

Executive Board

(Systemwide Senate Review) Proposed Revision to Senate Bylaw 336.F.3

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May 14, 2021

Mary Gauvain
Chair, UC Academic Senate

Re: (Systemwide Senate Review) Proposed Revision to Senate Bylaw 336.F.3

Dear Chair Gauvain,

The Divisional Executive Board, councils, and committees appreciate the opportunity to review the Proposed Presidential Policy to Senate Bylaw 336.F.3. The Executive Board review the proposal and divisional committee feedback at its meeting on May 13, 2021. Members affirmed two important principles: the fundamental faculty right to hearing before a properly formulated group of faculty peers, and that the complainant and others involved should not be unduly burdened. The Executive Board lauded the attached response from the Committee on Privilege and Tenure for offering a way to resolve concerns and affirm these two principles.

Sincerely,



Shane White
Chair
UCLA Academic Senate

Encl.

Cc: Jody Kreiman, Vice Chair/Chair Elect, UCLA Academic Senate
Michael Meranze, Immediate Past Chair, UCLA Academic Senate
April de Stefano, Executive Director, UCLA Academic Senate

April 28, 2021

To: Executive Board
UCLA Academic Senate

From: Vilma Ortiz, Chair
UCLA Privilege and Tenure Committee



Re: Proposed revisions to Bylaw 336

The Committee on Privilege and Tenure appreciates the opportunity to review the additional proposed revisions to the Bylaw 336. The Committee strongly agrees with the Taskforce that any option that eliminates the right to a hearing before a properly constituted committee of the Academic Senate is unacceptable. The Committee does not have a problem with the proposed policy to accept into evidence the record and decision from the Title IX process as long as it includes the hearing transcript. The Committee also repeats below their comments submitted with the response to the SVSH Frameworks proposed revisions. In the Committee's opinion, which was also expressed during the last revision of Bylaw 336, there has been insufficient effort to consider all the allowable possibilities under the new regulations, including differentiating Title IX/DOE violations which require a hearing as opposed to those which do not.

Hearing Issue

In resolving the faculty right to a hearing in a disciplinary process, 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

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>

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 governed separately from the findings hearing. In fact, the Federal Code repeatedly emphasizes 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. For example:

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

In sum, 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. Secondly, even if the Hearing Officer is internal, 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 the hearing committee composition process under Bylaws 335 and 336 in all 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

² DOE, OCR “Part 2: Questions and Answers.”

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

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 Bylaw 336 hearing which will recommend 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

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

UNIVERSITY OF CALIFORNIA, ACADEMIC SENATE

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University of California
1111 Franklin Street, 12th Floor
Oakland, California 94607-5200*

March 22, 2021

CHAIRS OF SENATE DIVISIONS AND COMMITTEES:

Re: Systemwide Review of Proposed Revision of Senate Bylaw 336.F.3

Dear Colleagues,

I am forwarding for systemwide Senate review the attached revision to Senate Bylaw 336.F.3. proposed by the University Committee on Privilege and Tenure. It is the result of work by a UCPT Task Force formed in the wake of federal regulatory changes that now require a hearing at the Title IX phase for cases involving SVSH. (Earlier this year the Academic Senate adopted a change to Bylaw 336.F.8 related to the evidentiary standard used in such cases, to address another provision of the new federal regulations.)

Given concerns about duplication of effort and the burden on parties involved to go through two full hearings, the Task Force considered proposed changes to P&T roles in SVSH-related discipline cases. UCPT adopted the Task Force recommendation regarding acceptance of evidence from the Title IX process and what may be subsequently permitted for P&T hearings. This forms the basis of the proposed bylaw revision. The intent is to align Senate bylaws with new federal Title IX regulations while preserving the APM 016 right to a hearing for a faculty member facing discipline.

Please submit comments to the Academic Senate office at SenateReview@ucop.edu by May 19, 2021 to allow us to compile and summarize comments for the Academic Council's May 26 meeting. As always, any committee that considers these matters outside its jurisdiction or charge may decline to comment.

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

Sincerely,

A handwritten signature in cursive script that reads "Mary Gauvain".

Mary Gauvain, Chair
Academic Council

Encl:



UNIVERSITY COMMITTEE ON PRIVILEGE AND TENURE

Jorge Hankamer, Chair
hank@ucsc.edu

ACADEMIC SENATE

University of California
1111 Franklin Street, 12th Floor
Oakland, California 94607-5200

March 22, 2021

ACADEMIC SENATE CHAIR MARY GAUVAIN

Dear Chair Gauvain,

UCPT proposes a change in Senate Bylaw 336, consisting in the addition of the following language at the end of section 336.F.3:

For cases in which there was a hearing at the Title IX stage regarding violation of the University's policy on Sexual Violence and Sexual Harassment ("SVSH Policy"), the Hearing Committee shall accept into evidence the record and decision from the Title IX process. Other evidence, including witness testimony, regarding whether there was a violation of the SVSH Policy will not be permitted unless it pertains to newly discovered facts or circumstances that might significantly affect the determination of whether there was a violation of the Faculty Code of Conduct and that were not reasonably discoverable at the time of the Title IX process, as determined by the Hearing Committee in advance of the hearing.

A "redline" version of Bylaw 336.F.3, with the proposed language added, is attached. In addition, I am attaching the report from the UCPT Task Force on a response to proposals for changes in P&T roles in SVSH-related discipline cases.

Thank you. Please let me know if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Jorge Hankamer".

Jorge Hankamer
Chair, University Committee on Privilege and Tenure

cc: Robert Horwitz, Academic Senate Vice Chair
Hilary Baxter, Academic Senate Executive Director
Michael LaBriola, Academic Senate Assistant Director
UCPT Members
Suzanne Taylor, Systemwide Title IX Director
Josh Meltzer, Senior Counsel

**336. Privilege and Tenure: Divisional Committees -- Disciplinary Cases (En 23 May 2001)
(Am 1 July 2019)**

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. [Link to the previous version.](#)

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 2019)
 - 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 2019)
 - 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.

For cases in which there was a hearing at the Title IX stage regarding violation of the University's policy on Sexual Violence and Sexual Harassment ("SVSH Policy"), the Hearing Committee shall accept into evidence the record and decision from the Title IX process. Other evidence, including witness testimony, regarding whether there was a violation of the SVSH Policy will not be permitted unless it pertains to newly discovered facts or circumstances that might significantly affect the determination of whether there was a violation of the Faculty Code of Conduct and that were not reasonably discoverable at the time of the Title IX process, as determined by the Hearing Committee in advance of the hearing.

TASK FORCE ON A RESPONSE TO PROPOSALS FOR CHANGES IN P&T ROLE IN SVSH-RELATED DISCIPLINE CASES: REPORT TO UCPT

The new Title IX process, in effect as of August 14, 2020, requires a hearing where accuser and accused confront each other, conducted by a hearing officer or panel (34 CFR 106.45.b.6). Academic Senate leadership, concerned that the stress of enduring a Title IX hearing and also a subsequent P&T hearing might place an undue burden on complainants and witnesses and might suppress complaints, have presented two alternative proposals for changes to the P&T hearing process in Title IX-related cases (Table 1. Proposed Changes to P&T Hearing Process Following a Title IX Hearing in which Respondent is Found in Violation of SVSH Policy), both of which involve eliminating the P&T hearing in such cases. In addition, Senate Directors have expressed concern about the increased burden on Senate staff resulting from an increase in SVSH cases together with the constrained time frame imposed by the California State Auditor (Staffing SVSH hearings: a message from UC Academic Senate Directors, email from Hilary Baxter to UCPT, Nov. 20, 2020).

The question before us is whether to accept (either of) the proposed changes to the P&T hearing process, and if we do, how to go about implementing the proposed changes; if we do not, to consider what else might be done to mitigate the impact of the new regulations on participants and our process.

We (the task force) do not believe that we can accept any change in policy or practice that eliminates the possibility of a P&T hearing for a faculty member facing discipline. Both of the proposals before us go against APM 016, and indeed against some Standing Orders of the Regents: The Standing Orders provide that actions of certain types, some of them disciplinary in character, may not be carried out without the opportunity of a prior hearing before, or without advance consultation with, “a properly constituted advisory committee of the Academic Senate” (Standing Orders 100.4(c), 103.9 and 103.10). APM 016 goes on to state: “The Academic Senate has established Committees on Privilege and Tenure in each of the nine Divisions. The composition and duties of these committees are defined by the Academic Senate. One of the traditional roles of the Divisional Committees on Privilege and Tenure is to conduct hearings on disciplinary charges initiated by the Chancellor under this policy and make findings of fact and recommendations to the Chancellor regarding proposed disciplinary sanctions. The procedures for disciplinary hearings are set forth in Academic Senate Bylaw 336.” Bylaw 336, part A (“Right to a Hearing”) states: “In cases of disciplinary action commenced by the administration against a member of the Academic Senate ... proceedings shall be conducted before a Divisional Committee on Privilege and Tenure.”

In short, one of the rights that faculty have is the right not to be disciplined (in certain defined ways) without the opportunity of a hearing before their peers. The proposals before us would eliminate that right. That means that we (the Senate) cannot implement those proposals without a revision of APM 016 as well as APM 336, and maybe not at all, since there are Standing Orders of the Regents in the way.

We will briefly address the two specific proposals that have been put before us. Under Option 1, P&T is involved only at the level of sanctioning. P&T makes a recommendation on sanctioning based on the Title IX investigation report and the hearing officer's notice of determination. Clearly this would not provide the right to a hearing guaranteed by APM 016 and 336. Under option 2, representatives from P&T are present in the Title IX hearing and can "ask questions through the advisors". The decision about whether the respondent violated SVSH policy is to be determined by a panel composed of the P&T representatives and the hearing officer. The problem with this proposal is that the nature of the Title IX hearing is entirely different from that of a P&T disciplinary hearing. In a Title IX hearing, the opposing parties are the accuser and the accused; the administration, in the person of the Hearing Officer, is the arbiter. (34 CFR 106.45 systematically refers to this process as a "grievance" process.) In a P&T discipline hearing, the parties are the administration and the accused; the P&T hearing committee is the arbiter. The purpose of a P&T discipline hearing is to afford an accused faculty member, whom the administration has already announced an intention to discipline, the opportunity to argue, against the administration, that discipline should not be imposed or should be lessened. We believe that this function is an important part of shared governance, and not a part that the Academic Senate should relinquish.

That said, we recognize the concerns. We realize that a process that involves two hearings is going to be more cumbersome than a process requiring only one, and that complainants should not be subjected to a process that appears to require them to make their case twice. We have some suggestions about what can be done to mitigate those burdens, while preserving the faculty right to a P&T hearing when faced with discipline.

First, we think P&T hearing committees should recognize the fact that SVSH cases differ from other discipline cases in that there will have been an extensive Title IX investigation, as well as (in the new dispensation) a Title IX hearing. In SVSH-related discipline cases, we should make it clear to the parties that the Title IX Investigation Report and the Title IX hearing report will be entered into evidence (and that the hearing committee will also request the transcript of the Title IX hearing, including the appeal if one occurs, and any briefs or other documents generated by or considered in that process).

Hearing committee chairs should make it clear that the only witnesses P&T will be interested in hearing from will be witnesses who either (i) provide evidence that bears on whether the behavior of the respondent, as established by the Title IX investigation, constitutes a violation of the faculty code of conduct; or (ii) provide new evidence regarding the respondent's conduct that was not available during the Title IX investigation and that bears on whether the respondent violated the faculty code of conduct. Witnesses brought to repeat what the witness said at the Title IX hearing will not be permitted.

These tools are already available to P&T hearing committee chairs. Parties are required to submit in advance lists of witnesses to be called; chairs can require a statement concerning the purpose of each witness, and decline to hear witnesses whose testimony would duplicate the testimony of another witness, or information that the committee otherwise has, which would serve to eliminate most testimony from witnesses who testified at the Title IX hearing.

To assist Hearing Committee chairs in managing these issues, UCPT should consider developing a manual for P&T hearing chairs, serving as a guide to best practices, prerogatives of the chair, admissibility of documentary evidence, and managing hearings.

We anticipate that these measures, together with the separate change in evidentiary standard, will reduce both the number of hearings and their length in SVSH-related discipline cases, which should go some way toward answering the concerns of the Executive Directors.

We should also be aware that Department of Education regulations have changed before, and they might change again. We should not embark on a drastic overhaul of the relation between faculty and administration that may prove in a short time to have been unnecessary.