

April 28, 2021

To: Executive Board
UCLA Academic Senate

From: Vilma Ortiz, Chair
UCLA Privilege and Tenure Committee



Re: Proposed revisions to systemwide Sexual Violence and Sexual Harassment Investigation and Adjudication Framework for Senate and Non-Senate Faculty ("SVSH Framework")

The Committee on Privilege and Tenure appreciates the opportunity to review the proposed revisions to the systemwide SVSH Framework. The Committee received the request on March 30, 2021 and was not able to schedule a discussion until their April 14, 2021 meeting. Nonetheless, the Committee felt that the policy was important to review although it appears the principal issue of concern—that of how disciplinary hearings for Senate faculty under SVSH charges will be handled—has yet to be proposed.

As a document that is meant to make the process under the revised policy clear, the SVSH Framework provides an array of definitions and pathways without a clear explanation differentiating the terms and possible pathways:

- Prohibited Conduct that is not DOE-Covered (no hearing, no appeal)
- No-Title IX Hearing DOE-Covered Conduct (no hearing, but may appeal)
- All other DOE-Covered Conduct (may include both a hearing and an appeal).

Since the principal issue of concern before the Taskforce and the Academic Senate at this point is the right to a hearing before Senate faculty before discipline can be imposed, it would seem to be a helpful step forward to differentiate clearly among the different types of "covered conduct" and pathway options. In addition to defining the conduct categories, what does it mean that "may include" a hearing? Whose option is the hearing? Clarity of these terms would help interpret provisions such as III.B (Investigation) under "Investigating and Resolving Reports of Prohibited Conduct (Stage 1)." This seems to indicate "one investigation" for all types of conduct, but it is not clear what the process will be since the definitions seem quite opaque. In addition, III.B in the main document appears to be in conflict with G.13 in the DOE ADDENDUM which states that after an investigation that is followed by a hearing, there can be a statement by the Chancellor/Chancellor's designee that determines whether "further investigation" is needed, separate from any allegations of Prohibited Conduct that were investigated under the SVSH Policy. That is not only confusing, but would seem counter-productive. If an investigation involves matters that do not fall under the SVSH (or DOE) policies, these should be handled in parallel or coordination by the processes already in place on the individual campuses.

Hearing Issue

The Committee would also like to comment on the issue of the impact of the new processes on the faculty right to a hearing in a disciplinary process. In resolving this, the Committee recommends explicit recognition of three provisions in the current regulations. First, the regulations do not require that the Hearing Officer be from an outside entity.

At 30251-30252 of the Preamble to the regulations:

The final regulations leave recipients flexibility to use their own employees, or to outsource Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient's own employees are expected to perform these functions free from conflicts of interest and bias. The Department notes that several commenters favorably described regional center models that could involve recipients coordinating with each other to outsource Title IX grievance proceedings to experts free from potential conflicts of interest stemming from affiliation with the recipient. **The Department declines to require recipients to use outside, unaffiliated Title IX personnel because the Department does not conclude that such prescription is necessary to effectuate the purposes of the final regulations; although recipients may face challenges with respect to ensuring that personnel serve free from conflicts of interest and bias, recipients can comply with the final regulations by using the recipient's own employees.**¹

The Committee recognizes that ensuring "free[dom from] conflicts of interest and bias" can indeed be challenging, especially with a single Hearing Officer. At the same time, having a Hearing Officer who does not understand the academic context can be equally problematic. For that reason, if there is to be a single hearing, the Committee recommends the use of a hearing *panel* that involves trained representation from the category of individuals involved (faculty, staff, students). The DOE regulations explicitly contemplate the use of a panel.

at page 30370 of the Preamble to the regulations, the Department notes: "The . . . final regulations leave significant flexibility to recipients, including whether the Title IX Coordinator can also serve as the investigator, **whether to use a panel of decision-makers** or a single decisionmaker, and **whether to use the recipient's own employees** or outsource investigative and adjudicative functions to professionals outside the recipient's employ."² [emphasis added]

The Faculty Code of Conduct provides that as much as feasible there should be a separation of investigative and disciplinary processes. Even if a hearing is required for some SVSH cases, the Committee does not find that negates the right to a faculty disciplinary hearing. This Committee does not find it appropriate that a Title IX Officer or a Hearing Officer recommend disciplinary sanctions. That is a function for the faculty disciplinary process.

The Committee also notes that the DOE regulations do not prohibit a sanction process which is separate from the findings hearing. In fact, the regulations emphasize that the process of finding a violation of Title IX is a *grievance* process, focused on remedies. In addition, the guidelines repeatedly emphasize that, while discipline cannot be imposed without following a grievance process, the imposition of discipline is completely up to the individual institutions.

Because Title IX is a civil rights law concerned with equal educational access, these final regulations do not require or prescribe disciplinary sanctions. The

¹ United States Department of Education, Office of Civil Rights "Part 2: Questions and Answers Regarding the Department's Title IX Regulations" (January 15, 2021). Available: <https://www2.ed.gov/about/offices/list/ocr/docs/ga-titleix-part2-20210115.pdf>

² DOE, OCR "Part 2: Questions and Answers."

Department's charge under Title IX is to preserve victims' equal access to access, leaving discipline decisions within the discretion of recipients.³

The Department's focus in these final regulations is on ensuring that recipients take action to restore and preserve a complainant's equal educational access, leaving recipients discretion to make disciplinary decisions when a respondent is found responsible.⁴

Therefore, in light of federal guidance, the Committee recommends the following. First, there should be serious consideration of having the Hearing Officer be, at a minimum, someone with experience in the UC system, if not a current employee. In addition, even if the Hearing Officer is external, the Committee recommends that the University use a hearing *panel*. P&T should have the authority to appoint the panel members in a manner that conforms with hearing committee composition under Bylaws 335 and 336 in cases when the respondent and/or complainant are members of the Academic Senate. We note here that this should be explicit even when the complainant is a faculty member, as faculty also have grievance rights. Potential members should be provided training by the Administration, as provided in the Faculty Code of Conduct: "Divisions are encouraged to develop procedures to provide faculty investigators with training, consultation, or legal counsel to assist with the investigation of faculty disciplinary cases."⁵ The Hearing Officer will not have a vote for recommending a sanction. Ideally, the panel members who have participated in the finding process would deliberate regarding recommending a sanction, in line with the process currently in existence in Bylaw 336§F.9, 10.

At a minimum, no sanction should be imposed without a hearing before a "properly constituted" committee of the Academic Senate. Therefore, should the University not agree to form a panel, there should be a separate disciplinary hearing to determine appropriate sanctions. Where the grievant is a faculty member, this panel should also (or instead) recommend appropriate remedies in compliance with faculty grievance rights. As long as the result is appropriately reported, federal guidance allows a "sanction phase."⁶

cc:

2020-21 Committee on Privilege and Tenure: Elizabeth F. Carter, Sandra H. Graham, Barry O'Neill, Clyde S. Spillenger, Dwight C. Streit, and Harry V. Vinters

³ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. 106 §30070.

⁴ 34 C.F.R. 106 §30044 (fn 164).

⁵ APM 015§III.B.3

⁶ See DOE, OCR "Part 2: Questions and Answers," pp. 10-11.