



320 STEPHENS HALL  
UNIVERSITY OF CALIFORNIA

October 23, 2015

J. DANIEL HARE  
Chair, Academic Council

*Subject: proposed revisions to the Presidential Policy on Sexual Violence and Sexual Harassment*

Dear Dan,

The Berkeley Divisional Council discussed the proposed revisions at its October 19<sup>th</sup> meeting with input from our divisional committees on Faculty Welfare; Diversity, Equity, and Campus Climate (DECC); and Privilege and Tenure. Because of the compressed review period, none of those committees (some of which could only engage via email exchange) nor Divisional Council thought they had time to review the proposed Policy in as great a depth or with as great a care as it deserves. In particular, the Divisional Council did not reach complete consensus, which is reflected in this memorandum.

The Divisional Council generally agreed on the following points:

- In the last bullet point of Section II.C.6 (p. 7), faculty are not explicitly mentioned. If they are to be included, then this should be clearly stated. If they are not, then a phrase along the lines of "... Unit (ORU), but not faculty members otherwise" should be added. With reference to the same bullet point, should directors of centers be added? Alternatively, it could be prudent simply to replace the bullet with "Managers and Supervisors as defined in XX," where XX is some University document or relevant State law that defines managers and supervisors for these purposes.
- The privacy protections in Section III.C.3 should be stronger: to wit, the University should commit to keep reports confidential to the fullest extent permitted by law. The rationale for this is that the lack of procedural safeguards and the preponderance-of-evidence standard mean a non-trivial risk of erroneously finding an individual violated Policy. The potential severe adverse consequences for an individual from such error—and the consequent litigation risk to the University—would thus argue for strict confidentiality.
- It should be clarified in Section IV.F whether or not a failure to fulfill a reporting obligation is itself an action subject to investigation under Policy that could lead to a Report and the Remedies specified in the Appendix.
- Clarification is also required in Section IV.F concerning the phrase, "Non-compliance with this Policy, other than violations of Prohibited Conduct, may

result in employment or educational consequences up to and including informal counseling, education, adverse performance evaluations, corrective actions, and termination.” Who decides when non-compliance (*e.g.*, failure to report) is actionable? Who decides what the appropriate consequences will be? For faculty, one might conjecture that non-compliance would be actionable if that is deemed a violation of the Faculty Code of Conduct, with pursuant consequences determined through the usual procedures; but if so, this should be clearly stated.

- Section V.A.5 should be clarified to state that the findings in a Report, although they can be used as evidence, are not necessarily binding or determinative in a further disciplinary or grievance proceedings. Such clarification is needed, in part, because the standard of proof for finding a violation under the Presidential Policy, a preponderance of the evidence, differs from the standard required in other proceedings. An additional rationale for clarification is that the procedures under the Presidential Policy are streamlined and lack normal procedural safeguards.
- In light of the Marcy case, it was thought wise to insert language to ensure the Policy is consistent with the provisions of Senate Bylaw 336, particularly in regards to the effect of an investigation under this Policy with respect to the statute of limitations for disciplinary actions.
- Section V.B.6: although this matter is specified as being left to the Locations, it was unclear what would constitute adequate and appropriate implementation of the mandatory annual training and who would determine whether a Location’s training met the requirements of this Policy. Additionally, what are the sanctions Locations can impose on those individuals who either fail to complete the mandated training or fail to complete it satisfactorily (whatever that might happen to mean)? The Policy should provide answers to these questions.

The following were discussed in Divisional Council, but no clear consensus or conclusion was reached.

- Concerns were raised about Complainant and Respondent’s right to representation when personally interviewed and at any related meeting as set forth in Section V.A.4.b. What if Complainant or Respondent wishes an attorney present but cannot afford one? What role can the representative play (can, *e.g.*, s/he offer advice during an interview or related meeting, ask questions of the Investigator, etc.)? Section VII.1 might seem to offer some answer to this last question, but it then begs the question of what are the “certain restrictions” the institution can impose and the criteria by which it can decide to impose them.
- Some members of Divisional Council viewed the Policy as remedial in focus, serving to protect the Complainant and not focused on disciplining the Respondent. There was a debate as to whether it sufficiently protected the Complainant, with the DECC committee chair arguing strongly that it fell far short of providing adequate protections and support for Complainants. Yet others viewed it as an adversarial process and worried about the potential negative consequences that could arise given the limited protections afforded the Respondent, including no clear statement of her/his rights, with respect to the standard of proof, ambiguity as to what constituted permissible evidence, access to counsel, and her/his own intoxication or other factors affecting her/his mental abilities not being grounds for her/his defense.

- A concern was raised about the Policy's apparent silence concerning the consequences for knowingly making a false complaint.

The following were raised by one or more committees reporting to Divisional Council, but were either not discussed or not discussed at length by Divisional Council. I include them because they nonetheless seem points worthy of consideration.

- Section V.A.5 implies Complainant and Respondent have rights of appeal. It is, however, unclear to whom an appeal is made and what would constitute grounds for an appeal.
- Appendix IV part (v): a question was raised as to whether a Title IX Coordinator can require a faculty member to “undergo training, including sexual harassment training, anger management training, and periodic refresher classes” without a formal disciplinary proceeding as set forth in the APM and Senate Bylaws.
- Although a faculty member could be guilty of sexual harassment through her/his classroom conduct, there are also issues of academic freedom pertaining to teaching that involves sexual material (*e.g.*, a discussion of sexual assault in a law course). Consequently, there could be room to clarify the protections for teaching such topics in Section III.D.
- A question was raised concerning *quid pro quo* harassment (Section II.B.2.a.i) in which it is alleged that a person's submission to such conduct is *implicitly* the basis for employment decisions, academic evaluation, etc. A view was expressed that if the Policy were to be consistent with the law governing civil actions, then it must be shown that the Respondent *intended* acceptance of the sexual contact, proposition, etc. to be a condition for an employment decision, academic evaluation, etc.; moreover, in this regard, the Complainant's *inference* of such a condition is not considered sufficient proof. By what means, then, is intent to be ascertained in determining whether behavior was *quid pro quo* harassment absent any explicit statement of intent by the Respondent?
- The following typographical errors:
  - Section II.B.1.b.i: the word “harm” or “injury” is missing from the end of the last sentence.
  - Section II.B.1.c: the phrase “... by other University including ... is missing something between “University” and “including.”

Regards,



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 Chair, Berkeley Division of the Academic Senate  
 Thomas & Alison Schneider Distinguished Professor of Finance & Professor of  
 Economics

cc: 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

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