UNIVERSITY OF CALIFORNIA

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VIDEOCONFERENCE OF THE ASSEMBLY OF THE ACADEMIC SENATE

Wednesday, February 10, 2021
10:00 am - 12:30 pm

I. Roll Call

2020-21 Assembly Roll Call February 10, 2021

President of the University:
Michael Drake

Academic Council Members:
Mary Gauvain, Chair
Robert Horwitz, Vice Chair
Jennifer Johnson-Hanks, Chair, UCB
Richard Tucker, Chair, UCD
Jeffrey Barrett, Chair, UCI
Shane White, UCLA Chair
Robin DeLugan, Chair, UCM
Jason Stajich, Chair, UCR
Steven Constable, Chair, UCSD
Sharmila Majumdar, Chair, UCSF
Susannah Scott, Chair, UCSB
David Brundage, Chair, UCSC
Eddie Comeaux, Chair, BOARS
Amr El Abbadi, CCGA Chair
F. Javier Arsuaga, Chair, UCAADE
Susan Tapert, Chair, UCAP
Daniel Potter, Chair, UCEP
Shelley Halpain, Chair, UCFW
Richard Desjardins, Chair, UCORP
Sean Malloy, Chair, UCPB

Berkeley (5)
Suzanne Fleiszig
Colleen Lye
Adair Morse
Nathan Sayre
David Wagner

Davis (6)
Joe Chen
Hans-Georg Mueller
Joel Hass
Robert Powell
TBD (2)

Irvine (4)
Elliott Currie
Andrej Luptak
Nancy McLoughlin
Naomi Morrissette

Los Angeles (7)
Hiram Beltran-Sanchez
Nicholas Brecha
Jessica Cattelino
Mansoureh Eghbali
Ann Karagozian
William Marotti
Peter Tontonoz

Merced (1)
Jessica Trounstine

Riverside (2)
Peter Chung
Isgouhi Kaloshian

San Diego (5)
Mariana Cherner
Seana Coulson
Juan Lasheras
Stephanie Mel
Daniel Widener

San Francisco (5)
Marek Brzezinski
Linda Centore
Bo Huang
Jae-Woo Lee
Dyche Mullins

Santa Barbara (3)
Bassam Bamieh
Isabel Bayrakdarian
Yuedong Wang

Santa Cruz (2)
Patricia Gallagher
Judith Habicht-Mauche

Secretary/Parliamentarian
Andrew Dickson

UNIVERSITY OF CALIFORNIA ACADEMIC SENATE

VIDEOCONFERENCE MEETING OF ASSEMBLY OF THE ACADEMIC SENATE

December 9, 2020

MINUTES OF MEETING

I. ROLL CALL OF MEMBERS

Pursuant to the call, the Assembly of the Academic Senate met on Wednesday, December 9, 2020. Academic Senate Chair Mary Gauvain presided and called the meeting to order at 10:00 am. Senate Director Hilary Baxter called the roll of Assembly members and confirmed a quorum. Attendance is listed in Appendix A of these minutes.

II. MINUTES

ACTION: The Assembly approved the minutes of June 10, 2020.

III. ANNOUNCEMENTS BY SENATE LEADERSHIP

- **Mary Gauvain, Chair**
- **Robert Horwitz, Vice Chair**

Systemwide Reviews: Academic Senate divisions and committees are reviewing the report of the Senate's Online Undergraduate Degree Task Force; the report and recommendations of the joint Faculty Salary Scales Task Force; and future state recommendations for the Innovative Learning Technology Initiative. Soon, Senate reviewers will be invited to opine on the report and recommendations of the Feasibility Study Working Group that is charged with evaluating the viability of a new UC admissions test, following the Regents' decision to phase-out the SAT/ACT by 2025.

COVID-19: Systemwide Senate committees are grappling with the wide-ranging effects of the pandemic on the morale, productivity, and mental health of faculty, students, and staff, following their adjustments to remote teaching, learning, and working environments.

Curtailment Program: The University's new curtailment program asks each UC location to generate savings through a flexible mix of local measures that could include workforce actions such as temporary layoffs and unpaid leave days. However, some Council members insist that Regents Standing Order 100.4 (*qq*) empowers the UC president or a chancellor to implement furloughs only after the Regents declare a financial emergency. Council members are also concerned that the flexibility given to campuses in the program could harm the systemwide sense of UC and create unequal effects on faculty and staff across campuses. The Regents amended UCRP to preserve the accrual of service credit during a temporary layoff or furlough to ensure it does not constitute a break in service. The administration responded positively to the Academic Council's request to also protect employees' highest average plan compensation (HAPC) with respect to pension calculations.

Regents Meeting: At their November meeting, the Regents discussed ways to further improve undergraduate transfer to UC from the California Community Colleges and heard from transfer advocates who called on the University to implement additional reforms. The Regents also heard President Drake's vision for a debt-free path to a UC degree; considered opportunities for

improving Native American student enrollment and outreach; discussed accommodations and services to support students with disabilities; approved a 2021-22 budget and capital projects at UCD and UCSD; and accepted the report of the Special Committee on Basic Needs and its recommendations for addressing student basic needs insecurity.

Climate Crisis: The Academic Council is following up on letters it sent to the administration earlier this year concerning the climate crisis. The letters follow the Senate's 2019 Memorial to the Regents on Divestment from Fossil Fuel Companies. They ask the University to implement transparency and oversight measures to allow public review of fossil fuel investments in the endowment and retirement plan, and to issue an RFP for new commercial banking vendors that adhere to Environment, Social and Governance principles. Chair Gauvain and Vice Chair Horwitz have asked Senate committees to consider how to become more engaged in climate issues. They invited Assembly members to contribute ideas for actions and conversations that can help move forward the issues of divestment, carbon neutrality, and environmental sustainability.

Clinician Morale: The Academic Council plans to assemble a working group to consider specific problems affecting the morale of health sciences faculty, particularly those in non-Senate titles who feel removed from shared governance and other Senate privileges.

Human Resources: The systemwide UC Department of Human Resources works closely with the Academic Senate, primarily through UCFW and its Task Forces on Investment and Retirement and Health Care. Following several high-ranking departures from the Department, UCOP retained a consultant to interview constituents about what they want from systemwide HR. Senate leaders will ensure that the Senate is represented in ongoing discussions about the future state of Human Resources for the University as a whole.

- Chair Gauvain responded to questions from Assembly members about faculty morale and COVID vaccine distribution. She noted that the UC administration is aware that the pandemic is affecting faculty and staff morale. She and Vice Chair Horwitz are emphasizing the faculty's role in UC's continued success during the pandemic. Senate leaders have conveyed to administrators a suggestion for an additional sabbatical credit to recognize the extra teaching and service performed by faculty during the pandemic and the effect of the shutdown on their research. Chair Gauvain noted that the UC medical centers are building capacity to store and distribute COVID vaccines. Campuses will follow public health guidelines for distribution of the Pfizer and Moderna vaccines and are likely to prioritize frontline healthcare workers and first responders.

IV. REPORTS OF STANDING COMMITTEES

A. Academic Council

1. Revisions to Senate Bylaw 160 (Editorial Committee)

At its September 23, 2020 meeting, the Academic Council approved a request from the Editorial Committee to align its members' term of service with other systemwide Senate committees. Currently, Bylaw 160 specifies the term as July 1 to June 30. However, in practice, like other Senate committees, the Editorial Committee uses September 1 to August 31 as the service period. It is important for the functioning of the Editorial Committee to extend appointments through the summer and end on August 31 because the work of the UC Press continues over the summer. The Academic Council approved the amendment at its September 23, 2020 meeting and recommends Assembly approval.

ACTION: A motion to approve to revision was made and seconded. Chair Gauvain asked if there were any objections, and hearing none, stated that the motion was approved.

2. Revisions to Senate Bylaw 125.B.14

In 2018, the Board Regents accepted Senate Chair May's request to amend the eligibility requirement for the Senate representative to the Board of Regents Committee on Health Services. The previous requirement that the individual hold a clinical appointment at a UC "School of Medicine" was changed to "health sciences school" to allow the Academic Council to consider highly qualified individuals from other health sciences professional schools who would be excellent contributors to the Committee's work. The proposed revision to Senate Bylaw 125.B.14 will conform with the amended Charter of the Health Services Committee. The Academic Council approved the amendment at its November 23, 2020, meeting and recommends Assembly approval.

ACTION: A motion to approve to revision was made and seconded. Chair Gauvain asked if there were any objections, and hearing none, stated that the motion was approved.

V. ANNOUNCEMENTS BY THE PRESIDENT, PROVOST, AND CHIEF FINANCIAL OFFICER

- **Michael Drake, President**
- **Michael T. Brown, Provost and Executive Vice President**
- **Nathan Brostrom, Executive Vice President and Chief Financial Officer**

Report from the President: President Drake began his career as a UCSF professor of Ophthalmology before serving as the UC systemwide vice president for health affairs, chancellor of UC Irvine, and president of The Ohio State University. He said the chance to return home to California and his UC family motivated him to accept the job. He stressed that faculty are the core of the University's teaching, research, and public service missions; he expressed appreciation for UC faculty, students, and staff who transitioned quickly and effectively to remote education, often with additional family care challenges; and he acknowledged that everyone is working harder without the rewards of in-person collaboration.

President Drake said as vice president for health affairs, he relied on the CDC for advice around the SARS and AIDS epidemics, and he looks forward to hearing their continuing recommendations concerning COVID. The recent surge in cases is alarming. Today 350 COVID patients are in UC hospitals, compared to about 80 in November, and UC health employees are fighting to keep things in order and moving forward. But the vaccine is a light at the end of the tunnel. The University expects a national recommendation for vaccine distribution and understands it will be critical to prioritize front line health care workers, the elderly, and other vulnerable populations.

In studying campus efforts to repopulate dorms and classrooms, the University found that by enforcing public health guidelines for social distancing, masks, and handwashing, and by limiting dorm occupancy to singles, students living on campus had a significantly lower positivity rate compared to students living off-campus, and compared to the overall positivity rate in surrounding communities, based on a seven-day rolling average. The outcomes were similar across campuses.

President Drake stated he believes in shared governance and will look to the Senate for advice on how to address campus budget shortfalls. He thanked the Academic Council for its feedback on the curtailment program, and particularly for noting a glitch that would have reduced the Highest Average Plan Compensation (HAPC) calculation for employees retiring in the next three years.

- Assembly members thanked President Drake for addressing the HAPC concern. They asked if the University will require students to get a COVID vaccine; when faculty will become a vaccine priority; and the prospects for state reinvestment in the University or a new federal stimulus package that supports higher education.
- Members also recommended against increasing enrollment without additional funding when campuses are at capacity, and they noted that the lack of a systemwide approach to cuts could exacerbate inequities. Members asked administrators to consider how the University might help graduate students navigate the poor job market.
- Members noted that Regents Standing Order 100.4 *qq* appears to require a declaration of financial emergency prior to a systemwide curtailment program involving pay cuts and furloughs. They also asked administrators to clarify whether individual chancellors are subject to 100.4.

President Drake said UC's vaccination plan will align with public health guidelines; faculty should become a vaccine priority by the end of first quarter of 2021, and students by the end of the second quarter. He said UC has many supporters in state government and is emphasizing the high return on state investment in higher education. The prospects for a new federal stimulus package in 2021 are also strong. He said enrollment growth requires funding and UC will not compromise teaching and research excellence in pursuit of growth. UCOP is working with individual campuses to bridge budget gaps and eliminate structural budget deficits.

CFO Brostrom noted that UC has incurred $2.7 billion in lost revenue and unexpected costs from the pandemic, but its financial position is fundamentally strong: 2020-21 enrollment is steady; applications for 2021-22 admission are up 17 percent; and UC medical center revenues have recovered. And although auxiliary revenues have fallen, UC does not anticipate a long-term drop in demand for an on-campus experience. UC's 2021-22 state budget request of $518 million includes restoration of the $300 million reduction UC sustained in 2020-21, and new funding to support cost increases. He said the current budget crisis underscores the need for a predictable and stable tuition policy that supports campuses and bolsters the financial aid system. While UC does enjoy strong access to capital at low interest rates, the University's capital budget needs around seismic safety and deferred maintenance are at a critical state, particularly after the failure of the General Obligation bond ballot issue.

Provost Brown thanked the Senate for its innovative policy responses to COVID. He noted that the pandemic could affect research productivity for several years and encouraged faculty to assess the productivity of their colleagues in this context. He also encouraged the Senate to remain engaged on issues such as open access, campus climate, and racism. He said UC will need new investments in faculty, research, and graduate education to support its continued excellence, and invited ideas for how to increase funding and support for graduate students.

CFO Brostrom said the University believes that a declaration of financial emergency is unnecessary given the University's strong financial position. He said individual chancellors have the discretion to take workforce actions on their campus, but the President would review and approve any actions related to the pandemic.

VI. UNIVERSITY AND FACULTY WELFARE REPORT [None]

VII. NEW BUSINESS [None]

VIII. SPECIAL ORDERS [None]

A. Consent Calendar

B. Annual Reports [2019-20]

IX. REPORTS ON SPECIAL COMMITTEES [None]

X. PETITIONS OF STUDENTS [None]

XI. UNFINISHED BUSINESS [None]

The meeting adjourned at 12:30 pm
Minutes Prepared by: Michael LaBriola, Assistant Director, Academic Senate
Attest: Mary Gauvain, Academic Senate Chair

Attachments: Appendix A – Assembly Attendance Record, Meeting of December 9, 2020

Appendix A – 2020-2021 Assembly Attendance Record, Meeting of December 9, 2020

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TBD (2)

Irvine (4)
Elliott Currie
Andrej Luptak
Nancy McLoughlin
Naomi Morrissette

Los Angeles (7)
Hiram Beltran-Sanchez (absent)
Nicholas Brecha
Jessica Cattelino
Mansoureh Eghbali
Ann Karagozian (absent)
William Marotti
Peter Tontonoz

Merced (1)
Jessica Trounstine

Riverside (2)
Peter Chung (absent)
Isgouhi Kaloshian

San Diego (5)
Mariana Cherner
Seana Coulson
Juan Lasheras (absent)
Stephanie Mel
Daniel Widener

San Francisco (5)
Marek Brzezinski (absent)
Linda Centore (absent)
Bo Huang
Jae-Woo Lee
Dyche Mullins (absent)

Santa Barbara (3)
Bassam Bamieh
Isabel Bayrakdarian
Yuedong Wang

Santa Cruz (2)
Patricia Gallagher
Judith Habicht-Mauche

Secretary/Parliamentarian
Andrew Dickson

III. ANNOUNCEMENTS BY THE CHAIR

- **Mary Gauvain**

IV. REPORTS OF STANDING COMMITTEES

A. Academic Council

- **Mary Gauvain, Chair**

1. Revisions to Senate Bylaw 336.F.8

Background and Justification: The revisions to Senate Bylaw 336 are needed for alignment with state and federal law. On August 14, 2020, new federal Title IX regulations took effect detailing how the University must respond to certain complaints of sexual misconduct. The regulations require the use of a single evidentiary standard in all cases, regardless of the respondent's identity (i.e., student, staff, or faculty). In addition, California state law requires the University to use the "preponderance of the evidence" standard in SVSH matters involving students. Senate Bylaw 336 currently permits the Senate Privilege and Tenure proceedings for cases involving SVSH to use the "clear and convincing" evidentiary standard. At its January 27, 2021 meeting, following a systemwide Senate review, the Academic Council approved amendments to Academic Senate Bylaw 336.F.8., calling for the use of the preponderance of evidence standard in P&T hearings for cases of alleged violation of the University's SVSH policy. The Academic Council recommends Assembly approval. Divisional and committee comments from the systemwide Senate review are attached below.

ACTION REQUESTED: The Assembly is asked to endorse the Council recommendation.

336. Privilege and Tenure: Divisional Committees -- Disciplinary Cases

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 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.

ACADEMIC SENATE
BERKELEY
320 STEPHENS HALL
UNIVERSITY OF CALIFORNIA

January 19, 2021

MARY GAUVAIN
Chair, Academic Council

Subject: Berkeley Comments on the Proposed Revisions to Senate Bylaw 336.F.8 – Evidentiary Standard

Dear Chair Gauvain;

On November 30, 2020, the Council of the Berkeley Division (DIVCO) discussed the proposed revisions to Senate Bylaw 336.F.8, informed by comments from our local committees on Diversity, Equity, and Campus Climate (DECC); Faculty Welfare (FWEL); Privilege and Tenure (P&T); Rules and Elections (R&E). The committee comments are appended in their entirety.

The Berkeley Division supports the revisions, recognizing that they are necessary to align the APM with current federal Title IX regulations.

At the same time, we are concerned about the fact that faculty disciplinary cases may include multiple charges, only some of which would be subject to this revision. We therefore request procedural guidance on how to adhere to the revised terms of Senate Bylaw 336.F.8.

Thank you for the opportunity to comment.

Sincerely,

Jennifer Johnson-Hanks
Professor of Demography and Sociology
Chair, Berkeley Division of the Academic Senate

Enclosures

cc: Ronald Cohen, Vice Chair, Berkeley Division of the Academic Senate
Lok Siu, Committee on Diversity, Equity, and Campus Climate
David Hollinger, Co-Chair, Committee on Faculty Welfare
Terrance Odean, Co-Chair, Committee on Faculty Welfare
Samuel Otter, Chair, Committee on Privilege and Tenure
J. Keith Gilless, Chair, Committee on Rules and Elections
Jocelyn Surla Banaria, Executive Director, Berkeley Division of the Academic Senate
Sumei Quiggle, Associate Director staffing Rules and Elections
Linda Corley, Senate Analyst, Committee on Diversity, Equity, and Campus Climate
Sumali Tuchrello, Senate Analyst, Committee on Faculty Welfare and Privilege & Tenure

ACADEMIC SENATE
BERKELEY
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November 30, 2020

PROFESSOR JENNIFER JOHNSON-HANKS
Chair, 2020-2021 Berkeley Division of the Academic Senate

Re: DECC's Comments on the Proposed Revisions to Senate Bylaw 336.F.8

The Committee on Diversity, Equity, and Campus Climate (DECC) has read the proposed revisions to Senate Bylaw 336.F.8. DECC unanimously endorsed the proposal without comment.

Sincerely,

Lok Siu
Chair, Committee on Diversity, Equity, and Campus Climate

LS/lc

Subject: Re: Committee comments requested - FW: (Systemwide Senate Review) Proposed Revisions to Senate Bylaw 336.F.8
Date: Tuesday, November 17, 2020 at 3:03:41 PM Pacific Standard Time
From: Sumali Tuchrello MA
To: Jocelyn Banaria, Jennifer Johnson-Hanks
CC: David HOLLINGER, Terrance T ODEAN, Ronald C COHEN, Haniya Ferrell

Dear Chair Johnson-Hanks,

On behalf of FWEL Co-Chairs Hollinger and Odean, I write to share that FWEL has no objection or substantial comment to provide regarding the proposed revision to SB 336.F.8.

Thank you.

Best Regards,

Sumali Tuchrello, MA
Senate Analyst
Berkeley Division of the Academic Senate
https://academic-senate.berkeley.edu/

On Wed, Oct 28, 2020 at 12:20 PM Jocelyn Banaria <jocelynbanaria@berkeley.edu> wrote:

> Dear Committee Chairs of DECC, FWEL, P&T, and R&E – Professors Siu, Hollinger, Odean, Otter, and Gilless,
>
> Division Chair Jennifer Johnson-Hanks requests DECC, FWEL, P&T, and R&E comments on the attached revisions to Senate Bylaw 336.F.8, calling for the use of the preponderance of evidence standard in P&T hearings for cases of alleged violation of the University's SVSH policy, needed for alignment with state and federal law.
>
> Please send your committee comments by November 23, 2020, for discussion at the November 30th DIVCO meeting.
>
> If you have questions, please consult your committee analyst or me. Thank you.
>
> Sincerely,
>
> Jocelyn
>
> ---

ACADEMIC SENATE
BERKELEY
320 STEPHENS HALL
UNIVERSITY OF CALIFORNIA

November 10, 2020

CHAIR JENNIFER JOHNSON-HANKS
Divisional Council

RE: Proposed Revisions to SB 336.F.8

Dear Chair Johnson-Hanks,

The Committee on Privilege and Tenure unanimously supports the proposal to revise systemwide Senate Bylaw (SB) 336.F.8 to bring the bylaw into compliance with the evidentiary standard required by Federal Title IX regulations as of August 2020.

Given that the U.S. Department of Education's new regulation requires the use of a single evidentiary standard in all cases alleging Department of Education covered conduct, that California state law requires the University to use the "preponderance of evidence" standard in Sexual Violence and Sexual Harassment (SVSH) matters involving students, and that UC Academic Senate Bylaw 336 mandates the "clear and convincing" standard in Privilege and Tenure hearings involving faculty misconduct, P&T acknowledges the need for a change in Bylaw 336 to ensure that the University of California is in compliance with Federal regulations. The Committee supports the exception in F.8 that the burden of proof held by the Chancellor or the Chancellor's designee in cases where faculty members are alleged to have violated the University's policy on Sexual Violence and Sexual Harassment should be changed from the "clear and convincing" to the "preponderance of evidence" standard.

In discussing the revisions, one point came up worth conveying to DIVCO for further deliberation. A faculty disciplinary case may be directed to P&T that includes multiple charges, related to violations of the UC Policy on SVSH and also to non-SVSH violations. Since the revisions in Bylaw 336 will now present a difference in evidentiary standard based on the type of allegation, which standard shall P&T apply in such cases? A single standard for the entire case? Or different standards for each allegation in the case? Procedural guidance from the systemwide Academic Senate on how exactly to adhere to the revised terms of SB 336.F.8 would be appreciated.

Sincerely,

Samuel Otter, Chair
Committee on Privilege and Tenure

SO/st

ACADEMIC SENATE
BERKELEY
320 STEPHENS HALL
UNIVERSITY OF CALIFORNIA

November 23, 2020

JENNIFER JOHNSON-HANKS
Chair, Berkeley Division

Re: Proposed revisions to SB 336F.8 on P&T hearings

Dear Chair Johnson-Hanks,

At its meeting on November 12, the Committee on Rules and Elections reviewed the proposed revisions to Senate Bylaw 336F.8. We understand that federal law requires that the same evidentiary standard be used in all Department of Education-covered conduct (SVSH cases). Because California state law requires that the "preponderance of the evidence" standard be used in student cases, it seems clear that we must adopt that standard for faculty cases as well. We support maintaining the "clear and convincing evidence" standard for non-SVSH cases.

The proposed revision would combine the two types of cases and two standards into one clause. We feel that it might be clearer to describe each type of case and the corresponding standards in separate provisions in section F8.

Sincerely,

J. Keith Gilless
Chair, Committee on Rules and Elections

JKG/scq

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DAVIS, CALIFORNIA 95616-8502
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academicsenate.ucdavis.edu

January 20, 2021

Mary Gauvain
Chair, Academic Council

RE: Proposed Revisions to Systemwide Senate Bylaw 336.F.8

Dear Mary,

The proposed revisions to Senate Bylaw 336.F.8 were forwarded to all standing committees of the Davis Division of the Academic Senate. Three committees responded: Elections, Rules and Jurisdiction (CERJ), Faculty Welfare (FW), and Privilege and Tenure Investigative (P&T).

CERJ and FW support the proposed changes, while P&T had greater concerns. Committees recognize the need to conform to state and federal laws. However, both FW and P&T expressed concern that changing the standards could constitute a loss of established rights for faculty and potentially lead to wrongful termination suits against the university. P&T also finds problematic the following proposed revision language: for SVSH cases, the chancellor or chancellor's designee has "the burden of proving the allegations by a preponderance of the evidence." P&T questions the premise that one can "prove" a fact when the level of certainty required is only "more probable than not." P&T recommends adjusting the language to match California's SB 967, which does not require anything to be "proved."

The Davis Division appreciates the opportunity to comment.

Sincerely,

Richard P. Tucker, Ph.D.
Chair, Davis Division of the Academic Senate
University of California, Davis

Enclosed: Davis Division Committee Responses

c: Hilary Baxter, Executive Director, Systemwide Academic Senate
Michael LaBriola, Assistant Director, Systemwide Academic Senate
Edwin M. Arevalo, Executive Director, Davis Division of the Academic Senate

November 22, 2020

Richard Tucker
Chair, Davis Division of the Academic Senate

RE: RFC: Proposed Revisions to Systemwide Senate Bylaw 336.F.8

Dear Richard:

The Committee on Elections, Rules and Jurisdiction (CERJ) reviewed the Request for Consultation on the Proposed Revisions to Systemwide Senate Bylaw 336.F.8. The committee has no concerns about the proposed bylaw revisions. The committee also does not see any impacts to the divisional bylaws.

Thank you.

Sincerely,

Andrea J. Fascetti

Andrea Fascetti
Chair, Committee on Elections, Rules and Jurisdiction

December 18, 2020

Richard Tucker, Chair
Davis Division of the Academic Senate

RE: Proposed Revisions to Systemwide Senate Bylaw 336.F.8

Dear Professor Tucker,

The Faculty Welfare Committee reviewed and discussed in great detail the Proposed Revisions to Systemwide Senate Bylaw 336.F.8. We note that from a UC faculty perspective the proposed changes amount to a potential loss of established rights (the rights to be found culpable in a P&T trial based on higher evidentiary standards than the proposed ones). And we are concerned about the potential for errors due to such lowering of the evidentiary standards, errors which may not be easy to correct. However, predominant in our considerations and discussion were the UC principles of equity and fairness, by which all UC community members must be treated equally. We found that the proposed changes are aligned with those principles.

In the absence of an opportunity to fine tune Bylaw 336.F.8, in order to retain faculty rights not in contrast to DE mandated changes, we support the proposed revisions.

Regards,

Vladimir Filkov, Chair
Faculty Welfare Committee

December 18, 2020

Richard Tucker
Chair, Davis Division of Academic Senate

RE: RFC: Proposed Revisions to Systemwide Senate Bylaw 336.F.8

1. Introduction

The Committee on Privilege and Tenure (P&T) — Investigative Subcommittee reviewed the Request For Consultation on the Proposed Revisions to Systemwide Senate Bylaw 336.F.8. The committee has serious concerns about the proposed bylaw revisions. To put it plainly, we believe it is a bad idea, and a recipe for all sorts of serious future trouble and perversions of justice, to apply the preponderance of the evidence standard in investigations of faculty sexual violence and sexual harassment. Of course, the University's position of being in effect forced by state and federal rules to implement a policy of this type is a difficult position to be in, but this does not alleviate our concerns nor obviate the need to express them. Moreover, there may be increased legal jeopardy in wrongful termination suits brought against the university in SVSH cases leading to dismissal using the lower standard of evidence.

Below we review the different concerns that were brought up, and make specific recommendations as to how the Academic Senate might attempt to navigate this difficult issue.

2. Concerns about weakening of due process protections in faculty investigations of misconduct

Our main and most serious concern is that the proposed policy change will significantly weaken due process protections enjoyed by faculty in connection with investigations of alleged misconduct. We are no legal experts, but even a cursory amount of research we conducted on this subject revealed the fact that the use of the preponderance of evidence standard in connection with investigations of campus sexual misconduct is highly controversial and a matter of ongoing debate by legal experts, policymakers, and the courts. The practice raises difficult legal issues at all levels, including the level of constitutional law, and does not even appear to be a matter of settled law at this point in time — a fact that the Academic Senate may want to consider carefully.

To cite two examples of this debate, we note first that the American Association of University Professors (AAUP) states in a report from 2012 its objection to the practice in no uncertain terms:

> The AAUP advocates the continued use of "clear and convincing evidence" in both student and faculty discipline cases as a necessary safeguard of due process and shared governance.[1]

The AAUP reaffirmed this position in two further reports from 2016 and 2020, where they wrote:

> Specifically, this report identifies the following areas as threats to the academic freedom essential to teaching and research, extramural speech, and robust faculty governance: [...] The adoption of lower evidentiary standards in sexual-harassment hearings (the "preponderance of evidence" instead of the "clear and convincing" standard).[2]

> We object to the absence in the new regulations of any requirement that universities implement AAUP-recommended due-process protections in cases involving faculty members, including the right to a hearing by an elected faculty committee using the "clear and convincing evidence" standard of proof.[3]

As a second example, a court ruling from 2018 found that applying the preponderance of the evidence standard in a campus sexual misconduct case (in a case where the accused was a student) violated the constitutional due process rights of the accused. As a law article reviewing the case, *J. Lee v. The University of New Mexico*, explained:

> [...] on September 20 [2018], Judge James O. Browning of the United States District Court for the District of New Mexico issued a significant order that due process mandates a higher level of evidentiary proof to adjudicate a student's responsibility than a preponderance of the evidence.[4]

The Appendix to this letter contains a list of further references we found discussing the legal implications of using the preponderance of the evidence standard in connection with campus sexual misconduct, with some authors showing a clear skepticism or hostility towards the idea, and others considering it more favorably.

Even setting aside the legal angle, about which we are not qualified to opine, the idea that one can be found guilty of a type of misconduct considered by many to be among the most dishonorable and objectionable there is — an event with possibly career-ending consequences — based on a degree of likelihood that amounts to little more than a random guess, is highly troubling and conflicts with our common sense; the potential for error seems simply much too great to be acceptable. And we stress that

[1] https://www.aaup.org/report/campus-sexual-assault-suggested-policies-and-procedures#overlay-context=news/new-statement-sexual-assault
[2] https://www.aaup.org/report/history-uses-and-abuses-title-ix
[3] https://www.aaup.org/sites/default/files/AAUP_response_Title_IX_final_rule.pdf
[4] https://www.nixonpeabody.com/-/media/Files/Alerts/2018-September/Title-IX-preponderance-ruling.ashx?la=en

we hold this opinion despite our firm belief that the University should do its utmost to advocate for and pursue justice on behalf of victims of sexual harassment and sexual violence, and that this imperative should be reflected in University policy to the fullest extent that is reasonable to do so.

Our recommendation:
Given the potentially serious and far-reaching consequences of the proposed policy change, and given the controversial nature of the subject, we believe the Academic Senate ought not to rush into making a hasty policy change on this matter. It would seem prudent to look more deeply into this issue. In particular, we would recommend that legal and policy experts be consulted about what the legal, ethical, policy, and other (e.g., public relations) ramifications might be to enshrining the preponderance of the evidence standard as the applicable standard in investigations of faculty sexual violence and sexual harassment, prior to enacting any change to the policy.

3. Concerns about the language of the proposed revision

We now discuss the specific details of the proposed revision, starting from the premise (notwithstanding the serious concern expressed in Section 2 above) that the evidentiary standards policy indeed needs to be changed. Looking at the proposed added language in 336.F.8, we see that it stipulates that in the case of alleged violations 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.” We find this language problematic, as it is implies the underlying premise that one can “prove” a fact by a preponderance of the evidence. Considering that the “preponderance of the evidence” evidentiary standard is defined as the level of certainty at which the asserted fact is considered “more probable than not” (that is, a higher than 50% likelihood), and considering that the dictionary definition of the verb “prove” is “[to] demonstrate the truth or existence of (something) by evidence or argument”, we regard the concept of “proving [something] by a preponderance of the evidence” as self-contradictory and impossible to achieve. As an example, one may hold the belief based on looking at the weather forecast that it is more probable than not that it will rain today. Can this reasonably be said to imply that one has proved that it will rain today? The answer is clearly no.

We also note that the proposed language is not necessary to achieve compliance with California's SB 967 bill (said compliance being the main stated motivation behind the proposed amendment to Bylaw 336). The bill requires the University to adopt a policy concerning sexual assault, domestic violence, dating violence, and stalking, which “shall include”, among a number of things, “(3) A policy that the standard used in determining whether the elements of the complaint against the accused have been demonstrated is the preponderance of the evidence.” In particular, there is no mention of "proving" anything.

Our recommendation: we recommend that the language of the proposed revision be adapted to be consistent with the less self-contradictory formulation of SB 967.

4. Concerns about inconsistent evidentiary standards in different types of faculty misconduct

Another concern is that the proposed policy change will create a wide gap in the evidentiary standards applied to sexual violence and sexual harassment in comparison with all other types of faculty misconduct. Consider the following hypothetical examples of misconduct a faculty member may be accused of:

- Making racist remarks towards a co-worker
- Physical assault
- Misuse of research funds for private purposes
- Research misconduct, including fabricating research data
- Discriminating against a student based on their age, national origin or race, for example

Under both the existing and proposed policy, all of these types of misconduct will need to be demonstrated under the "clear and convincing" evidentiary standard in order to find the accused faculty guilty of misconduct. By contrast, under the proposed policy, sexual violence and sexual harassment will occupy a unique position as a type of offense equal to or greater than in seriousness to the above cited examples, but for which the required evidentiary standard is, bizarrely, much lower.

Again, we are no legal experts and are not qualified to opine on whether such a glaring policy inconsistency can hold legal water should a dispute on this matter ever reach the courts (although one does wonder). But at the very least, the inconsistency is an affront to common sense and plain logic. Among other reasons why it seems inadvisable, implementing a policy that has such large inconsistencies can have obvious negative consequences in undermining the faculty's morale and their belief in the justness of the rules governing their employment, fostering cynical views regarding the stupidity of institutional policies, and disincentivizing faculty from making it a general habit to respect and follow the rules even on matters unrelated to the particular point of inconsistency.

Our recommendation: the Academic Senate should ensure prior to making any policy change that the new policy respects basic requirements of logic and consistency. On this occasion, it does not.

5. Summary

The stated motivation behind the proposed amendment to Bylaw 336.F.8 is to bring University policy into compliance with the intersection of state and federal law. In other words, the reasons why we are contemplating this policy change is "because we have to". While that is of course an undeniably practical motivation, it is by equal measures troubling given the concerns we expressed above, which we believe are quite likely to be broadly shared by many Academic Senate faculty.

We are not suggesting that the Senate ignore the need to be compliant with the law. However, keeping in mind the above analysis, the need to comply with the law does not necessarily mean that we should comply *without question*, or that complying should be the end of the story; instead we should seek to act so as to resolve the ethical tension arising out of the conflict between our beliefs and the legal requirements. And in fact, there are ways to act, since the University of California is large and influential enough that it can help *make* the rules governing policy rather than just follow them blindly. Consider for example that, on September 30 of this year, California Gov. Gavin Newsom signed into law SB 918, nicknamed the "UC Davis Wine Sales Bill". This law allows wine produced by students in the UC Davis Viticulture and Enology program to be sold, eliminating the waste that resulted from an earlier legal requirement that this wine be dumped.[5] Similarly, in 2014 the California state legislature passed AB 1989 (nicknamed the "sip-and-spit" bill), a law lobbied for by UC Davis that allowed underage enology students to participate in wine-tasting activities related to their educational programs (as long as they spit out the wine after tasting it).[6]

If the University can lobby for bespoke legislation on such matters of relatively trifling significance, one can surmise that when it comes to admittedly complex, but also highly consequential policy matters such as the one being discussed here, the Academic Senate can find a way to influence policy-setting in a similar way, or at least attempt to. As a final recommendation, we therefore suggest that, concurrently with continuing to consider what is the most appropriate way to amend Bylaw 336 to ensure our compliance with state and federal law, the Senate should explore mechanisms to lobby the state legislature for a revision to SB 967, and/or lobby the Department of Education to allow an exception to their recent policy in a way that would resolve the current conflict between the federal and state requirements, thus allowing our policy expressed in Bylaw 336.F.8 to remain in (or revert to) its current sensible form.

[5] See: https://sd03.senate.ca.gov/news/20201001-governor-signs-sen-dodd's-uc-davis-wine-sales-bill
[6] See: https://www.ucdavis.edu/news/governor-signs-'sip-and-spit'-bill/

Appendix: References

1. 2016 article analyzing SB 967 and the problems with applying the preponderance of evidence standard
https://dailynexus.com/2016-02-12/the-underlying-problems-of-sb-967-and-affirmative-consent/

2. A 2017 debate in the New York Times on the subject of evidentiary standards in campus sexual misconduct cases
https://www.nytimes.com/roomfordebate/2017/01/04/is-a-higher-standard-needed-for-campus-sexual-assault-cases

3. A 2015 Master's thesis by Elizabeth Sommer from Northern Michigan University titled "Use of preponderance of evidence in campus adjudication of sexual misconduct"
https://commons.nmu.edu/cgi/viewcontent.cgi?article=1077&context=theses

4. Reports from 2012, 2016 and 2020 from the American Association of University Professors (cited in Section 2)
https://www.aaup.org/report/campus-sexual-assault-suggested-policies-and-procedures#overlay-context=news/new-statement-sexual-assault
https://www.aaup.org/report/history-uses-and-abuses-title-ix
https://www.aaup.org/sites/default/files/AAUP_response_Title_IX_final_rule.pdf

5. Article by Steven M. Richard discussing the *J. Lee v. The University of New Mexico* court ruling (cited in Section 2)
https://www.nixonpeabody.com/-/media/Files/Alerts/2018-September/Title-IX-preponderance-ruling.ashx?la=en

6. Two articles in Inside Higher Ed discussing the burden of proof in campus sexual misconduct cases
https://www.insidehighered.com/quicktakes/2016/08/08/law-professors-defend-education-dept-burden-proof
https://www.insidehighered.com/news/2016/07/15/85-organizations-defend-education-departments-title-ix-enforcement-efforts

7. 2020 article in the Pepperdine Law Review by Rachael A. Goldman: When Is Due Process Due?: The Impact of Title IX Sexual Assault Adjudication on the Rights of University Students
https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=2508&context=plr

UCLA Academic Senate

January 19, 2021

Mary Gauvain
UC Academic Senate Chair

Re: Proposed Revision to Senate Bylaw 336.F.8

Dear Chair Gauvain,

The Divisional Executive Board, councils, and committees appreciate the opportunity to review the proposed revision to Senate Bylaw 336.F.8. Committee members applauded efforts to clarify Bylaw 336, which is an important bylaw that supports equity.

The response of the Committee on Privilege and Tenure (P&T) was supported or endorsed by the Committees on Diversity Equity and Inclusion, Faculty Welfare, Charges, and Rules and Jurisdiction, but additional comments were made. The membership of the Executive Board endorsed the P&T response and the overlay of additional committees' and individuals' concerns. All of the attached comments are important and warrant careful consideration and response. At this time, without responses to the identified concerns, the Executive Board was unable to support the proposed revision to Senate Bylaw 336.F.8 as is.

P&T expressed three key areas of concern: variance in disciplinary standards, variance with imposition of discipline following other types of investigation outcomes, and the right to a hearing. P&T made a set of four recommendations, in brief to:

- Evaluate whether using "preponderance of the evidence" as the investigation standard for a finding of a violation, with "clear and convincing" remaining the standard to impose any of the six disciplinary actions as defined in APM-016, would meet the intersection of federal and state standards;
- Add language to the proposed bylaw revisions that clearly specifies that the revisions only apply to cases for which an intersection of Federal and State policy must be decided by a preponderance of the evidence;
- Alternatively (or additionally), since California law only requires the lower standard for "sexual assault, domestic violence, dating violence, and stalking," have the bylaw carve out only these violations rather than all Title IX violations;
- Specify that the Title IX hearing will also be the hearing before a committee of the Senate.

The Committee on Rules and Jurisdiction (CR&J) added additional concerns and another layer of analysis to the P&T letter, noting:

- There is no conflict between state law and UC Senate Bylaws requiring the preponderance of the evidence standard for cases of sexual harassment.

- DOE's August 2020 ruling on Title IX specifies that the standard of evidence to be used in determining responsibility in individual cases be the same for all classes of respondents in the University, but says nothing about the imposition of disciplinary sanctions in case of a finding of responsibility.
- Concerns relating to the idea that the Title IX hearing be stipulated as 'the hearing before a committee of the Senate,' and the role of the hearing officer.

The concerns of the Los Angeles Division are many and robust, warranting close review of all the attached individual letters. There were several overarching themes. Members raised concerns about an erosion of faculty rights and freedoms. They questioned the scope required by state law as well as whether the federal regulations requiring the same standard of evidence govern the standard to impose discipline or the standard to make a finding of a violation.

Once again, we appreciate the opportunity to opine on this issue. As is the divisional practice, we have appended all of the committee responses we received prior to the deadline to submit our response.

Sincerely,

Shane White
Chair, UCLA Academic Senate

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

January 14, 2021

To: Shane White, Chair
Academic Senate

Re: Systemwide Review of UC Academic Senate Bylaw 336 Amendment

Dear Chair White,

The Committee on Rules and Jurisdiction is grateful for the opportunity to comment on the proposed revisions to Bylaw 336. The Divisional Committee on Privilege and Tenure has already reviewed the proposed revisions to the Bylaw, outlining the background to the proposed revisions, in respect of both current UCLA policy and procedure and the rationale for change. In what follows we shall take their response as read.

The University should desire to alter the rules protecting the due process rights of faculty subject to disciplinary proceedings, rules known to faculty when they were hired and under which faculty members have worked throughout their careers, only to the least extent required by governing California and Federal law. Accordingly, CR&J would like to add notes in support of the P&T response.

Note that the DOE's annotation to the relevant Federal regulation[1] states in several places (first on p. 30246): 'These final regulations are focused on sexual harassment allegations, including remedies for victims of sexual harassment, and not on remedies for other kinds of misconduct.'; again, (p. 30378) 'These final regulations are focused on the appropriate standard of evidence for use in resolving allegations of Title IX sexual harassment, and not on the appropriate standard of evidence for use in cases of other types of misconduct by students, or employees.' That focus would appear to leave current UC Bylaws untouched, as California law does not address procedures for the determination of responsibility of members of the University for sexual harassment.

In light of this fact, it appears unnecessary to adopt any change of Senate Bylaw 336: the University is explicitly allowed by DOE to choose either standard of proof in cases of sexual harassment. If, nevertheless, it is thought advisable to make changes, we note the following:

First, as P&T points out, the relevant article of California law, Cal. Ed. Code §67386(a)(3), applies the standard of 'preponderance of the evidence' to be 'used in determining whether the elements of the complaint against the accused have been demonstrated' the cases of students accused of violent acts against sexual partners and others ('Sexual assault, domestic violence, dating violence, and stalking'), acts which are also crimes under California penal law. That article says nothing about cases of sexual harassment and other non-violent offenses. CR&J agrees with P&T's third recommendation, that UC should explore the possibility of separating the cases of sexual violence from those of sexual harassment, judging each with a different standard of evidence. There is, after all, no article of the Cal. Ed. Code requiring the preponderance of the evidence standard for cases of sexual harassment, and thus no conflict between state law and UC Senate Bylaws on that head. The proposed revision refers to current UC SVSH policy, merely asserting that 'consistency in practice with respect to all misconduct covered by that policy is desired'. But the assertion is unsupported and debatable—indeed, it is denied in the DOE's guidance.

[1] https://www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal

Second, DOE's ruling on Title IX last August specifies that *the standard of evidence to be used in determining responsibility* in individual cases be the same for all classes of respondents in the University. This says nothing about the imposition of disciplinary sanctions in case of a finding of responsibility.

That distinction accords with the current UC Bylaws. The systemwide P&T Committee, in recommending changes in the relevant bylaw (then Bylaw 335) regarding early termination of faculty contracts in 2001 (https://senate.universityofcalifornia.edu/_files/assembly/may2001/may2001viid.pdf page 88) distinguished two different cases the Administration must prove with clear and convincing evidence: 1) whether an individual faculty member has committed a violation of the Faculty Code of Conduct; 2) whether there is good cause for early termination of that faculty member's contract. Of these:
1) corresponds to the Department of Education OCR's specification that 'the determination of responsibility' be judged according to the University's choice of one standard of evidence or the other, that choice being the same when applied to all members of the University community;
2) is another matter, the determination whether or not there is good cause to take a specific disciplinary action, namely, early termination of contract, against a faculty member found responsible for a violation of the FCC.

The current Bylaws distinguish three different kinds of case that come before P&T, delineating for each its own procedures and standards in a separately numbered Bylaw: grievances, disciplinary cases, termination cases. For termination cases, the UC Bylaw accords with AAUP's recommendation that the standard of 'clear and convincing evidence' be used, and it seems highly inadvisable for UC to set its own rules for termination in opposition to the AAUP's standard. In that case, one could argue that the other 'disciplinary sanctions'—written censure, reduction in salary, demotion, suspension without pay, denial or curtailment of emeritus status—be treated in the same way as termination, with which they are classed.

We agree, therefore, that the University might investigate whether it would satisfy the DOE's demand that a single evidentiary standard be used to establish responsibility for cases of violation of Title IX sexual harassment by any member of the University to change the evidentiary standard used in the determination that the FCC has been violated ('responsibility'), i.e., the Title IX hearing, but not for the imposition of disciplinary sanction. The latter is currently done after a separate hearing in front of a different body, viz., P&T.

Finally, a question arises regarding P&T's fourth suggestion, that the Title IX hearing be stipulated as 'the hearing before a committee of the Senate', with a Hearing Officer appointed by the Title IX Office and the rest of the members chosen by P&T, so that the Hearing Officer may participate in recommending a finding, but not vote on the recommendation of a sanction. Does P&T intend this as a recommendation to be adopted as an alternative to other recommendations or one to be recommended in any case?

We hope that you will find these considerations useful in your own deliberations about the UCLA Division's response to the proposed revision of Bylaw 336. If you have any questions, please do not hesitate to contact me at blank@humnet.ucla.edu or the Committee on Rules and Jurisdiction Analyst, Taylor Lane Daymude at tlanedaymude@senate.ucla.edu.

Sincerely,

David Blank, Chair
Committee on Rules and Jurisdiction

UCLA Academic Senate
Committee on Diversity, Equity & Inclusion

January 13, 2021

To: Shane White, Chair
Academic Senate

Re: Systemwide Review of UC Academic Senate Bylaw 336 Amendment

Dear Chair White,

At its meeting on December 8, 2020, the Committee on Diversity, Equity and Inclusion discussed the proposed revisions to UC Academic Senate Bylaw 336.F.8. The Committee subsequently endorsed the draft memorandum from the Committee on Privilege and Tenure, dated January 6, 2021.

We appreciate being given the opportunity to weigh in on this issue. If you have any questions, please do not hesitate to contact me at yarborou@humnet.ucla.edu or the Interim Committee on Diversity, Equity and Inclusion Analyst, Taylor Lane Daymude at tlanedaymude@senate.ucla.edu.

Sincerely,

Richard Yarborough

Professor Richard Yarborough, Chair
Committee on Diversity, Equity and Inclusion

UCLA Academic Senate
Charges Committee

January 14, 2021

To: Shane White, Chair
Academic Senate

Re: Proposed Revisions to Systemwide Bylaw 336

The Charges Committee has reviewed the proposed revisions to Systemwide Bylaw 336 and the Committee on Privilege & Tenure's (P&T) response to the proposed revisions. The Charges Committee represents "faculty involvement in the investigation of allegations of misconduct and/or in making recommendations to appropriate administrative officers" whether a formal disciplinary complaint should be filed (probable cause).[1] Bylaw 336 principally governs the P&T process for disciplinary cases that involve Senate faculty once probable cause is established. The Committee therefore in general agreed that they support the comments in the P&T letter, with the following added concern and recommendation.

Committee members are concerned that parties in cases involving sexual harassment or sexual violence should only undergo one hearing. If the hearing is required as part of the Title IX finding process, it must be designed so that faculty do not lose their right to a hearing before a committee of the Academic Senate and do not have to endure two separate hearings.[2]

The Charges Committee also strongly recommends that a more robust discussion is in order about the scope required by state law and as to whether the federal regulations requiring the same standard of evidence govern the standard to impose discipline **or** the standard to make a finding of a violation. The latter is already preponderance of the evidence for all parties (faculty, student, staff).

Sincerely,

Jeff Bronstein, Chair
Committee on Charges

cc: Jody Krieman, Vice Chair/Chair-Elect, Academic Senate
Michael Meranze, Immediate Past Chair, Academic Senate
April de Stefano, Academic Senate Executive Director

[1] Faculty Code of Conduct, Enforcement and Sanction APM-015 §III.B.4
[2] See Senate Legislative Ruling 3.73 which establishes the "Divisional Committee on Privilege and Tenure" as the "properly constituted advisory committee of the Academic Senate."

UCLA Academic Senate
Faculty Welfare Committee

January 15, 2021

Shane White, Chair
Academic Senate

Re: Proposed Revisions to Senate Bylaw 336.F.8

Dear Chair White,

At its meeting on November 17, 2020, the Faculty Welfare Committee reviewed and discussed the Proposed Revisions to Senate Bylaw 336.F.8. Additionally, members reviewed the Committee on Privilege & Tenure's response via email and unanimously endorsed it.

Thank you for the opportunity to review and comment. If you have any questions, please contact us via the Faculty Welfare Committee's interim analyst, Elizabeth Feller, at efeller@senate.ucla.edu .

Sincerely,

Huiying Li, Chair
Faculty Welfare Committee

cc: Jody Kreiman, Vice Chair/Chair Elect, Academic Senate
Michael Meranze, Immediate Past Chair, Academic Senate
April de Stefano, Executive Director, Academic Senate
Elizabeth Feller, Interim Analyst, Faculty Welfare Committee
Faculty Welfare Committee Members

UCLA Academic Senate
Council on Academic Personnel

January 14, 2021

To: Shane White, Chair
Academic Senate

Re: Proposed Revisions to Systemwide Bylaw 336

The Council on Academic Personnel has reviewed the proposed revisions to Systemwide Bylaw 336 and the Committee on Privilege & Tenure's (P&T) response to the proposed revisions. One member, former Charges Chair Dan Bussel (Law), also provided an individual response, which we attach here.

A strong majority of the Council members supported Professor Bussel's response, which "does not object" to the recommendations in the P&T memo, but does strongly assert that the proposal constitutes "watering down of the due process protections afforded Senate members accused of sexual misconduct below the standards historically employed by the University of California and recommended by the American Association of University Professors (AAUP)."

The Council therefore recommends a more careful analysis as to whether the cited authorities, indeed, compel the Senate to change its standards for imposing disciplinary sanctions. Under current bylaws, the disciplinary hearing is already carefully separated from the Title IX investigation and finding process. According to the Faculty Code of Conduct, "University discipline, **as distinguished from other forms of reproval or administrative actions**, should be reserved for faculty misconduct that is either serious in itself or is made serious through its repetition, or its consequences" (emphasis added)."[1]

If you have any questions, please do not hesitate to contact me or the Council Analyst, Marian Olivas.

Sincerely,

Ali Behdad, Chair
Council on Academic Personnel

Enc. Letter, Dan Bussel to Shane White and Ali Behdad (January 7, 2021)

cc: Shane White, Chair, Academic Senate
Jody Krieman, Vice Chair/Chair-Elect, Academic Senate
Michael Meranze, Immediate Past Chair, Academic Senate
April de Stefano, Academic Senate Executive Director

[1] APM 015, II "Professional Responsibilities, Ethical Principles, and Unacceptable Faculty Conduct"

January 14, 2021

To: Shane White, Chair
UCLA Academic Senate

From: Vilma Ortiz, Chair
UCLA Privilege and Tenure Committee

Re: Proposed revisions to systemwide Bylaw 336

The Committee on Privilege and Tenure appreciates the opportunity to review the proposed revisions to systemwide Bylaw 336. The revisions propose that the evidentiary standard used in P&T hearings to determine disciplinary sanctions be revised from "clear and convincing" to a "preponderance of the evidence standard." The stated rationale is that this will conform to an intersection of new federal regulations and existing California law. The second matter to address is that the new regulations require that a Title IX finding (after a Title IX investigation) now requires a formal hearing.

BACKGROUND

In order to review these changes, it is helpful to understand the basics of the disciplinary process and how it is practiced at UCLA. In compliance with the Faculty Code of Conduct statement that there "should be provision, to the maximum feasible extent, for separating investigative and judicial functions,"[1] the faculty disciplinary process at UCLA ordinarily involves a two-step process in which charges are first brought before the Charges Committee as part of the investigation phase, which includes finding of probable cause. When the Charges Committee determines there exists probable cause, the case is referred to the Vice Chancellor of Academic Personnel adjudication by way of a disciplinary hearing before a hearing committee appointed by P&T.

In cases of an alleged violation of the University policy on Sexual Violence and Sexual Harassment (SVSH), however, allegations are first brought to the Title IX office, which is empowered to initiate an administrative investigation. The most recent changes to systemwide SVSH policy have already been incorporated into Appendix XII. These specify that, should the Title IX office find after investigation a violation of the University SVSH policy by a "preponderance of the evidence," that finding will *ipso facto* constitute a finding of probable cause that the Faculty Code of Conduct has been violated. At UCLA, this has already effectively excluded a faculty role via charges in the investigation process.[2]

Nonetheless, under the current policy and practice, faculty who have been found by the Title IX office to be in violation of SVSH policy by a preponderance of the evidence maintain their right to a hearing before the Privilege and Tenure (P&T) Committee before discipline can be imposed. For its hearings on alleged violations of the Faculty Code of Conduct, the P&T Committee uses a "clear and

[1] Faculty Code of Conduct. APM-015 III.B.6.
[2] The Title IX Office's finding authorizes the bringing of charges directly to the P&T Committee. One rationale for excluding Charges Committee participation in SVSH cases is that the Title IX office employs a "preponderance of the evidence" standard in its findings, which is no less rigorous a standard than the "probable cause" standard that the Charges Committee would customarily employ.

convincing evidence" standard of proof before recommending disciplinary sanctions. This standard is higher than that of "preponderance of the evidence."

The current proposal involves two changes. First, as briefly noted above, instead of having the Title IX investigator make a finding concerning violation of SVSH policy following an investigation, Title IX Offices will now have to determine whether the policy has been violated by engaging in a two-step process. Following the investigation, there will be a *recommendation* whether, using a "preponderance of the evidence" standard, policy has been violated. Then the case will go to a hearing before a Hearing Officer. Both parties will have the right to cross examination in the hearing. The outcome of the Title IX hearing will constitute a finding by a preponderance of the evidence.

The second change involves the standard for imposing discipline. The proposed revisions to Senate ByLaw 336 change the standard of proof to be applied by the P&T Committee in SVSH disciplinary cases to "preponderance of the evidence" rather than the otherwise applicable "clear and convincing evidence" standard. That is, the standard of proof will be "preponderance of the evidence" not only for a finding of a violation, but for imposition of discipline.

The reasons proffered for this proposed change involve the intersection of federal and state law, which are binding on UC. Federal law, as expressed in recent regulations of the Department of Education, requires that a uniform standard of proof be applied in SVSH cases, regardless of whether the respondent is a student, faculty member, or staff member. At the same time, California state law requires that campus sexual harassment cases involving student respondents be subject to a "preponderance of the evidence" standard. This seems to leave the university little choice but to specify (as in the proposed revision to Bylaw 336) a "preponderance of the evidence" standard for P&T disciplinary hearings involving an alleged violation of the University SVSH policy.

Issues Raised by the Proposed Revision to Senate ByLaw 336

Issue One: Variance in disciplinary standards

This would single out SVSH violations, when it comes to discipline, for treatment different from all other violations of the FCC, which would be still be subject to a "clear and convincing evidence" standard for imposition of discipline.

In requiring a uniform standard for imposing discipline for SVSH cases regardless of the identity of the respondent, the intersection of federal and state law thus introduces a disparity between SVSH cases and other kinds of cases. Although this is assertedly being done under the compulsion of federal and state law, it is conceivable that a faculty member subject to discipline for violation of the SVSH policy under such conditions could have a legal claim against the university for discriminatory treatment.

Another issue that has arisen is that the standard for disciplining faculty is higher than that for imposing discipline on students or staff. The standard of "clear and convincing" was added as a clarification when the bylaws were revised in 2001. The UC Committee on Privilege & Tenure made the following comment:

> The existing . . . Bylaw does not specify who has the burden of proof at such a hearing or what level of proof is required, an omission that many P&T members found astonishing. It is analogous to having a criminal trial without assigning to the district attorney the burden of proving guilt beyond a reasonable doubt. The

> proposed Bylaws clearly specify both the burden and the level of proof required at a hearing. In disciplinary cases against a faculty member, the administration will bear the burden of proving a violation of the Faculty Code of Conduct by clear and convincing evidence. . . . Finally, in early termination cases, the administration will be required to provide clear and convincing evidence that there is good cause for the termination. This last requirement is consistent with both Regental Standing Orders and AAUP guidelines.[3]

It would not be advisable to rectify the apparent disparity by making all violations of the FCC subject to a "preponderance of the evidence" standard for imposing discipline on faculty without a vigorous discussion of the implications for tenure and academic freedom. The sanctions for violations of the Faculty Code of Conduct are punitive actions specifically involving the faculty academic appointment and therefore have an intentionally higher bar than discipline for students or staff, generally understood to be a protection of faculty academic freedom.[4]

Issue Two: Variance with imposition of discipline following other types of investigation outcomes

The investigative standard of proof is already "preponderance of the evidence" for other investigative processes on campus, most notably for research misconduct and for discrimination, but also for cases investigated by the whistleblower process, privacy violations, violation of electronic communication policies, etc. In these cases a finding of a violation allows for the imposition of a variety of administrative actions[5] without precluding the right to a hearing, with a clear and convincing standard of proof required, before one of the six actions[6] specifically defined as disciplinary sanctions is imposed. The proposed change will mean that for SVSH cases a finding of a violation will not only allow the imposition of a variety of administrative actions, but will also allow the imposition of disciplinary sanctions.

Issue Three: Right to a Hearing

It has been suggested that the inclusion in the proposal of a hearing during the SVSH finding phase should serve to ameliorate concerns that the Title IX process is, in effect, assuming a measure of control over disciplinary matters without the protections specified by the faculty disciplinary process. However, the Title IX hearing process contemplated by the proposal sits in tension with the right to a hearing "before a properly constituted advisory committee of the Academic Senate" before discipline is

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[3] University of California Academic Assembly, "Notice of Meeting" (May 23, 2001), p. 90. Available: https://senate.universityofcalifornia.edu/_files/assembly/may2001/may2001whole.pdf;
In their statement on "Recommended Institutional Regulations on Academic Freedom and Tenure," the American Association of University Professors (AAUP) recommends that the standard for dismissal proceedings be "clear and convincing." See: https://www.aaup.org/report/recommended-institutional-regulations-academic-freedom-and-tenure

[4] See also "The History, Uses, and Abuses of Title IX" for a discussion of Title IX issues specific to academia. Available: https://www.aaup.org/report/history-uses-and-abuses-title-ix

[5] "Disciplinary action is to be distinguished from certain other administrative actions taken as the result, not of willful misconduct but rather, for example, of disability or incompetence. The administration naturally bears the responsibility of assuring that the University's resources are used productively and appropriately. In meeting this responsibility, administrators must occasionally take actions which resemble certain disciplinary sanctions but which are actually of an entirely different character. These actions are subject to separate procedures with due process guarantees and should not be confused with disciplinary action with its implications of culpability and sanction." APM-016

[6] Written censure, Reduction in Salary, Demotion, Suspension (without pay), Denial or Curtailment of Emeritus Status, Dismissal.

imposed.[7] It would be burdensome for all parties to be subjected to two hearings. Additionally, since the proposed disciplinary standard is the same as that for an investigative finding of a violation, it would not make sense to have a second hearing. The possibility exists that pressure would mount to dispense altogether with the faculty disciplinary hearing. The proposed revisions as they stand substantially weaken the Senate faculty right to a disciplinary hearing tried by peers.

RECOMMENDATIONS

- Evaluate whether using "preponderance of the evidence" as the investigation standard for a finding of a violation (which as it stands allows imposition of administrative remedies short of discipline), with "clear and convincing" remaining the standard to impose any of the six disciplinary actions as defined in APM-016, would meet the intersection of federal and state standards.
- Add language to the proposed bylaw revisions that clearly specifies that the revisions *only* apply to cases for which an intersection of Federal and State policy must be decided by a preponderance of the evidence. Should those policies or the interpretation of those policies change, the bylaws will revert to the previous version.
- Alternatively (or additionally), since California law only requires the lower standard for "Sexual assault, domestic violence, dating violence, and stalking," have the bylaw carve out only these violations rather than all Title IX violations.
- Specify that the Title IX hearing will also be the hearing before a committee of the Senate. Therefore, while the Hearing Officer may be appointed by the Title IX Office, P&T will retain the authority to appoint the remaining members of the hearing panel with the same procedures as for other disciplinary hearings. The Hearing Officer may participate in recommending a finding, but will not have a vote for recommending a sanction.

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

Jody Krieman, Vice Chair/Chair-Elect, Academic Senate
Michael Meranze, Immediate Past Chair, Academic Senate
April de Stefano, Academic Senate Executive Director

[7] Safeguards against arbitrary or unjust disciplinary actions, including provision for hearings and appeals, are well established in the University. 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" (APM-016)

. . . When such action [*that would affect personnel*] relates to a Professor, Associate Professor, or an equivalent position; Assistant Professor; a Professor in Residence, an Associate Professor in Residence, or an Assistant Professor in Residence; a Professor of Clinical (e.g., Medicine), an Associate Professor of Clinical (e.g., Medicine) or an Assistant Professor of clinical (e.g., Medicine); a Senior Lecturer with Security of Employment, or a Lecturer with Security of Employment, the Chancellor shall consult with a properly constituted advisory committee of the Academic Senate.

The termination of a continuous tenure appointment or the termination of the appointment of any other member of the faculty before the expiration of the appointee's contract shall be only for good cause, after the opportunity for a hearing before the properly constituted advisory committee of the Academic Senate.
[Regents Standing Orders 100.4(c), 103.9]

UCLA Academic Senate
Graduate Council

December 7, 2020

To: Shane White, Chair
Academic Senate

From: Andrea Kasko, Chair
Graduate Council

Re: Systemwide Senate Review: Proposed Revisions to Senate Bylaw 336.F.8

At the Graduate Council's December 4, 2020 meeting, the proposed revisions to Senate Bylaw 336.F.8 were presented as an information item.

Although the Graduate Council was not required to opine on this issue, a member offered the following observation for your consideration:

> On page 6 (Senate Bylaw 336.F.9), it would be useful to include in the specific language regarding the determination of sanctions which evidentiary standard was met for violations of the University's policy on Sexual Violence and Sexual Harassment.

Thank you for the opportunity to comment. If you have any questions, please do not hesitate to contact me via the Graduate Council analyst, Estrella Arciba, at earciba@senate.ucla.edu.

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OFFICE OF THE ACADEMIC SENATE
ROBIN DELUGAN, CHAIR, ACADEMIC SENATE
senatechair@ucmerced.edu

UNIVERSITY OF CALIFORNIA, MERCED

January 13, 2021

To: Mary Gauvain, Chair, Academic Council

Re: Proposed Amendments to Senate Bylaw 336.F.8

The proposed amendments aim to make Senate Bylaw 336.F.8 compliant with the recent federal policy change regarding sexual violence and sexual harassment allegations. It calls for the use of the preponderance of evidence standard in P&T hearings for cases of alleged violation of the UC's SVSH policy.

The Merced Division Senate and School Executive Committees were invited to comment. The Committees on Rules and Elections, Diversity and Equity endorse the proposed amendments. The Faculty Welfare and Academic Freedom Committee, the School of Engineering and Natural Sciences Executive Committees offer comments for consideration. They are appended to this memo (pages 4 – 7).

The Merced Division thanks you for the opportunity to comment on these proposed Bylaw amendments.

Sincerely,

Robin M. DeLugan

Robin DeLugan
Chair, Divisional Council
UC Merced

CC: Hilary Baxter, Executive Director, Systemwide Academic Senate
Michael Labriola, Assistant Director, Systemwide Academic Senate
Senate Office

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ACADEMIC SENATE, MERCED DIVISION
COMMITTEE ON RULES AND ELECTIONS (CRE)

UNIVERSITY OF CALIFORNIA, MERCED
5200 NORTH LAKE ROAD
MERCED, CA 95343

December 7, 2020

To: Robin DeLugan, Chair, Divisional Council

From: Committee on Rules and Elections

Re: Proposed Revisions to Systemwide Senate Bylaw 336.F.8

The Committee on Rules and Elections has reviewed the proposed revisions to Systemwide Senate Bylaw 336.F.8 – Evidentiary Standard. Since the UC is mandated by the federal government to use the same evidentiary standard in P&T hearings for cases of alleged violation of the University's SVSH policy, the proposed amendment seems necessary and unavoidable.

We thank you for the opportunity to review this item.

CC: CRE Members
Senate Office

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ACADEMIC SENATE, MERCED DIVISION
COMMITTEE FOR DIVERSITY AND EQUITY

UNIVERSITY OF CALIFORNIA, MERCED
5200 NORTH LAKE ROAD
MERCED, CA 95343
(209) 228-7930

December 7, 2020

To: Robin DeLugan, Senate Chair

From: Committee for Diversity and Equity (D&E)

Re: Proposed Revisions to Senate Bylaw 336.F.8

The Committee for Diversity and Equity (D&E) reviewed the proposed revisions to Senate Bylaw 336.F.8, calling for the use of the preponderance of evidence standard in P&T hearings for cases of alleged violation of the University's Sexual Violence and Sexual Harassment (SVSH) policy. Since the University is mandated by the federal government to use the same evidentiary standard for all members of our campus, and the state law requires a "preponderance of evidence" whenever students are involved in SVSH cases, D&E does not see any alternative than the proposed revisions. D&E also notes that, as per proposed revisions, the higher "clear and convincing" evidentiary standard will continue to be applied to P&T cases except in the cases of SVSH-related misconduct where the lower "preponderance of evidence" standard is used.

It is D&E's understanding that a faculty member's P&T case would (should) only be negatively affected when they were the aggressor, not the victim. Given the power structures that exist in academia and that many cases of sexual harassment and assault go unreported, D&E fully supports the proposed revisions to the bylaw.

The Committee for Diversity and Equity appreciates the opportunity to opine.

cc: D&E Members
Fatima Paul, Executive Director, Senate Office
Senate Office

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ACADEMIC SENATE, MERCED DIVISION
COMMITTEE ON FACULTY WELFARE AND ACADEMIC FREEDOM
CAROLIN FRANK, CHAIR
cfrank3@ucmerced.edu

UNIVERSITY OF CALIFORNIA, MERCED
5200 NORTH LAKE ROAD
MERCED, CA 95343
(209) 228-4369

December 1, 2020

To: Robin DeLugan, Chair, Divisional Council

From: Carolin Frank, Chair, Committee on Faculty Welfare and Academic Freedom (FWAF)

Re: Proposed Revisions to Senate Bylaw 336.F.8

FWAF has reviewed the proposed revisions to Senate Bylaw 336.F.8, which calls for the use of the preponderance of evidence standard in P&T hearings for cases of alleged violation of the University's Sexual Violence and Sexual Harassment (SVSH) policy, needed for alignment with state and federal law.

The revision to the policy, by lowering the existing standard of evidence for hearings where faculty are accused to "preponderance of evidence," is an improvement from the perspective of SVSH victims, who might be denied justice because the available evidence cannot meet the standard of "clear and convincing" evidence in some cases.

However, for those accused, who are in fact innocent, the lowering of the standards is concerning, given the potentially irreparable damage to their career. We share the broad concerns of the UC system on the change of policy, especially the interim policy which continues to permit using different evidentiary standards for faculty, students, and staff, but acknowledge that the current federal law requires it.

FWAF appreciates the opportunity to opine.

cc: Senate office

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SCHOOL OF ENGINEERING

University of California, Merced
5200 N. Lake Road | Merced, CA 95343
PHONE: 209-228-4411
FAX: 209-228-4047

December 7, 2020

To: UC-M Academic Senate
From: Catherine Keske, Chair, School of Engineering Executive Committee (SoE ExComm)
Re: Proposed Revisions to Senate Bylaw 336.F.8

Dear Senate Chair DeLugan:

The School of Engineering Executive Committee (SoE ExComm) appreciates the opportunity to provide feedback on the Proposed Revisions to Senate Bylaw 336.F.8.

We call for the Senate to revise Bylaw 336. The "Preponderance of Evidence" legal standard[1] promulgates that there is >50% chance that a claim is true. Bylaw 336 stacks the bias against the victim so that the Preponderance of Evidence threshold in Bylaw 336.F.8 is unlikely to be reached. Moreover, we are in an era where the long-term impacts of racial bias in policing are finally being recognized and have become a source of public outcry. We cannot turn away from the bias that is embedded into Bylaw 336.

This item was discussed at the November 17 SoE ExComm meeting, with the Chair sharing comments from two Senate faculty. One Senate Faculty member wished to provide comments anonymously, so neither identity was revealed. An additional review of comments was later conducted via email. As follows are suggestions for addressing 336.F.8 specifically, and to motivate the revision for Bylaw 336 generally.

***1) Inconsistency in Legal Standards*:** The proposed modification in Bylaw 336.F.8 states that the criterion for "Preponderance of Evidence" (new Federal regulation) will only be considered by the Chancellor or Chancellors' designee for allegations in cases that violate the University's policy on Sexual Violence and Sexual Harassment, but for all other cases, the "Clear and Convincing" evidence criteria will be used.

The rationale for the use of these two different criteria is unclear.

- Why isn't the new 'Preponderance of Evidence' threshold being used for all cases?
- Why are there two criteria for Faculty?
- Why only the " Preponderance of Evidence " criteria for staff and students?

2) Lack of Restorative Justice: One SoE Senate Faculty member expressed concern that the proposed policy exhibited a "lack of sensitivity about victims and their rights" and that there was "no restorative justice". This Senate Faculty member emphasized that Bylaw 336.F.8 was designed to protect the accused and the

[1] See Cornell's Legal Information Institute for the Preponderance of Evidence standard that serves as the burden of proof standard for civil trials.

University, rather than ensuring that support is provided to the victim. Ironically, overlooking these elements also places the University at higher risk, particularly since mitigation practices aren't spelled out.

3) ***Three-year Time Horizon is Too Long***: The faculty member indicated that the three-year timeline extended to Chancellors seems arbitrary and it provides an avenue to place scores of individuals in harm's way. See Part B, "Time Limitation for Filing Disciplinary Charges":

> *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.*

We suggest substantially shortening the time window for Chancellors to report incidents.

4) Biased Committee Composition: Committee Composition plays an important part of reducing bias, so that the Preponderance of Evidence threshold is fair to all parties.

- Bylaw 336 is lacking in a requirement for gender, racial, ethnic, sexual orientation (and other) diversity and representation on the P&T Committee and in general.

- It is stated in several occasions in Bylaw 336 that the Committee on Privilege and Tenure will be composed of Senate members from the same Division and members from other Divisions could constitute a new Committee only under extraordinary circumstances:

"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."

We do not find the rationale for this restriction. The tenure evaluation path includes CAP, which is composed of Senate members from different Divisions. Why are there restrictions to forming a more varied committee for such cases?

General Concerns Expressed to SoE ExComm and Dilemma

The second Senate faculty member explicitly expressed concern about the UC-Merced Title IX Office, and gaps in oversight by the Administration. After deliberation, the Committee felt that it would be best to address these concerns as a separate item in a later meeting, though members were conflicted about next steps. On one hand, ignoring credible concerns kicks the can down the road and perpetuates the cycle of not addressing problems raised about the Office. However, elevating campus-specific concerns in response to a system-wide Senate memo may not be the proper place to address such issues. The SoE ExComm agreed to note the concern and dilemma in its response to the Bylaw 336.F.8 memo. The Committee agreed to revisit the topic in a future meeting, where additional action would likely be taken.

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SCHOOL OF NATUAL SCIENCES

UNIVERSITY OF CALIFORNIA, MERCED
5200 N. LAKE ROAD BLDG A
MERCED, CA 95343

3 December 2020

To: Robin DeLugan, Chair, Merced Division of the Academic Senate

From: Harish S. Bhat, Chair, Natural Sciences Executive Committee

Re: Proposed Revisions to Senate Bylaw 336.F.8

NSEC appreciates the opportunity to opine and has three main comments.

First, though this may be difficult to achieve in practice, UC Merced should aspire to treat all members of the university community—whether faculty, staff, or students—equally. It does not seem tenable to employ a "two-tier" system and simultaneously maintain that the University aims for equal treatment in SVSH matters.

Second, if state law requires that the "preponderance of evidence" standard be used in SVSH matters involving students, and if we accept that standards should be equal for matters involving students, faculty, and/or staff, then the "preponderance of evidence" standard should be used for all matters.

Third, the "clear and convincing" standard seems overly subjective and open to interpretation. Especially in cases where evidence is lacking, what may be "convincing" to some may not be "convincing" to others.

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CHAIR, ACADEMIC SENATE
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January 13, 2021

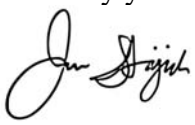
Mary Gauvain, Chair, Academic Council
1111 Franklin Street, 12th Floor
Oakland, CA 94607-5200

RE: Proposed Revisions to Senate Bylaw 336.F.8

Dear Mary,

The UCR Senate is pleased to provide the attached package of standing committee feedback on the proposed revisions to Senate Bylaw 336.F.8.

Sincerely yours,



Jason Stajich
Professor of Microbiology & Plant Pathology and Chair of the Riverside Division

CC: Michael LaBriola, Assistant Director of the Academic Senate
Hilary Baxter, Executive Director of the Academic Senate
Cherysa Cortez, Executive Director of UCR Academic Senate

UC RIVERSIDE Academic Senate

COMMITTEE ON CHARGES

November 30, 2020

TO: Jason Stajich, Chair
Riverside Division

FR: Richard Smith
Chair, Committee on Charges

Re: [Systemwide Review] Proposed Revisions to Senate Bylaw 336.F.8

The Committee on Charges discussed the proposed revisions to Senate Bylaw 336.F.8, which relate to the evidentiary standard used in P&T proceedings for cases involving sexual violence and sexual harassment (SVSH). The Committee notes that having a lower evidentiary standard for SVSH allegations compared to other allegations could create an incentive for complainants to inappropriately allege SVSH charge(s) because of the lower bar for preponderance of evidence. At UCR, the Committee on Charges is not part of the adjudication process for cases only containing allegations of SVSH. However, the Committee is unclear how a case would be handled if it contained charges alleging SVSH and others that do not (i.e. APM-015 Faculty Code of Conduct).

UC RIVERSIDE Academic Senate

COMMITTEE ON FACULTY WELFARE

December 17, 2020

To: Jason Stajich
Riverside Division Academic Senate

From: Patricia Morton, Chair
Committee on Faculty Welfare

Re: [Systemwide Review] Proposed Revisions to Senate Bylaw 336.F.8

The Committee on Faculty Welfare met on December 15, 2020 to consider the 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 violations of the University's SVSH policy. CFW is in support as it is a legally required revision. The Committee hopes that that in the future, further revisions will address the difference in the application of the evidentiary standard between faculty, students, and staff.

UC RIVERSIDE Academic Senate

COMMITTEE ON PRIVILEGE & TENURE

December 16, 2020

To: Jason Stajich, Chair
Riverside Division

From: Roya Zandi, Chair ZANDI-HAGHIGHI
Committee on Privilege & Tenure

Re: [Systemwide Review] Proposed Revisions to Senate Bylaw 336.F.8

The Committee on Privilege and Tenure reviewed the 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 violations of the University's SVSH policy and is in support of the revision. The proposed revision will make the application of the Bylaw 336.F.8 clearer and bring it in line with state law. Further, the Committee believes that whether the higher (clear and convincing) or lower (preponderance) standard is used, it should be uniformly applied no matter if the respondent is a faculty, student, or staff member.

UC SANTA BARBARA

Academic Senate
Susannah Scott, Chair
Shasta Delp, Executive Director

1233 Girvetz Hall
Santa Barbara, CA 93106-3050
http://www.senate.ucsb.edu

January 20, 2021

To: Mary Gauvain, Chair
Academic Senate

From: Susannah Scott, Chair
Santa Barbara Division

Re: **Systemwide Review of Proposed Revisions to Senate Bylaw 336**

The Santa Barbara Division's Committee on Privilege and Tenure (P&T) considered the proposed revisions to Senate Bylaw 336 that call for the use of the preponderance standard in P&T hearings for cases of alleged violation of the University's Sexual Violence and Sexual Harassment (SVSH) policy. P&T's response is attached for your review.

The Santa Barbara Division agrees with the proposed changes that bring the evidentiary standard into compliance with federal and state law where it is required to do so, i.e. cases involving "sexual harassment" as defined by Title IX regulations (DOE-Covered Conduct). However, we have a range of opinions on whether it is wise to do so more broadly for other conduct covered under UC's SVSH policy, and therefore urge further discussion and consideration of the latter point.

We thank you for the opportunity to opine.

January 13, 2021

To: Susannah Scott, Chair
Academic Senate

From: Eckart Meiburg, Chair
Committee on Privilege and Tenure

Re: Response to Proposed Changes to Bylaw 336

The Committee on Privilege and Tenure (P&T) met recently to examine proposed revisions to Senate Bylaw 336. Members engaged in an in-depth and wide-ranging discussion of the proposal but were unable to reach a consensus. P&T decided therefore to share various points of view that received support among members. In the Committee's view, this is an appropriate response given the complexity of the issues raised by this proposal.

The Committee recognized that the existing version of Senate Bylaw 336 needs to be updated in order to conform with current federal and state law. However, members disagreed about whether the specific changes in this proposal should be endorsed.

A key issue raised was that the current proposal goes beyond what is required to ensure consistency with current federal and state law. The combination of California law and the federal Title IX regulations require that faculty cases be evaluated under the preponderance of the evidence standard only for cases involving "sexual harassment" as defined by the Title IX regulations (DOE-Covered Conduct). However, UC's Sexual Violence and Sexual Harassment policy (SVSH Policy) uses a broader definition of sexual harassment that includes some conduct that would not qualify as DOE-Covered Conduct.[1] For such conduct, the regulations would not require UC to use the preponderance of the evidence standard.

More specifically, California State Law (Education Code section 67386(a)) mandates the preponderance of evidence standard for student respondent cases involving "sexual assault, domestic violence, dating violence, and stalking." The Title IX regulations define "sexual harassment" to include sexual assault, domestic violence, dating violence and stalking, as well as other forms of sexual harassment, 34 C.F.R. § 106.30(a). Because the Title IX regulations require that the university "apply the same standard of evidence to all cases involving sexual harassment," 34 C.F.R. § 106.45(b)(1)(vii), all student respondent cases that involve DOE-Covered Conduct must be evaluated under the preponderance of the evidence standard. And because the Title IX regulations also require that universities "apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty," 34 C.F.R. § 106.45(b)(1)(vii), this means that complaints against faculty involving DOE-Covered Conduct would need to be evaluated by a preponderance of the evidence standard.

However, the University SVSH Policy uses a broader definition of sexual harassment than the Title IX regulations. The current proposal would result in the preponderance of the evidence standard being used for all alleged SVSH violations, even if those alleged violations do not qualify as DOE-Covered Conduct.

[1] Section I.B of the University SVSH policy defines "Prohibited Conduct" under the categories "Sexual Violence," "Sexual Harassment," and "Other Prohibited Conduct." The definition of "DOE-Covered Conduct" is given in Appendix IV.B of the policy. As noted at the end of Section I.B: "To determine whether conduct is DOE-Covered Conduct the Title IX Officer will do the assessment and apply the definitions Appendix IV. The definitions here [in Section I.B] are broader than and encompass all conduct included in the Appendix IV definitions [of DOE-Covered Conduct]."

Some members expressed support for an alternative to the current proposal that would only require a preponderance of evidence standard for allegations pertaining to DOE-Covered Conduct. Consistent with this approach, the following more narrowly tailored revisions to Bylaw 336.F.8 were proposed:

> 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 DOE-Covered Conduct as defined in** 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.

Other members expressed support for revisions as stated in the proposal; that is, they supported the extension of the preponderance of evidence standard to all SVSH allegations. One reason offered in support of this approach related to fairness; i.e., it would mean that faculty would be held to the same standard as students and staff when it comes to alleged violations of the SVSH Policy. Some members also expressed concern that if the Bylaw provided a different standard for DOE-Covered Conduct and other SVSH conduct, it could result in SVSH cases in which some portions of the alleged conduct would be evaluated under a preponderance of the evidence standard while other portions of the conduct would be evaluated under the clear and convincing standard.

However, the Committee was not unanimous in the view that considerations of fairness *necessitate* the extension of the preponderance standard to all categories of SVSH allegations. It was suggested, for example, that a higher standard for imposing discipline on faculty than on staff and/or students might be warranted since the negative consequences of formal discipline are typically more severe for faculty than for staff or students (all things considered, a faculty member's being stripped of tenure is more likely to have a greater negative effect on career prospects than a student's expulsion or a staff member's termination).

Skepticism was also expressed as to the propriety of the Committee's appealing in its response to considerations of comparative fairness between Senate faculty and other members of the UC community. On this point it was suggested that the mandate of P&T properly lies in promoting, protecting and respecting the rights and privileges of Senate faculty, while other agencies exist to advocate for the interests of staff and students. As such, P&T may not be an appropriate body to endorse potential weakening of the protections afforded Senate faculty in the name of comparative fairness with students and staff.

Finally, P&T was concerned that accepting the proposal would have the implication that distinct allegations would be evaluated by distinct standards, i.e., the preponderance standard for SVSH-related allegations and the clear and convincing standard for non-SVSH allegations. In addition to the absence of a clear and principled justification for such inconsistency this could raise practical difficulties, especially in cases that include both SVSH and non-SVSH elements.

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125 CLARK KERR HALL
(831) 459 - 2086

January 20, 2021

MARY GAUVAIN, Chair
Academic Council

Re: Systemwide Review of Proposed Revisions to Senate Bylaw 336.F.8

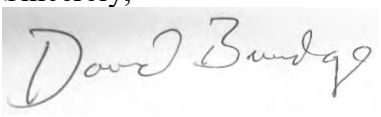
Dear Mary:

The Santa Cruz division has completed its reviews of the proposed revisions to systemwide Senate bylaw 336 which are intended to bring the University into compliance with regulations promulgated by the Department of Education (DOE). These changes will require that a single standard of either "preponderance of the evidence" or "clear and convincing evidence" be applicable to all cases of sexual harassment, faculty and employees alike. Under the proposed revisions, the University will adopt the "preponderance of the evidence standard" in cases against faculty that in implicate the University's policy on Sexual Violence and Sexual Harassment (SVSH). The Committees on Affirmative Action and Diversity (CAAD), Faculty Welfare (CFW), Privilege and Tenure (P&T), and Rules, Jurisdiction, and Elections (RJ&E) have responded.

RJ&E deemed the revision to be an "appropriate way of ensuring compliance" with the changes to the federal regulations. P&T & CAAD also approved of the adoption of a unitary evidentiary standard involving SVSH policy. CAAD highlighted language from the framing document, writing that "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." Indeed, the removal of the "clear and convincing standard" and application of the "preponderance" standard as applied to faculty in SVSH cases brings us in line with the standard applied in SVSH cases involving university staff. To be clear, the Senate understands this to a be a lowering of the bar as "clear and convincing" requires a higher burden of proof. Where CAAD appreciated the egalitarian qualities of this change, CFW voiced concern over the lowering of "clear and convincing" to the "preponderance" standard, and suggested that both continue to be applied.

Lastly, P&T would like to see language added to the bylaw that would encourage the divisional P&Ts to explain their logic in arriving at their decisions under the preponderance standard, a suggestion also made by CFW.

Sincerely,



David Brundage, Chair
Academic Senate, Santa Cruz Division

cc: Sylvanna Falcón, Chair, Committee on Affirmative Action and Diversity
Nico Orlandi, Chair, Committee on Faculty Welfare
Julie Guthman, Chair, Committee on Privilege and Tenure
Ken Pedrotti, Chair, Committee on Rules, Jurisdiction and Elections

January 14, 2021

David Brundage, Chair
Academic Senate, Santa Cruz Division

Re: Systemwide Senate Proposed Revisions to Senate Bylaw 336.F.8

Dear David,

The Committee on Affirmative Action and Diversity (CAAD) has reviewed the proposed revision to Senate Bylaw 336.F.8 and supports the revised standard of "a preponderance of the evidence," and removal of the "clear and convincing" standard, in hearing cases of sexual violence and assault violations. The committee agrees with the articulation in the framing document, which notes that "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." As stated in previous correspondence from the committee, and although beyond the scope of this consultation, CAAD reiterates its concern about compressed timelines that were referenced in the document.

Sincerely,

Sylvanna M. Falcón

Sylvanna Falcón, Chair
Committee on Affirmative Action and Diversity

cc: Nico Orlandi, Chair, Committee on Faculty Welfare
Julie Guthman, Chair, Committee on Privilege and Tenure
Ken Pedrotti, Chair, Committee on Rules, Jurisdiction and Elections

January 14, 2021

David Brundage, Chair
Academic Senate

Re: Systemwide Review of Proposed Revisions to SB 336.F.8 – Evidentiary Standard

Dear David,

During its meeting of December 3, 2020, the Committee on Faculty Welfare (CFW) reviewed the proposed revisions to SB 336.F in response to new federal title IX regulations on SVSH. The committee raised serious concerns about lowering the standard from "clear and convincing evidence" to "preponderance of evidence" to meet the requirements. CFW considered recommending that the interim solution of producing recommendations/judgement on both standards be continued. However, after consulting with the P&T Chair, CFW recommends that the revised policy require that campus Committees on Privilege and Tenure (or similar review committees) be explicit about the evidence and criteria considered in their written narrative, so as to be useful in a court of law with higher evidentiary standards should the case end up in civil court.

Thank you for the opportunity to provide feedback.

Sincerely,

Nico Orlandi, Chair
Committee on Faculty Welfare

cc: Sylvanna Falcón, Chair, Committee on Affirmative Action and Diversity
Julie Guthman, Chair, Committee on Privilege and Tenure
Kenneth Pedrotti, Chair, Committee on Rules, Jurisdiction, and Elections

December 10, 2020

DAVID BRUNDAGE, Chair
Academic Senate, Santa Cruz Division

Re: Systemwide Review of Proposed Amendments to Senate Bylaw 336F.8

Dear David,

During its meeting of December 9, 2020, the Committee on Privilege and Tenure (P&T), reviewed the proposed amendment to systemwide Senate bylaw 336.F.8, which aligns the standard of evidence for faculty with those for students and staff in cases involving the University's policy on Sexual Harassment and Sexual Violence (SVSH), in accordance with new Department of Education regulations.

The committee broadly supports the elimination of a double standard, and accepts that the "preponderance of evidence" standard must be abided, even while recognizing that SVSH-related disciplinary cases that come before P&T often entail other violations of the Faculty Code of Conduct that will continue to be determined according to the "clear and convincing" standard. Given that, and given that P&T determinations may be used in courts of law, P&T suggests the inclusion of language that encourages P&T hearing committees to explain their logic in arriving at their decisions under the preponderance standard.

Sincerely,
/s/
Julie Guthman, Chair
Committee on Privilege and Tenure

cc: Sylvanna Falcon, Chair, Committee on Affirmative Action and Diversity
Nico Orlandi, Chair, Committee on Faculty Welfare
Kenneth Pedrotti, Chair, Committee on Rules, Jurisdiction, and Elections

December 21, 2020

DAVID BRUNDAGE, Chair
Academic Senate, Santa Cruz Division

Re: Systemwide Review of Proposed Revisions to Senate Bylaw 336.F.8

Dear David,

During its meeting of December 8, 2020, the Committee on Rules, Jurisdiction, and Elections reviewed the proposed revisions to Senate Bylaw 336.F.8. The Committee deemed the revision to be an appropriate way of ensuring compliance with the referenced state law and federal regulations.

Sincerely,
/s/
Kenneth Pedrotti, Chair
Committee on Rules, Jurisdiction, and Elections

cc: Sylvanna Falcon, Chair, Committee on Affirmative Action and Diversity
Nico Orlandi, Chair, Committee on Faculty Welfare
Julie Guthman, Chair, Committee on Privilege and Tenure

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December 18, 2020

Professor Mary Gauvain
Chair, Academic Senate
University of California
VIA EMAIL

Re: Divisional Review of UC Senate Bylaw 336

Dear Professor Gauvain,

The proposed revision to UC Academic Senate Bylaw 336, Privilege and Tenure Divisional Committees – Disciplinary Cases, was distributed to San Diego Divisional Senate standing committees and discussed at the December 14, 2020 Divisional Senate Council meeting. Senate Council unanimously endorsed the proposed revision.

The Divisional Committee on Privilege and Tenure response is attached.

Sincerely,

Steven Constable
Chair
San Diego Divisional Academic Senate

Attachment

cc: Tara Javidi, Vice Chair, San Diego Divisional Academic Senate
Ray Rodriguez, Director, San Diego Divisional Academic Senate
Hilary Baxter, Executive Director, UC Systemwide Academic Senate

ACADEMIC SENATE: SAN DIEGO DIVISION, 0002
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November 6, 2020

STEVEN CONSTABLE, Chair
San Diego Divisional Academic Senate

SUBJECT: Review of Proposed Revisions to UC Academic Senate Bylaw 336

Dear Chair Constable,

The Committee on Privilege and Tenure reviewed the proposed revision to UC Academic Senate Bylaw 336, Privilege and Tenure Divisional Committees –Disciplinary Cases, at its meeting on November 5, 2020. The Committee endorses the proposed revision, to comply with state and federal law, and in the interest of parity.

Sincerely,

James Posakony, Chair
Committee on Privilege and Tenure

cc: Tara Javidi, Vice Chair, San Diego Divisional Academic Senate
Ray Rodriguez, Director, San Diego Divisional Academic Senate

UCSF Academic Senate

http://senate.ucsf.edu

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Sharmila Majumdar, PhD, Chair
Steven Cheung, MD, Vice Chair
Pamela Ling, MD, Secretary
Jae Woo Lee, MD, Parliamentarian

January 20, 2020

Mary Gauvain, PhD
Chair, Academic Council
Systemwide Academic Senate
University of California Office of the President
1111 Franklin St., 12th Floor
Oakland, CA 94607-5200

Re: Senate Bylaw 336.F.8 - Evidentiary Standards

Dear Mary:

UCSF's Privilege & Tenure (P&T) committee recently reviewed the proposed revisions to Senate Bylaw 336.F.8, and noted that they are required by new federal Title IX regulations from the U.S. Department of Education. As such, California law which requires the application of the "preponderance of the evidence" standard of proof in cases involving the Sexual Harassment and Sexual Violence Policy.

We support this change and are prepared to use the preponderance of the evidence standard of proof in SVSH cases.

Thank you for the opportunity to provide feedback on proposed revisions to this bylaw. If you have any questions, please let me know.

Sincerely,

S. Majumdar

Sharmila Majumdar, PhD, 2019-21 Chair
UCSF Academic Senate

Enclosures (1)
Cc: Steven Cheung, MD, UCSF Division Vice Chair
Susan Chapman, RN, PhD, FAAN, Chair, UCSF Privilege and Tenure

UCSF Academic Senate

http://senate.ucsf.edu

January 14, 2021

Professor Sharmila Majumdar, PhD
Chair, UCSF Academic Senate

RE: Proposed Revisions to Senate Bylaw 336.F.8 - Evidentiary Standard

Dear Chair Majumdar,

The proposed revisions to Senate Bylaw 336.F.8 are required by new federal Title IX regulations from the U.S. Department of Education and California law which requires the application of the "preponderance of the evidence" standard of proof in cases involving the Sexual Harassment and Sexual Violence Policy.

We support this change and are prepared to use the preponderance of the evidence standard of proof in SVSH cases.

Sincerely,

Susan Chapman, RN, PhD, FAAN
Chair, Privilege and Tenure
UCSF Academic Senate
2020-2021

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UNIVERSITY COMMITTEE ON ACADEMIC PERSONNEL (UCAP)
Susan Tapert, Chair
stapert@health.ucsd.edu

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1111 Franklin Street, 12th Floor
Oakland, CA 94607-5200
Phone: (510) 987-9466

January 7, 2021

MARY GAUVAIN, CHAIR
ACADEMIC COUNCIL

RE: PROPOSED REVISIONS TO SENATE BYLAW 336.F.8

Dear Mary,

UCAP has reviewed the proposed revisions to Senate Bylaw 336.F.8 and, although this matter may not be directly under the purview of CAPs, we would like to convey the following feedback. Members agree that the recommended changes are appropriate. However, having one standard for students and a more stringent standard for faculty creates inequality. There is a concern that the administrative goal of the revisions appears to be to remove meaningful peer review of sexual harassment charges against senate faculty.

Thank you for the opportunity to comment on this matter. Please don't hesitate to contact me if you have any questions.

Sincerely,

Susan Tapert, Chair
UCAP

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UNIVERSITY COMMITTEE ON FACULTY WELFARE (UCFW)
Shelley Halpain, Chair
Shalpain@ucsd.edu

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Oakland, CA 94607-5200
Phone: (510) 987-9466
Fax: (510) 763-0309

January 20, 2021

MARY GAUVAIN, CHAIR
ACADEMIC COUNCIL

RE: Proposed Revisions to Senate Bylaw 336.F.8 (Evidentiary Standards)

Dear Mary,

The University Committee on Faculty Welfare (UCFW) has reviewed the proposed revisions to Senate Bylaw 336.F.8 (Evidentiary Standards), and we have several comments. First, we note that these changes are in response to evolving federal and state guidelines, which continue to be in flux. Indeed, the next federal administration has indicated its intention to take this and related issues under renewed consideration. UC is also called upon by the state auditor to use the same evidentiary standards in sexual violence/sexual harassment (SVSH) cases, rather than to retain the differential standards currently in place: preponderance of evidence versus clear and convincing.

Insofar as the proposed revisions are conforming amendments for legal compliance, we have no feedback. We do, however, respectfully ask for clarification of the effective date and policy promulgation process, as well as the development and distribution of implementation guidelines.

Further, the implications brought to light by considering this issue deserve further discussion. For example, some members of UCFW support maintaining the higher standard of evidence in order to protect faculty careers, but other members note that the higher standard of evidence has historically disadvantaged women and faculty of color. Some speculate that cases of plagiarism should be adjudicated by a different standard than cases of SVSH. What is clear is that a more deliberate and comprehensive discussion should occur. The Senate should act purposively, not reactively, especially in this critical area.

Thank you for helping to advance our shared interests.

Sincerely,

Shelley Halpain, UCFW Chair

Copy: UCFW
Hilary Baxter, Executive Director, Academic Senate
Robert Horwitz, Academic Council Vice Chair

V. UNIVERSITY AND FACULTY WELFARE REPORT

- **Shelley Halpain, Chair, University Committee on Faculty Welfare**

VI. ANNOUNCEMENTS BY THE PRESIDENT

- **Michael Drake**

VII. ANNOUNCEMENTS BY THE PROVOST

- **Michael T. Brown**

VIII. SPECIAL ORDERS

A. Consent Calendar [NONE]

IX. SPECIAL ORDERS [NONE]

A. Consent Calendar

X. REPORTS ON SPECIAL COMMITTEES [NONE]

XI. PETITIONS OF STUDENTS [NONE]

XII. UNFINISHED BUSINESS [NONE]

XIII. NEW BUSINESS