor of Mechanical Engineering

Encl.

Cc: Donna Jones and Christine Wildsoet, Co-chairs, Committee on Diversity, Equity and Campus Climate
Mark Gergen, Chair, Committee on Faculty Welfare
Vern Paxson, Chair, Committee on Privilege and Tenure
Lisa Alvarez-Cohen, Chair, Graduate Council
David Presti, Chair, Undergraduate Council
Andrea Green Rush, Executive Director staffing the Committee on Privilege and Tenure
Linda Song, Associate Director staffing Graduate Council and Undergraduate Council
Diane Sprouse, Senate Analyst, Committee on Diversity, Equity, and Campus Climate
Anita Ross, Senate Analyst, Committee on Faculty Welfare

**Compiled commentary of Berkeley Division reporting committees and
councils
April 21, 2015**

The policy does not address the dual position of Graduate Student Instructors (GSIs) who are both a student and a supervisor. The definition of harassment on p. 3 from Policy 100 on Student Conduct and Discipline § 102.09 covers conduct that is "severe and/or pervasive, objectively offensive, and substantially impairs a person's access to University programs or activities." Under this rule a GSI who made unwanted sexual advances towards an undergraduate who the GSI supervised would be guilty of harassment only if the advances were severe or pervasive and substantially harmed the undergraduate. The general definition of harassment is not nearly so forgiving. It covers any "conduct of a sexual nature . . . that affect's or interferes with a person's . . . education, and/or educational performance." Nor is it clear whether a GSI is a "Designated Employee" who is under a reporting obligation. If the drafters of the policy decide not to address the special issues raised by GSI, then they might make it clear that campuses are expected to develop appropriate rules for GSIs.

We found several items that we think may be worth passing on to be addressed by the appropriate people before the policy is finalized.

At p. 15, second paragraph, the Policy states "When a report is received, managers, supervisors, and designated employees are required to notify the Title IX Officer . . . or other appropriate official designated by the location . . ." Is a failure by a faculty member to report a basis for disciplinary action against the faculty member under APM 15?

On the same point, does the University have discretion with regards to who is a mandatory reporter? It might also be helpful to clarify when a faculty member has a reporting obligation under applicable law apart from the Report. Coming at the last question from the other direction, to what extent does the Policy impose a new reporting obligation?

At p. 2 the Policy defines "sexual harassment" to include "conduct of a sexual nature, including verbal, nonverbal, or physical conduct—behavior that affects or interferes with a person's employment, work, education, and or educational performance." Appendix II (p. 27) explains: "Because the forms of unacceptable behavior listed in the Faculty Code of Conduct also apply to sexual harassment or sexual violence, a violation of the University's Policy on Sexual Harassment and Sexual Violence also constitutes a violation of the Faculty Code of Conduct." APM-015 does indeed prohibit under the Faculty Code of Conduct "Discrimination, including harassment . . ." But it does not define harassment.

The Policy may broaden the definition to cover conduct that was not heretofore considered sexual harassment and raising concerns for over breadth. This possibility is suggested by the narrower definition of "sexual harassment" in the

Student Code of Conduct, which the Policy incorporates by references on p. 3 as “unwelcome conduct of a sexual nature that effectively denies equal access to the University’s resources and opportunities because such conduct is severe and/or pervasive, objectively offensive and substantially impairs a person’s access to University programs or activities.”

The definition of harassment that applies to a faculty member does not require sexual conduct that is severe and/or pervasive, objectively offensive, and substantially affects or interferes with a person’s employment, work, education, and or educational performance. This raises a possible concern for over breadth. The Committee thought this concern could adequately be addressed by adding the word reasonable to the definition so it covers: “unreasonable conduct of a sexual nature, including verbal, nonverbal, or physical conduct, that affects or interferes with a person’s employment, work, education, and or educational performance.”

Overall, the document appears very comprehensive, although we have identified some areas in need of clarification and/or deficiencies ... Nonetheless, our more serious concern is to ensure that implementations of this policy lead towards the goal mandated by the Title IX investigations: to ensure that students are not denied the ability to participate fully in educational and other opportunities due to sex.

Thus the policy and its recommendations ought to lead to notable improvements not just in community culture and behavior on the UC Berkeley campus, but also in the administrative handling of assault reports ...

A. Areas in need of clarification

P6 and related later sections (e.g. page 9), states in relation to mandatory reporting responsibilities that *“Generally, this includes all employees, including academic appointees unless s/he has been identified as an employee who can provide confidential consultations for the University community pursuant to Section V.F. of this Policy. Designated employees must be informed of their own reporting responsibilities.”* Given the relatively limited resources available to support victims in distress and the potential value of having access to people (faculty &/or staff) that such people may already know and trust, this clause seems very restrictive and counter to the needs of the victim. Trained ombudspersons, strategically placed in units across the campus, may go some way to dealing with this problem. Also, victims of violence (sexual or otherwise) should automatically be assigned an advocate who can keep information confidential as requested by the victim.

P7. *“Any staff, student or academic employee in violation of this Policy may be subject to disciplinary action, up to and including dismissal.”* This sentence sets the wrong tone – a violation should always come with disciplinary action, which itself can be tailored to the nature of the violation.

P8. *“For example, policies that concern faculty-student relationships are found in The Faculty Code of Conduct.”* This sentence needs to be expanded to cover all teaching

relationships, including those between graduate student instructors and undergraduate students. It would also have more impact if the relevant sections of the Faculty Code of Conduct were extracted and clarified, or at least added as an appendix to this policy.

Clarifications are needed e.g. in what may or may not constitute a supervisory role. We recommend an unmistakable discouragement of faculty-undergraduate relationships such as in the recent Harvard policy: "No faculty member shall request or accept sexual favors from, or initiate or engage in a romantic or sexual relationship with, any undergraduate student." Similarly clear ground rules are needed for faculty-graduate student and GSI-undergraduate relationships.

"While the University understands the desire for confidentiality and will consider such a request, the University also has a legal responsibility to the respondent. Depending on the situation, there are cases in which the University needs to inform the respondent of the source of the allegation. (Information regarding confidentiality can be found in Section V.E and F.)" This clause will always work against reporting by victims, due to fears of retaliation and various forms of likely damage to the victims academic career. It is also not clear from related sections in this document (e.g., P10), just how well developed and so fail-safe are the processes to monitor for and protect against retaliation. As an educational institution, rather than following fixed legal procedures, we ought to have a right (and in fact mandate) to prioritize the protection of victims over procedural interests of perpetrators - in particular in cases of proven and repetitive patterns of seriously harmful offenses.

P10: *"Generally, disciplinary action will be taken when the conduct is sufficiently severe, persistent, or pervasive that it alters the conditions of employment or limits the complainant's opportunity to participate in or benefit from educational programs."*

It is not clear that this wording covers the case of the repeat offender, involving multiple different victims.

P11. *"Each location is responsible for describing each type of disciplinary proceeding used by the location."* Might it not be of value for at least all UC campuses to work together to reach a consensus on what represents acceptable behavior and processes for dealing with unacceptable behavior? It would send a message to the community at large that UC is committed to effectively addressing this pervasive problem.

P12. A. *Location Responsibilities*

"3. Provide mandatory training and education about sexual harassment and sexual violence prevention to all students, faculty, other academic staff, and staff."

Other than for students, training is limited to on-line programs and is insufficient, if the aim is to change culture.

"10. Designate trained individuals to serve as resources for members of the University community who have questions or concerns regarding behavior that may be sexual harassment or sexual violence." How are these people selected for this tasks, i.e., what credentials are required, and how will they be identified by those in

need?

“11. Conduct proceedings that incorporate these additional elements:

- *Timely access to any information that will be used after the fact-finding investigation, but during informal and formal disciplinary meetings and hearings, to the complainant, the respondent, and appropriate officials.”*

Who will do the fact-finding? What procedures will be in place for ruling out officials with conflicts of interest etc.? Will all cases be handled the same or is there a need for specialized personnel with extra training to handle cases involving violence?

“P14. The responsibilities of the Title IX Officer (Sexual Harassment Officer) include, but may not be limited to, the duties listed below:

- *Identify and address any patterns or systemic problems that arise during the review of sexual harassment and sexual violence complaints.”*

Little mention is made in this policy document of the confidential reporting mechanisms. This would seem a mechanism for identifying systemic patterns and/or repeat offenders, which should be highlighted in relevant places in this document.

“P18. The individual(s) accused of conduct violating the Policy must be provided with a copy of the written request for Formal Investigation or otherwise given a full and complete written statement of the allegations, and a copy of the Policy; and The individual(s) conducting the investigation must: iv) For cases involving allegations of sexual violence, the individual(s) conducting the investigation must receive annual training on issues related to sexual violence. Such training includes how to conduct an investigation that protects the safety of the complainants and promotes accountability.”

A set of selection criteria needs to be developed as part of this process, to screen out as possible committee members, those prone to stereotyping and/or overly affected by unconscious biases.

P22. “F. Resources, Confidentiality of Consultation and Reporting Sexual Harassment and/or Sexual Violence

Such confidential resources include:

- *a survivor advocacy office,*
- *licensed counselors in employee assistance programs, and*
- *licensed counselors in student counseling centers.*

Individuals who consult with confidential resources will be advised that their discussions in these settings are not considered actual reports of sexual harassment or sexual violence. Without additional action by the individual, these discussions will not result in any formal action by the University to resolve their concerns.”

Victims choosing not to report otherwise should be made aware of and strongly encouraged to use the anonymous ethicspoint reporting system as a mechanism to identify systemic problems and/or repeat offenders.

We found the reference to abuse against “one’s self” in the context of dating and domestic violence confusing (see the first bullet under section C, “Abuse”, on p. 4 of clean copy). That reference should either be clarified or removed.

Members agreed that the focus of the proposed policy on protections for and consideration of the rights of complainants was appropriate and were aware of the devastating consequences that failure to take accusations of sexual violence seriously in the past has wrought. Members were also keenly aware of the potentially devastating consequences of an unsubstantiated or false accusation, especially given the potential of social media to spread hearsay. While there is adequate protection of the rights of respondents in terms of privacy and due process, members would like to see language that ensures that respondents are clearly informed about their rights in this process. Members also agreed that the potential for ambiguity, confusion, and damaging ramifications from claims of and instances of sexual harassment and sexual violence highlights the need to educate students about definitions, processes, and consequences.

Indeed, members believe that changing norms around what constitutes consent in particular makes education by the university imperative. We were thus pleased to learn that UCOP and the campus are developing mandatory training along these lines and endorse these efforts.

Members were troubled by the statement on page 4 (clean copy) that this policy will only cover stalking that could be construed as sexual or gender based in nature because it seems to place the responsibility on students to differentiate between different types of stalking, which could confuse them regarding what this policy covers, and thus might limit its protections.