

November 27, 2018

To: Joe Bristow, Academic Senate Chair

From: Sheryl Kataoka   
Privilege & Tenure Chair

**Re: Proposed Revisions to Presidential Policy “Sexual Violence and Sexual Harassment”**

Dear Chair Bristow,

The Privilege & Tenure Committee thanks you for the opportunity to comment on the proposed revisions to the “Sexual Violence and Sexual Harassment” Presidential Policy. After a period of review and extensive discussion, P&T offers the following comments on the proposed revisions:

**Timeframe**

The Committee notes that the OCR resolution agreement called for completing the various phases of addressing a Title IX allegation in reasonably prompt manner. Because what the SVSH policy defines as “reasonably prompt” should be comparable to what is defined as “reasonably prompt” for any charges that reach the Senate for a formal disciplinary hearing, **the Committee feels that it is important to point out that the proposed revisions, including the Chancellor/Chancellor’s designee “decision” time in the current framework, allow for 130-190 business days for the administrative handling of Title IX complaints** – before a matter is ever referred to the Senate for disciplinary hearings.

Phases

1. Report of prohibited conduct; preliminary assessment
2. Formal Investigation (and Notice of Outcome)
3. Decision regarding sanctions

1. Preliminary Assessment

The proposed revisions add a timeframe for an “Alternative Resolution” process of **30 to 60 business days** (from the date the Title IX Officer sends the written notice of initiation of the process). The previous version has no specified time period.

2. Formal Investigation

The proposed revisions add 30 business days to the guidelines for a prompt investigation: The investigation shall be completed promptly, typically within 60 **to 90** business days of the date the Title IX Officer notifies . . . (investigation).

3. Decision regarding sanctions

The policy, as before, refers to the “Investigation and Adjudication Framework for Senate and Non-Senate Faculty” (the “Framework”). The Framework divides the time period for “decision regarding sanctions” into two further phases:

- a. Chancellor/Chancellor’s designee’s decision (complainant/respondent opportunity to respond to the investigation report; Peer Review Committee; early resolution). The timeframe for this is currently **40 business days**.
- b. Filing a Senate charge.

**II. DEFINITIONS; B. Prohibited Conduct; 1. Sexual Violence**

**b. Sexual Assault – Contact:** The policy defines behaviors qualifying as sexual contact, including intentional touching of the genitals, groin, breast, or buttocks (including with the mouth). The revised policy adds, *inter alia*, making the complainant touch their own (or a third party’s) intimate body part and (ii) respondent touching complainant with his/her intimate body part (including complainant’s mouth).

The Committee broadly agreed that the body parts listed in the document seem to be under-inclusive. For example, the revisions specify contact with the mouth only in the context of mouth-to-intimate part contact. Many believed this to be too narrow of a definition because a situation involving, for example, a respondent touching a complainant’s lips with a non-intimate body part (e.g., the respondent’s finger) or even forced mouth to mouth kissing would not, by this definition, be considered sexual assault contact. This struck us as odd because the mouth is generally considered to be just as intimate as several (most?) of the other body parts that were expressly listed. There was widespread agreement that contact with the mouth, even if it does not involve contact with another intimate body part listed, should be included as a sexual contact.

More broadly, members feared that this finite list would mean that a respondent could defend similar contact as not being assault by virtue of not being listed. Possible solutions include a “catch-all” that defines sexual contact as contact that a *reasonable* person, under the totality of circumstances, would view as sexual contact. This standard, of course, poses the risk of being over-inclusive. Therefore, the Committee recommends adding language similar to that used in the Faculty Code of Conduct regarding types of unacceptable conduct.

***PROPOSED ADDITION:***

*The types of contact listed above meet the standard of sexual assault by contact and serve as examples of such contact. Other types of contact, not specifically enumerated above, may nonetheless be considered sexual assault contact if they meet the same standard.*

### **Aggravated. Duress**

1. The revisions propose that the phrase “power imbalance” be added to the definition of duress. Committee believes that “a power imbalance” should be a stand-alone category distinct from duress:
  - Overcoming the will of Complainant by:
    - *a power imbalance*
2. The policy states that sexual penetration is “aggravated” when it includes, *inter alia*, duress. In a legal context, to prove duress, the complainant must prove that: (i) the fear of the threat was genuine; (ii) the threat was imminent (i.e., would happen almost immediately upon a failure to comply); and (iii) the complainant not did have a reasonable opportunity to escape the threat. None of these requirements are spelled-out in the policy. The policy does mention that the claim of duress would be viewed in light of the totality of circumstances, including age and relationship. Understanding that this is an administrative rather than legal policy, the existing standard nonetheless may be too vague, particularly in light of the fact that the policy states the threat may be either direct or *implied*. Permitting liability for an implied threat without requiring proof of genuineness, imminence, and lack of an opportunity to escape may potentially extend the scope of the rule beyond acceptable (and reasonable) boundaries.

### **Additional Comments**

The Committee also offered comments on the following issues, which are not themselves under review, but the feedback has implications for the items that are under review:

#### **Standard of Proof in Situations Involving a Past/Existing Consensual Dating/Sexual Relationship:**

The current Department of Education guidelines allow schools to choose between the preponderance of evidence and clear and convincing standards when determining responsibility for establishing responsibility for violation of Title IX policy; UC uses preponderance of the evidence.

The Committee is concerned that Title IX investigators be aware that determining ongoing affirmative consent and/or the revocation of consent (in contrast to situations in which consent was never granted) is particularly difficult in these cases. The policy states, “It is the responsibility of each person to ensure they have the affirmative consent of the other to engage in the sexual activity. Lack of protest, lack of resistance, or silence, do not, alone, constitute consent. Affirmative consent must be ongoing and can be revoked at any time during sexual activity. The existence of a dating relationship or past sexual relations between the persons involved should never by itself be assumed to be an indicator of consent (nor will subsequent sexual relations or dating relationship alone suffice as evidence of consent to prior conduct).”<sup>1</sup>

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<sup>1</sup> University of California – Policy, Sexual Violence and Sexual Harassment, Definitions: Consent. Section II.A.

The Committee agrees that while a past or current dating and/or sexual relationship does not, by itself constitute consent, the policy and/or practice of Title IX investigators should acknowledge that a past or current dating and/or sexual relationship might contribute to a reasonable belief in ongoing consent barring other evidence that the respondent engaged in a disregard of the facts and circumstances.

**Timeliness for Making Reports:** Previous revisions removed the time limit for reporting, although the policy encourages prompt reporting of prohibited conduct. It seems reasonable that a removal of the statute of limitations needs to be accompanied by additional considerations that relate to the increased probability of impediments to the fair administration of justice caused by the passage of time. A reasonable criterion, for example, is to ascertain that the delay in bringing an incident to light does not unduly impinge on the respondent's ability to defend against the charges. Second, the committee is concerned that all cases, but especially those from long ago, be treated equitably and not overly focus on the reputation of the respondent or complainant.

Both of the above suggestions might impinge upon Section V.A.3, which mentions the information provided the complainant.

*On behalf of Committee members:*

Avanidhar Subrahmanyam; Norweeta Milburn; Vilma Ortiz; Patricia Johnson; Barry O'Neill; Sherod Thaxton

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