NEW FEDERAL TITLE IX REGULATIONS ON SVSH: Implications for Privilege & Tenure

Background

On August 14, 2020, new federal Title IX regulations from the U.S. Department of Education ("DE") went into effect. The regulations detail how UC must respond to certain complaints of sexual misconduct ("DE-Covered Conduct"). Though UC administration has serious concerns with some aspects of the regulations, it must comply as a condition of federal funding.

The regulations required significant changes to UC's Sexual Violence and Sexual Harassment ("SVSH") Policy and related procedures. Revisions were made this past summer and are in place. In addition, there are two matters for of specific relevance to the Senate. The first relates to the evidentiary standard used in P&T proceedings for cases involving SVSH and is the subject of this review. The second, now under consideration by UCPT, relates to concerns about the ways in which hearings now mandated at the Title IX phase duplicate those conducted by divisional P&T committees. A proposal to address duplication may come forward later this academic year.

Conflict in Evidentiary Standard Requirements

The new regulations require use of a single evidentiary standard in all cases alleging DE-Covered Conduct, regardless of the respondent's identity (i.e., whether faculty, students, or staff). While they do not specify which standard to employ, state law requires the University use the "preponderance of the evidence" standard in SVSH matters involving students. Existing Senate Bylaw 336, however, requires use of the "clear and convincing" standard in P&T hearings. Accordingly, formal Senate requirements are now at odds with the intersection of state and federal law.

As an interim response to the regulations, UCPT in August issued an advisory to divisional hearing committees (see attached). The advisory stated that, after any P&T hearing following a DE grievance process, hearing committees should evaluate evidence under both standards and, in the findings of fact, conclusions and recommendations, should include analysis under both standards; the Chancellor will then apply the preponderance standard in deciding sanctions. *While important to have put in place this interim accommodation, the Senate must act to implement a long-term solution to ensure compliance*.

Issues to Consider

The interim accommodation presents several difficulties for the University. Most centrally it still allows for different evidentiary standards to be used in SVSH cases depending on the status of the individuals involved. In doing so, the current practice privileges some members of the University community over others regarding allegations of the same type of misconduct—a condition contrary to the core value of providing a fair and equitable workplace for all employees.

In addition, there are two important issues to note with respect to the federal context. First, the call to resolve conflicting standards is not new. In February 2018, UC Berkeley entered into

a Resolution Agreement with DE's Office for Civil Rights ("OCR"), following OCR's review of the campus's handling of SVSH cases. OCR stated in its Letter of Findings that use of the higher clear and convincing standard for faculty discipline matters, instead of the preponderance standard used for students and staff, sets up a "two-tier system." Second, though promulgated under the current federal administration, the requirement for a single evidentiary standard in all cases alleging DE-Covered Conduct, regardless of the respondent's identity, is very unlikely to be reversed even if there is a change in national leadership.

Proposed Bylaw Revision

Attached is a proposed revision to Senate Bylaw 336.F.8 that calls for the use of the preponderance standard in P&T hearings for cases of alleged violation of the University's SVSH policy. The proposal references the UC SVSH policy rather than DE-Covered Conduct since the former is somewhat broader and consistency in practice with respect to all misconduct covered by that policy is desired.

GUIDELINES FOR DISCIPLINARY HEARINGS
UNDER REVISED ACADEMIC SENATE BYLAW 336
(Eff. July 1, 2019)

UC COMMITTEE ON PRIVILEGE AND TENURE

Academic Senate Bylaw 336, which governs disciplinary procedures before the Committee on Privilege and Tenure (P&T Committee), has been revised effective July 1, 2019. In order to reduce the amount of time it takes to resolve disciplinary charges, the Academic Senate was instructed to follow the recommendation of the State Auditor in its June 2018 report, and require that disciplinary hearings begin within 60 days of the date disciplinary charges are filed with the Divisional P&T Committee by the campus Administration.[1]

In order to accomplish this goal, it was necessary to develop a process with deadlines for each step. Although this process is time-intensive at certain stages and will be challenging for busy Divisional P&T Committees and staff, it allows for the orderly progression of a disciplinary case to meet the 60-day deadline.

Below are some suggested guidelines offered by UC P&T to maximize efficiency and plan for the various steps in the process.

Service of Disciplinary Charges on Faculty Member (336.C.1.a-b)

Under the revised Bylaw 336, it is now the responsibility of the campus Administration to transmit a copy of the disciplinary charges to the accused faculty member at the time the charges are filed with the P&T Committee. Each Divisional Committee should work with its campus Administration to establish a process for this.

Scheduling the Hearing (336.C.3)

Because of the difficulties inherent in identifying dates on which the Hearing Committee members, parties, attorneys and witnesses are all available, a principal goal of the revised Bylaw is to secure the hearing dates as early as possible in the process. This will entail brief periods of labor-intensive work that may require the full attention of the P&T Chair/staff.

Immediately upon receiving the disciplinary charges, the Divisional P&T staff should calculate the 60-day deadline for beginning the hearing. The Divisional P&T Chair should then take the following steps: (1) determine a reasonable time frame for offering dates to the parties, for example the 15-day period before the deadline; and (2) determine the availability of the P&T Committee members during that time period. The goal is to offer the parties as much availability as possible in the scheduling letter.[2]

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[1] The State Auditor's recommendation applied only to hearings involving claims of sexual harassment/sexual violence ; however, the system-wide P&T Committee (UC P&T) determined that it would be more efficient to apply the recommendation to all disciplinary hearings.

[2] Bylaw 336.C.3.c requires that all parties give priority to scheduling the hearing.

Because of the short time constraints, determining the availability of the P&T Committee members for a hearing will have to be done quickly. The P&T Chair/staff should be prepared to devote the necessary time to this task on short notice. A best practice would be to develop a calendar of members' availability each quarter or semester. Another best practice would be to consult the Divisional Committee on Committees about developing a slate of other potential panelists (e.g., former P&T members) who would be willing to serve on a Hearing Committee should there not be enough members with availability during the required time period. (See discussion of Section 336.F.1.below.)

The scheduling letter to the parties and attorneys[3] must go out within five calendar days of P&T's receipt of the disciplinary charges. To maximize efficiency, it is recommended that each Divisional P&T Committee develop a form letter for this purpose; a sample form letter will be provided to the Divisional Committees.

As soon as the parties have responded to the scheduling letter with their availability from among the dates offered, the P&T Chair should select the optimum hearing date(s), notify the parties and appoint the Hearing Committee (see below).

"Good Cause" Requirement for Extension of Deadlines (336.E)

Good cause is required for an extension of any deadline in Bylaw 336. Because of the short time constraints imposed by the Bylaw, extensions will not be granted routinely and must be justified.

This is especially true with party requests to extend the start of the hearing beyond the 60-day deadline. Such considerations as general workload, vacations or academic travel (to conferences, etc.) will not ordinarily be considered good cause for extending the start of the hearing. Such requests must be justified and include documentation of the circumstances.

The Hearing Committee Chair should carefully evaluate the justification for extension requests, including: (1) the reason for the request; (2) the materiality of the request; (3) the likely impact of the delay on the disciplinary case; and (4) the likely effect of the delay on the integrity of the process. The Chair should then determine whether, in his or her judgment, the circumstances warrant granting the requests.

Appointment of Hearing Committee (336.F.1)

The Hearing Committee should be appointed as soon as the parties have responded to the scheduling letter by providing their availability from among the dates offered. If there are insufficient members of the P&T Committee available to serve on the Hearing Committee on the selected dates, the P&T Chair may need to draw members from outside P&T. This might occur, for example, during the summer months and over the holidays.

[3] If the attorneys are not yet known, the scheduling letter should be sent to the parties with instructions to inform their attorneys.

To avoid delays and maximize efficiency in the appointment of the Hearing Committee, it is recommended that each Divisional P&T Committee work with its Divisional Senate to make arrangements for a "backup pool" of potential Hearing Committee members; ideally the pool would be composed of former P&T members, including emeriti who are willing to serve if called upon. Divisional Senates may also find it helpful to increase the standard size of each Divisional P&T Committee.

Pre-hearing Letter (336.F.2)

Under the revised Bylaw 336, the prehearing conference has been replaced by a prehearing letter which advises the parties of certain hearing procedures, as determined by the Hearing Committee Chair. Most of these are fairly standard and noncontroversial: (1) the deadline for the parties to determine facts that are undisputed, if any; (2) the deadline for exchanging exhibits and witness lists before the hearing; (3) whether prehearing/post-hearing briefs or opening/closing statements will be allowed; and (4) who may be present at the hearing.

In addition to these procedural matters, there is one substantive prehearing matter to be determined: the particular issue(s) to be decided by the Hearing Committee at the hearing. Under the revised Bylaw, the Hearing Committee Chair should prepare an initial statement of the issue(s) to be decided and include it in the prehearing letter to the parties. The parties will then have the opportunity to: (1) object to any of the issues proposed by the Chair; and/or (2) propose additional issues to be decided. The Chair will consider the parties' proposals and finalize the list of issues to be decided. In order to properly formulate the issues to be decided, the Hearing Committee Chair will need to be familiar with the case file (disciplinary charges and respondent's answer) by this point.

If there are any questions about the matters contained in the prehearing letter, the Hearing Committee Chair has the option of scheduling an in-person or telephonic conference with the parties to resolve the questions. These conferences can be difficult to schedule: every effort should be made to schedule such a conference as soon as possible, so as to avoid delays.

Report to Chancellor (336.F.10)

The revised Bylaw 336 imposes a deadline for the Hearing Committee to provide its findings and recommendations to the Chancellor: 30 days from the conclusion of the hearing. The conclusion of the hearing is defined as the date on which the Committee receives the court reporter's transcript of the hearing or the parties' post-hearing briefs, whichever is later. This means that the Hearing Committee will have 30 days in which to review the transcripts and exhibits, deliberate, and prepare the report of its findings and recommendations. This is likely to require a significant amount of work during the 30-day period; given the busy schedules of faculty, the Hearing Committee members will need to plan in advance and budget enough time for this. Deliberation sessions should be scheduled in advance, and time should be budgeted for drafting and revising the report. A best practice would be to develop a template report format for disciplinary matters; some of the report could then be drafted while awaiting the hearing transcripts and/or post-hearing briefs (e.g., "Background," "Standard of Review," etc.).

336. Privilege and Tenure: Divisional Committees -- Disciplinary Cases (En 23 May 01) (Am [INSERT DATE]~~1 July 19~~)

Substantial revisions to Bylaw 336 were approved by the Assembly of the Academic Senate on April 10, 2019. The changes went into effect on July 1, 2019. Additional revisions were approved by the Assembly of the Academic Senate on [DATE] and went into effect on [DATE].

A. Right to a Hearing

In cases of disciplinary action commenced by the administration against a member of the Academic Senate, or against other faculty members in cases where the right to a hearing before a Senate committee is given by Section 103.9 or 103.10 of the Standing Orders of The Regents (Appendix I), proceedings shall be conducted before a Divisional Committee on Privilege and Tenure (hereafter, the Committee). Under extraordinary circumstances and for good cause shown, on petition of any of the parties and with concurrence of the other parties, the University Committee on Privilege and Tenure may constitute a Special Committee composed of Senate members from any Division to carry out the proceedings.

B. Time Limitation for Filing Disciplinary Charges

The Chancellor is deemed to know about an alleged violation of the Faculty Code of Conduct when it is reported to any academic administrator at the level of department chair or above or, additionally, for an allegation of sexual violence or sexual harassment when the allegation is first reported to the campus Title IX Officer. The Chancellor must file disciplinary charges by delivering notice of proposed disciplinary action to the respondent no later than three years after the Chancellor is deemed to have known about the alleged violation. There is no limit on the time within which a complainant may report an alleged violation. (Am 9 March 05) (Am 14 Jun 17)

C. Prehearing Procedure in Disciplinary Cases

1. In cases of disciplinary charges filed by the administration against a member of the Academic Senate, or termination of appointment of a member of the faculty in a case where the right to a hearing before a Senate committee is given under Section 103.9 or 103.10 of the Standing Orders of The Regents, disciplinary charges shall be filed by the appropriate Chancellor or Chancellor's designee, once probable cause has been established. Procedures regarding the establishment of probable cause are determined by APM 015/016 and Divisional policies. The disciplinary charges shall be in writing and shall contain notice of proposed disciplinary sanctions and a full statement of the facts underlying the charges.

    a. The Chancellor or Chancellor’s designee shall deliver the disciplinary charges to the Chair of the Committee on Privilege and Tenure, with a copy to the accused faculty member. If practicable, the Chancellor or Chancellor’s designee shall deliver the disciplinary charges at an in-person meeting with the Chair of the Committee on Privilege and Tenure and the accused faculty member. If this is not practicable, the Chancellor or Chancellor’s designee shall deliver the disciplinary charges to the Chair of

the Committee on Privilege and Tenure electronically, with a copy to the accused sent electronically to the accused's official University email account and a courtesy copy by overnight delivery service to the accused's last known place of residence. The accused will be deemed to have received the disciplinary charges when they are sent to the accused's official University email account. (Am 1 July 19)

b. Along with a copy of the charges, the Chancellor or Chancellor's designee shall provide written notice to the accused of (i) the deadline for submitting an answer to the disciplinary charges (section C.2 below), and (ii) the deadline for commencing the hearing (section E.1 below). (Am 1 July 19)

2. The accused shall have 14 calendar days from the date of receipt of the disciplinary charges in which to file an answer in writing with the Committee on Privilege and Tenure. The Committee on Privilege and Tenure shall immediately provide a copy of the answer to the Chancellor or Chancellor's designee. (Am 14 Jun 17) (Am 1 July 19)

3. Within five business days after receiving the disciplinary charges, the Chair of the Committee on Privilege and Tenure shall contact the accused, the Chancellor or Chancellor's designee and/or their representatives in writing in order to schedule the hearing. (Am 1 July 19)

   a. The Chair shall offer a choice of dates for the hearing and instruct the parties to provide their availability on the given dates within 14 calendar days.

   b. Within five business days after receiving the information requested in section 3.a from the parties, the Committee on Privilege and Tenure will schedule the hearing and notify the accused, the Chancellor or Chancellor's designee and/or their representatives in writing of the date(s). The accused shall be given either in person or by email or overnight delivery service, at least ten calendar days' notice of the time and place of the hearing.

   c. All parties must give priority to the scheduling of a hearing and cooperate in good faith during the scheduling process. A hearing shall not be postponed because the accused faculty member is on leave or fails to appear.

D. Early Resolution

1. The Chancellor or Chancellor's designee and the accused may attempt to resolve the disciplinary charges through negotiation. A negotiated resolution is permissible and appropriate at any stage of these disciplinary procedures. Such negotiations may proceed with the assistance of impartial third parties, including one or more members of the Committee on Privilege and Tenure. However, such negotiation shall not extend any deadline in this Bylaw. (Am 14 Jun 17) (Am 1 July 19)

2. If a negotiated resolution is reached after disciplinary charges are filed, then the Chancellor or Chancellor's designee is encouraged to consult with the Chair of the Committee on Privilege and Tenure prior to finalizing the settlement. The Chair of the Committee on Privilege and Tenure should make a request for such a consultation once disciplinary charges have been filed with the Committee on Privilege and Tenure. The Chancellor or Chancellor's designee should inform the Committee on Privilege and Tenure if the matter is resolved. (Am 1 July 19)

E. Time Frame for Hearing Process in Disciplinary Cases (Am 1 July 19)

1. The hearing shall begin no later than 60 calendar days from the date disciplinary charges are filed with the Committee on Privilege and Tenure.

2. Any deadline in this Bylaw may be extended by the Chair of the Committee on Privilege and Tenure or the Chair of the Hearing Committee, but only for good cause shown, requested in writing in advance. Good cause consists of material or unforeseen circumstances sufficient to justify the extension sought. A request to delay the start of the hearing beyond the 60 days mandated by this Bylaw must include adequate documentation of the basis for the request.

3. Within three business days of receiving an extension request, the Chair of the Committee on Privilege and Tenure or the Chair of the Hearing Committee shall notify the accused, the Chancellor or Chancellor's designee, and/or their representatives in writing of the approval or denial of the request. If the request is approved, the notification shall include the reason for granting it, the length of the extension, and the projected new timeline.

F. Hearing and Posthearing Procedures

1. The Chair of the Committee on Privilege and Tenure shall appoint a Hearing Committee for each case in which disciplinary charges have been filed. The Hearing Committee must include at least three members. (Am 1 July 19)

    a. A majority of the Hearing Committee members shall be current or former members of the Committee on Privilege and Tenure, and the Chair of the Hearing Committee shall be a current member of the Committee on Privilege and Tenure. In exceptional circumstances, the Hearing

Committee may include one member from another Divisional Academic Senate.

b. The Chair of the Committee on Privilege and Tenure may not appoint a member of the department or equivalent administrative unit of any of the parties to the Hearing Committee.

c. Hearing Committee members shall disclose to the Hearing Committee any circumstances that may interfere with their objective consideration of the case and recuse themselves as appropriate.

d. A quorum for the conduct of the hearing shall consist of a majority of the Hearing Committee, including at least one member of the Committee on Privilege and Tenure.

2. Within two business days after the hearing has been scheduled the Chair of the Hearing Committee shall notify the accused, the Chancellor or the Chancellor's designee, and/or their representatives in writing of the Hearing Committee's decisions on the following prehearing matters: (Am 1 July 19)

a. The Hearing Committee's initial determination of the issues to be decided at the hearing. The Chair of the Hearing Committee shall invite the parties to inform the Committee of any other issues they believe to be important. The final determination of the issues to be decided shall be made by the Hearing Committee.

b. The deadline for the parties to determine the facts about which there is no dispute. At the hearing, these facts may be established by stipulation.

c. The deadline for both sides to exchange a list of witnesses and copies of exhibits to be presented at the hearing. The Hearing Committee has the discretion to limit each party to those witnesses whose names are disclosed to the other party prior to the hearing and to otherwise limit evidence to that which is relevant to the issues before the Hearing Committee.

d. Whether prehearing and post-hearing briefs will be submitted by the parties and, if so, the deadline for submitting those briefs.

e. Whether any person other than the Chancellor, the Chancellor's designee, the accused, and their representatives, may be present during all or part of the hearing. In order to preserve the confidentiality of the hearing, persons whose presence is not essential to a determination of the facts shall, as a general rule, be excluded from the hearing.

After the prehearing letter has been sent, the Chair of the Hearing Committee may at his or her discretion schedule a conference with the accused, the Chancellor or Chancellor's designee, and/or their representatives, to resolve any questions concerning items (a) through (e) above. Such a conference should take place as soon as possible. The scheduling of such a conference shall not result in an extension of the hearing date.

3. The Chancellor or Chancellor's designee, the accused, and/or their representatives shall be entitled to be present at all sessions of the Hearing Committee when evidence is being received. Each party shall have the right to be represented by counsel, to present its case by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross examination as may be required for a full and true disclosure of the facts.

4. The hearing need not be conducted according to the technical legal rules relating to evidence and witnesses. The Hearing Committee may, upon an appropriate showing of need by any party or on its own initiative, request files and documents under the control of the administration. All confidential information introduced into evidence shall remain so within the Hearing Committee. The Hearing Committee may call witnesses or make evidentiary requests on its own volition. The Hearing Committee also has the discretion to require that all witnesses affirm the veracity of their testimony and to permit witnesses to testify by videoconferencing. (Am 14 Jun 17)

5. Prior discipline imposed on the same accused faculty member after a hearing or by negotiation may be admitted into evidence if the prior conduct for which the faculty member was disciplined is relevant to the acts alleged in the current disciplinary matter. Under these conditions, prior hearing reports and records of negotiated settlements are always admissible. (Am 14 Jun 17)

6. No evidence other than that presented at the hearing shall be considered by the Hearing Committee or have weight in the proceedings, except that the Hearing Committee may take notice of any judicially noticeable facts that are commonly known. Parties present at the hearing shall be informed of matters thus noticed, and each party shall be given a reasonable opportunity to object to the Hearing Committee's notice of such matters.

7. The Divisional Committee on Privilege and Tenure may, at its discretion, request the appointment of a qualified person or persons, designated by the Chair of the University Committee on Privilege and Tenure, to provide legal advice and/or to assist in the organization and conduct of the hearing.

8. At the hearing, the Chancellor or Chancellor's designee has the burden of proving the allegations by clear and convincing evidence, except that for allegations of a violation of the University's policy on Sexual Violence and Sexual Harassment,

the Chancellor or Chancellor's designee has the burden of proving the allegations by a preponderance of the evidence.

9. The Hearing Committee shall not have power to recommend the imposition of a sanction more severe than that proposed in the notice of proposed disciplinary action. In determining the appropriate sanction to recommend, the Hearing Committee may choose to consider previous charges against the accused if those charges led to prior sanctions either after a disciplinary hearing or pursuant to a negotiated or mediated resolution.

10. The Hearing Committee shall make its findings of fact, conclusions supported by a statement of reasons based on the evidence, and recommendation. These shall be forwarded to the parties in the case, the Chancellor or Chancellor's designee, the Chair of the Divisional Committee on Privilege and Tenure, and the Chair of the University Committee on Privilege and Tenure, not more than 30 calendar days after the conclusion of the hearing. The conclusion of the hearing shall be the date of the Committee's receipt of (a) the written transcript of the hearing; or (b) if post-hearing briefs are permitted, the post-hearing briefs from the parties in the case, whichever is later. The findings, conclusions, recommendations, and record of the proceedings shall be confidential to the extent allowed by law and UC policy. The Hearing Committee may, however, with the consent of the accused, authorize release of the findings, conclusions, and recommendations to other individuals or entities, to the extent allowed by law. (Am 1 July 19)

11. The hearing shall be recorded. The Hearing Committee has the discretion to use a certified court reporter for this purpose, and the parties and their representatives shall have the right to a copy of the recording or transcript. The cost of the court reporter as well as other costs associated with the hearing will be borne by the administration. (Am 1 July 19)

12. The Hearing Committee may reconsider a case if either party presents, within a reasonable time after the decision, newly discovered facts or circumstances that might significantly affect the previous decision and that were not reasonably discoverable at the time of the hearing.

G. Relation to Prior Grievance Cases

a. A disciplinary Hearing Committee shall not be bound by the recommendation of another hearing body, including the findings of the Divisional Committee on Privilege and Tenure in a grievance case involving the same set of incidents. However, the Hearing Committee may accept into evidence the findings of another hearing body or investigative agency. The weight to be accorded evidence of this nature is at the discretion of the Hearing Committee and should take account of the nature of the other forum. In any case, the accused faculty member must be given full opportunity to challenge the findings of the other body.