



Robert Horwitz
Telephone: (510) 987-0887
Email: robert.horwitz@ucop.edu

Chair of the Assembly of the Academic Senate
Faculty Representative to the Regents
University of California
1111 Franklin Street, 12th Floor
Oakland, California 94607-5200

March 2, 2022

SENATE DIVISION CHAIRS

Re: Recommendations to Senate Divisions on the Mandated Recording of Classes

Dear Colleagues:

At its February 2022 meeting, the Academic Council endorsed the attached letter from the University Committee on Academic Freedom (UCAF). The letter responds to my request to UCAF for recommendations about how the Senate should view campus policies that mandate the recording of classes to accommodate disabled students, and student demands for continued mandatory recording of classes for all students, post-pandemic.

UCAF's letter emphasizes that the emergency shift to remote instruction during the pandemic was an extraordinary measure, but that maintaining a blanket requirement for class recording would violate the academic freedom of faculty and potentially chill student and faculty speech. Faculty take expectations of privacy in classrooms seriously, particularly around sensitive topics, and are concerned that unauthorized distribution of course recordings could expose students and instructors to attacks and discourage open discussion.

The letter also emphasizes the primacy of the Americans with Disabilities Act (ADA) by clarifying that ADA requirements supersede academic freedom in the context of the case-by-case process for accommodating a disabled student's specific need for course recording.

The Council agrees with UCAF's recommendations that Student Disability Offices (SDOs) should 1) consult faculty in the accommodations process and establish an appeal process for faculty; 2) consider individual accommodation requests in the context of academic freedom and alternative accommodations that lessen the potential harm to free speech; and 3) take steps to limit access to and distribution of class recordings beyond the accommodated student.

The UCAF letter addresses the specific student call for universal mandatory recording of classes, but that has been joined by a parallel call to mandate universal and permanent dual modality instruction. Any such mandate also violates academic freedom and creates impossible demands on faculty labor in the context of current resource allocation policies set by the campus administration.

We acknowledge that some faculty are not fully versed in the ADA requirements related to class recordings, and that an educational effort may be needed. But faculty also report that some SDOs have been inappropriately assertive in directing faculty to make recording accommodations in ways that fundamentally change the nature of the course. It is important for SDOs to take these academic freedom concerns more seriously. In addition, the Council feels that campus SDOs should provide sufficient resources to assist faculty in addressing course recording accommodations that fall under the ADA.

The Academic Council also emphasizes to our campus colleagues that campus policies determine faculty's freedom to choose a fully remote teaching modality. Although many campuses have policies that allow some fraction of instruction to be conducted online at the discretion of the instructor, the instructor does not determine the fraction that triggers the need for Senate approval. Senate committees are key to teaching modality determinations for courses and also provide guidance for the approval of alterations from the default in-person modality assumptions. Individual instructors must comport to existing policies regarding courses and curriculum.

UC faculty are committed to their students' success and we support reasonable accommodations under the ADA. Academic Senate leaders are open to continuing dialogue with students and campus administrators about how we can work together to better accommodate disabled students through campus SDOs. We ask that you forward the UCAF letter and recommendations to your local graduate and undergraduate deans or provosts for discussion and follow-up.

Please do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert Horwitz". The signature is fluid and cursive, with the first name "Robert" and last name "Horwitz" clearly distinguishable.

Robert Horwitz, Chair
Academic Council

Cc: Academic Council
UCAF
President Drake
Provost Brown
Campus Senate Directors
Executive Director Baxter

Encl.



UNIVERSITY COMMITTEE ON ACADEMIC FREEDOM (UCAF)
Ty Alper, Chair
Clinical Professor of Law, Berkeley Law
talper@law.berkeley.edu

Assembly of the Academic Senate
1111 Franklin Street, 12th Floor
Oakland, CA 94607-5200
Phone: (510) 987-9466

February 25, 2022

**ROBERT HORWITZ, CHAIR
ACADEMIC SENATE**

RE: MANDATED RECORDING OF CLASSES

Dear Robert,

Academic Council has requested recommendations from the University Committee on Academic Freedom (UCAF) regarding the mandated recording of classes. Our views are informed by consultation with colleagues on the campus academic freedom committees as well as, on the issue of recordings in the context of disability accommodations, general counsel at UCOP.

We appreciate that the University has a legal and moral obligation to prevent discrimination against students with disabilities and that granting reasonable accommodations to such students is the mechanism by which the institution fulfills that important mission. Against that backdrop, we feel strongly that a blanket requirement of mandated recording of classes is both a clear violation of academic freedom and an unnecessary measure to prevent discrimination against students with disabilities. We believe this is an easy call.

With respect to the mandated recording of classes on a case-by-case basis as an accommodation for students with disabilities, the calculus is not so straightforward. For the reasons I explain below, we acknowledge that the ADA accommodations process for a specific student is the proper method to address the need for recording on a case-by-case basis, but such a process must account for academic freedom concerns (of both faculty and students) that we believe are often under-appreciated by the officials ultimately responsible for making decisions about such accommodations.

We therefore recommend that faculty be meaningfully consulted in the process of determining accommodations; that the disability rights offices on campuses be informed about, and required to consider, the academic freedom concerns we outline in this letter; that where recording is required, and that restrictions on access to and distribution of the recordings, are imposed to mitigate risk.

Background

The pandemic required unprecedented interventions into what has long been considered a core tenet of academic freedom, which is that faculty are permitted to determine the modality of their own teaching. For example, during the height of the pandemic, by necessity, virtually all instruction was moved online, and most classes were required to be recorded.

In March 2020, UCAF wrote to the Chair of the Academic Senate to express its view that “requiring faculty members to teach on-line violates academic freedom . . . To require teachers to record and post lectures for an entire class of students (rather than to meet ADA accommodations for a specific student) violates the academic freedom to choose the most appropriate pedagogy.” Our letter acknowledged that the violation of academic freedom might be necessary in light of the extraordinary circumstances related to the pandemic but aimed to make clear that we believed it nonetheless to be a violation. In March 2021, UCAF [reiterated](#) its March 2020 position in another letter to the Chair.

In May 2021, UCAF [wrote](#) to the Chair to “express our strong concern that steps necessitated in an emergency not be treated as precedent afterward, especially to the extent that they are inconsistent with academic freedom. Our statements, like yours, have emphasized that responsibility for determining the proper mode of instruction in individual classes lies primarily with the faculty. As you recently wrote to President Drake, ‘It would be a violation of academic freedom for the administration to determine teaching platforms.’”

Recently there have been calls on some campuses for the continued mandatory recording of all classes, even though most, if not all, instruction has returned to the classroom or lab. In addition, some faculty have reported that recording of classes has become a more commonly-mandated accommodation, on a case-by-case basis, for students with disabilities.

Council has asked UCAF for its recommendations for how to address these issues.

At the outset, we do not need to dwell long on the suggestion that it would be appropriate – absent extraordinary circumstances like those present during the height of the pandemic – to mandate recording of all classes for all students. For the reasons UCAF has already explained in previous letters, a blanket requirement that classes be recorded would be a clear violation of academic freedom unjustified by any obligation to prevent discrimination of students with disabilities.

Accordingly, we devote the remainder of our analysis to the more difficult question of how the academic freedom concerns with recording of classes can be balanced with the need to allow for reasonable accommodations for students with disabilities. When we refer to “mandated” recording, we mean recording of classes that has been mandated for certain students on a case-by-case basis.

Below we explain the academic freedom concerns raised by mandated recording of classes as such an accommodation, the legal and policy framework within which these decisions get made, and ultimately provide our recommendations to Council.

Academic Freedom Concerns

The recording of classes – mandated or voluntary – does not necessarily raise academic freedom concerns in all cases. But in some cases, the mandated recording of classes creates a chilling effect. Once a recording is committed to digital, particularly cloud-based platforms, there is no guarantee (despite any assurances) that the recording will not make its way to unintended audiences. As stated recently by the American Association of University Professors (AAUP):

[W]e do caution that the recording of course sessions can pose serious risks to academic freedom, especially if the use of those recordings is not carefully restricted. Recorded faculty members must consider the possibility that their remarks might be presented, perhaps out of context, to the administration, the board, or the public at large. Even if that fear isn't realized, the mere possibility can have a chilling effect on a faculty member's exercise of their academic freedom right to discuss their subject freely in accordance with their best professional judgment.

We are also concerned that not all faculty are similarly situated. Contingent, or untenured, faculty may have even greater fears of reprisal for speech that may be deemed controversial. In addition, recording implicates the academic freedom of students, who, like faculty, may feel their speech is chilled when they know it is being recorded.

It may be useful to consider various types of instructional scenarios, from least to greatest concern on academic freedom grounds:

Mandatory recording of lectures only, with no student input. This scenario provides faculty with the greatest control over topics and class content. However, even in this case, the possibility of uncontrolled distribution of content can have a chilling effect on what topics or content professors cover, to the detriment of student learning.

Mandatory recording of lectures, with student input. This scenario presents greater risks to academic freedom. Student input, such as questions or comments on lecture content, injects a spontaneous element into lectures. This spontaneity is beneficial when confined to class participants. However, when lectures are recorded, it creates a loss of control over distribution that can threaten academic freedom in two ways. First, distribution to politically motivated parties can put faculty and students at risk solely for speech that ought to be protected by academic freedom, for example, for a politically unpopular statement. Second, concerns about monitoring outside the class can inhibit speech by both students and faculty. For example, concern about uncontrolled distribution of recorded content can inhibit the kinds of questions students ask, or the responses faculty give.

Mandatory recording of sessions with discussion between/presentations by students and faculty. This scenario presents the greatest risk to academic freedom. First, such discussions can easily touch on politically or ethically fraught topics. Mandatory recording raises the risk of reprisal beyond the classroom for candid speech on politically or ethically sensitive topics, and the purpose of academic freedom is to protect that speech. Again, students and contingent faculty are at particular risk here because they lack protection of tenure, and we should be especially mindful of that. The risk is also especially great for students from other countries with illiberal speech laws, who may be monitored by other students in the class. Because of these risks, the potential chilling effect of recording is especially great in this scenario. Second, faculty and/or students in certain fields may discuss or present work that is their intellectual property, which is threatened by the potential for broader distribution.

Legal Framework

Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act (ADA) are federal laws that prohibit discrimination on the basis of disability. They require the University to provide reasonable accommodations to students with disabilities except where they would impose an undue financial or administrative burden or constitute a fundamental alteration.¹ The U.S. Department of Justice issues regulations mandating how these various terms are to be interpreted, and of course case law also defines the contours of the law.

The federal regulations explicitly address “tape recording” of classes as an accommodation and prohibit an instructor from forbidding the use of a recorder “if that prohibition limits the student’s participation in the school program.”²

UC policy related to nondiscrimination on the basis of disability states that “[a]ny prohibition against the use of tape recorders or brailers in classrooms, or dog guides and service dogs in campus buildings, or other rules that have the effect of limiting the participation of qualified students with disabilities in educational programs, services, or activities, may not be adopted.”³

UC policy also mandates a consultative process with all stakeholders when an accommodation is being considered and formulated. Specifically, section 143.34 of the policy states that, “in attempting to provide any type of academic adjustment, faculty, disability

¹ As a practical matter, the undue burden defense is unlikely to apply to the University given its resources and budget. This is because the undue burden analysis considers “all resources available for use in the funding and operation of the service, program, or activity.” 28 C.F.R. § 35.164.

² See U.S. Department of Education Office of Civil Rights, *Auxiliary Aids and Services for Postsecondary Students with Disabilities*, <https://www2.ed.gov/about/offices/list/ocr/docs/auxaids.html> (quoting Federal regulation 45 C.F.R. § 1170.44(b): “A recipient may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient’s education program or activity.”).

³ [PACAOS 140 Guidelines Applying to Nondiscrimination on the Basis of Disability](#), 143.33.

management staff, and students with disabilities should work in concert to formulate accommodations that meet the individual educational needs of qualified students with disabilities while maintaining the academic integrity of the program, service, or activity to be modified.”

Finally, the policy also states that “it is essential that during this consultative process students be given an opportunity to express their preferred choice for disability accommodations and that this choice be given careful consideration, unless an equally effective accommodation can be provided, or that the use of the student’s choice would result in a fundamental alteration of the academic program, service, or activity, or would result in an undue financial and administrative burden.” Because the University is a public entity, it is obligated to give “primary consideration” to a disabled student’s accommodation requests.⁴

Recommendations

Mandated recording of all classes for all students violates the academic freedom of faculty and students alike and must not be permitted absent the kind of extraordinary pandemic-related circumstances we hope never to experience again.

It is equally clear that both federal law and UC policy related to disability accommodations preclude a blanket *prohibition* on recording of classes, as such a rule would violate the institution’s obligation to prevent discrimination against students with disabilities.

That leaves the question of class recordings as an accommodation for students with disabilities on a case-by-case basis.

Our committee is generally (though not unanimously) comfortable with the need for individual accommodations being mediated by the campus offices responsible for students with disabilities. And, given the challenges of pandemic learning, we believe instructors should be flexible whenever possible.

However, in our experience and the experience of members of the campus-based committees on academic freedom, the concerns regarding academic freedom outlined above are often under-appreciated by officials responsible for determining appropriate accommodations. It also appears that there is wide variation among these offices – even within campuses – that can result in disparate weight given to academic freedom concerns. Although we are aware that the law imposes strict limits on what may be considered a “fundamental alteration” of an academic course, we are concerned that deferring the issue of mandatory recording to disability offices has normalized breaches of academic freedom.

⁴ See 28 C.F.R. § 35.160(b)(2) (“In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities.”).

To address this concern within the bounds of the University's obligation to prevent discrimination against students with disabilities, we make the following recommendations:

1. Campus policy that requires disability management staff to consult with faculty in the accommodations process must be followed, especially when the proposed accommodation poses a legitimate risk of fundamentally altering the nature of the course by chilling either faculty or student speech. Anecdotally, we believe this consultation is not occurring with uniformity across campuses, which is surely due, in part, to resource and staffing constraints on the offices in question that we urge the administration to address. In addition, campuses that do not have appeal processes in place should include them in their accommodations determinations, so faculty can escalate academic freedom concerns if necessary.
2. Disability offices must be informed about the ways in which recording has the potential to fundamentally alter the nature of some courses, and they must be willing to consider creative, reasonable, alternative means of accommodating students with disabilities that lessen the potential for chilling of speech. We note that allowing students to "attend" class only through listening to a recording of the class may, in some instances, fundamentally alter the nature of the course *for that student*, such that they are not receiving the same high level of quality educational experience as those who attend class in-person.
3. Where recording of classes is deemed an appropriate accommodation, every effort must be made to mitigate academic freedom concerns through limitations on access to, and distribution of, class recordings and/or the duration of time the recordings are made available. University policy states that "[s]tudents or participants with disabilities in University programs, services, or activities may be required to sign an agreement that they will not release tape recordings or transcriptions of lectures, or otherwise hinder the ability of a professor to obtain a copyright." Students should be required in all instances to sign such agreements and, if necessary, student codes of conduct should be amended to clarify that violations of such agreements may result in disciplinary action.

UCAF appreciates the opportunity to comment on this matter.

Sincerely,



Ty Alper
Clinical Professor of Law
Chair, University Committee on Academic Freedom