



320 STEPHENS HALL
UNIVERSITY OF CALIFORNIA

December 5, 2018

ROBERT MAY
Chair, Academic Council

Subject: Revised Presidential Policy on Sexual Violence and Sexual Harassment

Dear Robert,

On November 19, 2018, the Divisional Council (DIVCO) of the Berkeley Division discussed the proposal cited in the subject line, informed by the commentary of our divisional committees on Diversity, Equity, and Campus Climate (DECC); Faculty Welfare (FWEL); Privilege and Tenure (P&T); Graduate Council (GC); and Undergraduate Council (UGC). Given their extensive commentary and suggested textual revisions, both the P&T and UGC reports are appended in their entirety.

The discussion in DIVCO highlighted a number of concerns.

DIVCO discussed the proposed policy's provisions concerning public speech. Both the P&T and UGC reports highlight inconsistencies and lack of clarity that should be addressed. P&T finds the policy to be "ambiguous and at times overly broad, if not inconsistent, in its treatment of public speech and pronouncements and the discretion it accords to the Title IX office vis-à-vis such statements." We also share UGC's concern about "reporting protocols for responding to class assignments that suggest a violation has taken place" and the potential effect of these provisions on students' self-expression. DIVCO recommends that these provisions be reconsidered to ensure clarity and to minimize unintended effects on students and faculty.

DIVCO is concerned about the degree of discretion and authority vested in the Title IX office under the proposed policy vis-à-vis P&T. The P&T report notes that the proposed revision affords Title IX offices considerable leeway and opportunities to extend timelines. While this may be appropriate and necessary in some situations, we note that the systemwide Senate has been instructed to codify restrictive timelines for the execution of P&T's responsibilities with respect to faculty respondents. This disparity is especially noteworthy given that the Title IX office is expected to make its determination by the "preponderance of the evidence" while P&T's determination is made based the higher evidentiary standard of "clear and convincing evidence."

DIVCO also discussed different models of reporting responsibilities for employees, specifically an alternative approach used at the University of Oregon as cited by FWEL. We understand that the definition of a responsible employee is a settled matter for the University of California, but we also note that the mandatory reporting requirement can create a difficult trade-off for faculty when responding to student concerns and disclosures.

Finally, DIVCO seconded the serious concerns about privacy and confidentiality described in the P&T report. We strongly support strengthening the language as recommended by P&T: "the Complaining Witness "should" and not simply "can" be advised as to the confidential and sensitive matter of personnel disciplinary actions."

Sincerely,



Barbara Spackman
Chair, Berkeley Division of the Academic Senate
Cecchetti Professor of Italian Studies and Professor of Comparative Literature

Encls. (2)

Cc: David Ahn, Chair, Committee on Diversity, Equity, and Campus Climate
Terrence Hendershott and Sheldon Zedeck, Co-chairs, Committee on Faculty Welfare
Marianne Constable, Chair, Committee on Privilege and Tenure
John Battles, Chair, Graduate Council
Jonah Levy, Chair, Undergraduate Council
Andrea Green Rush, Executive Director staffing Committee on Privilege and Tenure
Sumei Quiggle, Associate Director staffing Graduate Council and Undergraduate Council
Linda Corley, Senate Analyst, Committee on Diversity, Equity, and Campus Climate
Sumali Tuchrello, Senate Analyst, Committee on Faculty Welfare



320 STEPHENS HALL
UNIVERSITY OF CALIFORNIA

October 27, 2018

BARBARA SPACKMAN
Chair, Berkeley Division of the Academic Senate

Subject: Revised Presidential Policy on Sexual Violence and Sexual Harassment

Dear Barbara,

The Committee on Privilege and Tenure discussed the proposed revised Presidential Policy on Sexual Violence and Sexual Harassment. We understand the seriousness of the issue and the need to respond to it at the same time as we want to ensure due process. Within that context, we offer four general comments about the proposed policy, followed by specific points that are keyed to particular passages in the draft (marked in bold).

General comments about policy:

First, the proposed policy clearly privileges the proceedings of the Title IX Office and in effect enhances the authority of the former compared to that of the Senate Committee on Privilege and Tenure (P&T). We note, for instance, that in the proposed Presidential policy here under review, the Title IX Office is granted leeway to pursue various alternative resolution processes. The Title IX Office is given "typically within 60 to 90 business days" from the date of its notification of charges (to the Complainant and Respondent) to prepare a formal investigative report and determination as to how to proceed (which is based on a "preponderance of evidence" (more likely than not) standard). Its time limits, which are acknowledged to depend on "specific circumstances, including the complexity of the matter and the severity and extent of the alleged conduct" may also be extended "for good cause" (which is not defined in this document). The Sept 17, 2018, cover letter draws attention to the "addition of a 30 to 60 day timeframe for Alternative Resolution, and extension of the timeframe for the Formal Investigation process from 60 days to 90 days." By contrast (in proposed Senate Bylaw 336 revisions which have been prepared in response to SVSH concerns but will

apply to all disciplinary actions coming before P&T), P&T's timeframe gets shrunk: it is granted only 30 (calendar) days to prepare its report and recommendation (following a hearing that must be scheduled within 60 (calendar) days of when charges are sent) despite the fact that its recommendation of a sanction is based on a stricter "clear and convincing" standard.

Second, the proposed policy is ambiguous and at times overly broad, if not inconsistent, in its treatment of public speech and pronouncements and the discretion it accords to the Title IX office vis-à-vis such statements. The cover letter draws attention to "Provision for the Title IX officer to initiate investigations despite the absence of an identifiable, individual respondent or, alternatively, the lack of a specific complainant." The proposed policy states that the Title IX officer "may choose to initiate and conduct a Formal Investigation despite the lack of a Complainant where there is, for example... allegations [sic] of Prohibited Conduct covered by the Policy in the public realm (such as reports in the news or social media)." (**V. A. 5. b. v - page 17, clean copy**). Response to **FAQ # 9** meanwhile states that "statements made about incidents during such [public awareness] events [such as "Take Back the Night"], will not require an investigation unless the survivor initiates a complaint." (**p. 25, clean copy**). While we can see that "choosing" and "not requiring" are not necessarily incompatible, we are concerned about the status of statements made in the course of news reports about public events. Is the point that Title IX officers have discretion to initiate investigation in such cases despite lack of a complainant *or* that those who participate in public events can be assured that their statements will not be investigated without their consent? At minimum, the **bullet point on p. 17** needs to be restricted to sufficiently compelling circumstances and the policy regarding statements made during events such as Take Back the Night clarified.

Third, P&T remains deeply concerned about the privacy of all parties and the integrity and confidentiality of Title IX and P&T proceedings. Despite the provisions of the policy and whatever the policy regarding confidentiality of the Title IX report, we believe that *only* the recommendation that results from a P&T disciplinary hearing, and *not* the report articulating the justifications for that recommendation that are based on the confidential P&T hearing, should be released to a Complaining Witness, who is after all not formally a party in a disciplinary action. (See our questions and comments concerning **Discipline, p. 19**, below.) Even if our view is not adopted however, the response to **FAQ # 6** is misleading. It states, "The Complainant *can* be advised of the confidential and sensitive nature of personnel and student disciplinary matters that arise under this Policy but should not be restricted from further disclosing the information" (emphasis added). In a disciplinary hearing against a faculty member brought by the Administration before P&T (and perhaps also in disciplinary actions brought against students?), the policy's "Complainant" is more properly referred to as a "Complaining Witness." (This might be noted in **Definitions on p. 6**.) Second and more importantly, the Complaining Witness "should" and not simply "can" be advised as to

the confidential and sensitive matter of personnel disciplinary actions. (Please see below regarding "**Disclosure of Information**," pp. 16 and 17, for additional comments along these lines.)

Finally, we note that the use of a modifier, such as "typically within 60 to 90 business days," following the word "promptly" in directives about timing (pp, 16, 18, etc) renders the word "promptly" unnecessary.

Specific concerns as to the draft (page numbers refer to clean copy):

p. 9. III.E.2 Retaliation says "(See Section II.C)" but no reference to "retaliation" appears in II.C. Based on current placement of "Retaliation" under "Other Prohibited Conduct," it appears that the reference should be to Section II.B.e

p. 11 reference to "employment" in final sentence is difficult to follow: "Non-compliance with this Policy, other than violations of Prohibited Conduct, may result in *educational efforts or employment or educational consequences* up to and including informal counseling, adverse performance evaluations, corrective actions, and termination" (emphasis added). Change wording or word order or insert "consequences" after "employment" to clarify: "educational efforts, employment consequences, or educational consequences"

p. 13, 2d paragraph of item 3: "Student Affairs Offices" - at UCB, this would refer to the Student Conduct Office; this office should not be confused with the departmental Student Affairs Officers who advise students as to majors and so forth

p. 13, item 3 - for clarity and to indicate urgency of provision in 3d paragraph, reverse the order of **paragraphs 2 and 3**

p. 16 "If the Title IX Officer decides not to proceed with a Formal Investigation, the Title IX Officer shall inform the Complainant that the ability to provide remedies may be limited, but the Title IX Officer shall nonetheless afford such remedies as are consistent with maintaining privacy and the absence of an administrative finding" does not make clear what "**the absence of an administrative finding**" refers to. "If the Title IX Officer decides not to proceed with a Formal Investigation," then a formal disciplinary action in which charges are brought by the administration against a Respondent (such as a P&T hearing regarding a faculty member or presumably the equivalent in situations in which a student is accused) will not occur. Need to clarify whether "the absence of an administrative finding" refers to the lack of such a disciplinary action and its findings or whether the phrase refers (redundantly) to the lack of a Title IX Formal Investigation's findings.

pp. 16-17, Formal investigation. b ii “Disclosure of Information” – change “may” to “should” in “Participants in an investigation *may* be counseled about the importance of keeping information learned through the investigation private” (emphasis added).

p. 17 “Disclosure” continued: “Witnesses will be notified that the information they provide and their identities are typically disclosed to the Complainant and the Respondent.” Does this refer to all information provided or only to information that makes it into the Title IX report of the Formal Investigation?

p. 17 “allegations of Prohibited Conduct covered by this Policy in the public realm (such as reports in the news or social media)” Please see third general comment above.

p. 17 “Grievance/Complaint Procedures for Employees” – this section requires that grievances or complaints concerning SVSH that are filed elsewhere (with a union or P&T?) be forwarded to the Title IX officer for processing, after which the grievance may be reactivated. Does this mean that a grievant or complainant loses control of the grievance or complaint to Title IX unless they first begin outside Title IX? What if the time limits for filing are different under Title IX and for the other entity?

p. 19, “8.c. Discipline” states that if the matter results in a disciplinary proceeding, “at the conclusion of that proceeding, the Complainant and the Respondent will be contemporaneously informed in writing of the outcome of the disciplinary proceeding, including the final determination with respect to the alleged offense, any discipline that is imposed, and the rationale for the results.” We again note that in a disciplinary proceeding before P&T, the Complainant in the Title IX action becomes the Complaining Witness, while the Administration and the faculty member are considered parties. P&T sends the parties copies of its hearing report, which contains its reasoning for advisory recommendations that are addressed to the Chancellor. What exactly is the “outcome,” the “final determination,” and the “rationale for the results” that the Complaining Witness, as distinct from the Administration, is to be informed about? What does/should the Complaining Witness receive? What or when exactly is “the conclusion of that [disciplinary] proceeding”? Is Complaining Witness entitled to the P&T hearing panel’s recommendation to the Chancellor? To its report as to such recommendation? To something other than the Chancellor’s “final determination” as to sanctions? **FAQ # 2** defines a “result” or “outcome” as including “a written description of any initial, temporary, and final decision made by any authorized person, which aims to resolve a disciplinary matter. The result must disclose any discipline imposed and the rationale for the result and the discipline.” Does a P&T hearing panel’s advisory recommendation and the reasoning behind such recommendation articulated in its heretofore confidential report to the Chancellor constitute an “outcome” to which a complaining witness is entitled and, if so, when? (We have indicated what we think in our third general comment above; here we limit ourselves to pointing out textual ambiguities.)

p. 21. Note states that “The requirements of #3, 4, and 5 above are for locations with students only. However, ANR, UCOP, and LBNL should coordinate delivery of these services with associated campuses or affiliated organizations.” Do requirements of **#3, 4, and 5** (for CARE, Respondent Services Coordinator, CMT and CCRT) apply only to students then or only to locations with students?

p. 22. #11 - there is no reference here or elsewhere in the document to informing respondents of any of their rights or of available services, including access to the respondent services coordinator that is provided for on **p. 21 #4**.

I hope this is helpful. If you have questions, please let me know.

Sincerely,

A handwritten signature in cursive script, appearing to read "M. Constable".

Marianne Constable
Chair, Committee on Privilege and Tenure
Professor of Rhetoric



320 STEPHENS HALL
UNIVERSITY OF CALIFORNIA

November 8, 2018

PROFESSOR BARBARA SPACKMAN
Chair, Berkeley Division of the Academic Senate

*Re: UGC Comments on the Proposed Revised Presidential Policy
on Sexual Violence and Sexual Harassment*

Dear Chair Spackman,

The Undergraduate Council praised the revisions as a whole, but had a few questions that we hope Divisional Council considers addressing.

The first concerns the circumstances under which some forms of speech might be excluded from the requirement to report. The current document cites two specific exceptions: public awareness events such as Take Back the Night, and information disclosed by an individual participating in IRB approved research. We suggest that rather than simply mentioning Take Back the Night the committee alter the language to include “public performances, protests, or public awareness events such as poetry readings, Take Back the Night protests, Vagina Monologue performances, and other forms of creative public expression.”

This led to our second concern regarding reporting protocols for responding to class assignments that suggest a violation has taken place. Such disclosures could emerge within the context of an analytical paper in which the student describes their experience in an anecdote or through an appeal to experiential evidence, or as part of a creative writing assignment such as a poem, journal entry, play, film, etc. The relevant issues here include respecting the creative expression of students, including recognizing student work as privately held intellectual property; not wanting to limit or hinder forms of self-expression; avoiding blanket statements as part of class orientation that would proactively warn students to not disclose reportable offenses in writing or in class discussions. The Committee feels that forms of creative or analytical expression should be protected from disclosure protocols, but would appreciate guidance for faculty in distinguishing the difference between potentially exempted statements that surface through class assignments and how discussion of these assignments might lead to disclosures that would need to be reported.

The third issue that the Committee felt merited greater elaboration was a discussion of potential consequences associated with faculty’s failure to report.

Sincerely,



Jonah Levy
Chair, Undergraduate Council



Juana María Rodríguez
Vice Chair, Undergraduate Council