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Assembly of the Academic Senate, Academic Council
University of California
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December 19, 2003

JOSEPH P. MULLINIX
SENIOR VICE PRESIDENT
BUSINESS AND FINANCE

C. JUDSON KING
PROVOST AND SENIOR VICE PRESIDENT
ACADEMIC AFFAIRS

Re: Academic Council's Final Response on Proposed Revisions to the University of California Policy on Sexual Harassment and Procedures for Responding to Reports of Sexual Harassment

Dear Joe and Jud:

The Academic Council has completed its review of the Proposed Revisions to the University of California Policy on Sexual Harassment and Procedures for Responding to Reports of Sexual Harassment, and I am pleased to submit our report to you. The Council's response is based on comments received from the UCAF, UCEP, UCP&T, UCFW and CCGA Systemwide Committees; the Davis, San Diego, Irvine, Berkeley, Los Angeles, and Santa Barbara Divisions; and on substantive discussions during our November and December Academic Council meetings.

General Comments:

While the Academic Council recognizes the need to update and revise this policy in order to bring conformity across the system, more review time would have enhanced the ability of the Senate committees to conduct a more deliberative consultation, which is well warranted since this is a policy that affects faculty rights. For example, since the revised policy is intended to reflect current campus practices, it would have been instructive to have had the opportunity to review actual campus experiences and their litigation histories. Given the short review period afforded the Senate, a carefully prepared executive summary that highlighted the significant changes from the old policy would have been helpful.

Suggested Modifications:

B. Definition of Sexual Harassment (page 1)

- The definition is unduly broad, as it applies to all members of the "university community" including visitors to university campuses. Taken literally, this means that university disciplinary procedures would be available to a campus visitor claiming sexual harassment by another visitor. Since it is unlikely that this is what the drafters intended, the second paragraph should be reframed.

- The Council took exception to the phrase “severe and pervasive” in the last sentence of this provision, and recommends changing the wording in the definition to “severe or pervasive. This is the language used in many of the campus policies. Several respondents suggested adding “persistent” – “severe, persistent, or pervasive” to indicate that the conduct will be judged as harassment whether it is a single serious act, a long-continued set of actions, or a systematic pattern.
- To add greater clarity to the definition, examples of conduct that might constitute sexual harassment should be included.

E. Disciplinary Action in Response to Sexual Harassment (page 3)

- The Council has a concern about the last sentence of this provision – “Conduct that is sexual harassment or retaliation in violation of this policy is considered to be outside the normal course and scope of employment and not a direct consequence of the discharge of an individual’s duties.” It is not clear whose decision it would be to judge whether conduct is outside the normal course and scope of employment, and whether this statement could result in a lack of protection and/or indemnification for a third party responsible for reporting. This section should be rewritten to clarify the intent.

F. Intentionally False Reports (page 3)

- The phrase “may be” should be replaced with the word will in the last sentence of this provision so that it is clear that disciplinary action will ensue from intentionally false accusations.

G. Free Speech and Academic Freedom (page 3)

- Several respondents suggested that the fifth sentence be amended to read: “Consistent with these principles, no provision of this policy shall be interpreted to prohibit conduct that is legitimately related to course content and teaching or research methods of an individual faculty member.”
- The policy should make clear that while faculty have certain constitutional protections these are not the full extent of their academic freedom protections. In the course of their research and instruction, faculty have academic freedom in speech and writing. APM 010 – Academic Freedom should therefore be referenced at the end of this provision.
- The University Committee on Academic Freedom (UCAF) was one of several committees expressing the view that protections for students should be included in Paragraph 7. In their comment letter, UCAF has proposed two alternative drafts intended to replace the current language in Paragraph 7, which addresses the student issue. Please see page 2 of the enclosed UCAF letter.

PART II.

B. Response to Reports of Sexual Harassment (page 7)

- Under 4 -- *Procedures for Formal Investigation, “g”*: the policy states, “The reports may be relied upon as evidence in other related procedures, such as subsequent complaints, grievances and/or disciplinary actions.” The suggestion that the report may be “relied upon” conveys the impression that the report can be believed and that it may substitute for direct testimony at a hearing. This is inappropriate. The passage should be revised or deleted.

- Under 4 -- *Procedures for Formal Investigation*, it is unclear in item "i" exactly what information will be redacted in the version of the investigative report that the complainant and the accused are allowed to receive. This section should clarify that in redacting information, the University is only protecting the identity of individuals and not removing any other information that could be considered as evidence.

C. Complaints or Grievances Involving Allegations of Sexual Harassment (page 8)

- The phrase, "in a timely manner," which defines the time limit for filing a complaint or grievance regarding the resolution of a report of sexual harassment, needs greater clarification. The date when the time begins is specified in the proposed language, but the end date is not. The majority view of Council is that a statute of limitation for reports should be firmly set. Several respondents said one year, but at least one respondent thought that flexibility for reporting after one year is needed, especially for graduate students.
- The current systemwide policy and some current campus policies include remedies for complainants whose allegations of sexual harassment were deemed well founded through the University's procedures. These remedies could include restoration in pay or reinstatement in position. The proposed revised policy includes no remedies short of those protective measures used while a case is being pursued. The lack of remedies might discourage a complainant from filing a report of sexual harassment.

E. Privacy (pages 8-9)

- The complainant should be made aware of the actual discipline before it is officially reported to the personnel record. In actual practice, Title IX officers on many of the campuses report to the complainant the range of disciplines that are appropriate, sometimes narrowing the range sufficiently to let the complainant have some idea of the specific disciplinary action. This helps the complainant to bring closure to the situation. A way should be found to better fit the policy to practice or to allow for specific information to be given to the complainant.

Evaluation System. The Council notes that the policy is missing any attempt to put in place an evaluation system that can determine if the policy is fairly implemented and executed. A section should be added that requires the Title IX Coordinator to monitor the policy's effectiveness and fairness.

It is in the interest of everyone in the UC community that any policy the University adopts to deal with this very complicated issue is as good as we can collectively make it. In that spirit, I hope you will find these comments helpful. For your additional information, I have enclosed all of the Senate Committee and Divisional response letters that I received on this proposal.

Cordially yours,



Lawrence Pitts, Chair
Academic Council

Encl. Systemwide Senate Committee Responses
cc: Academic Council
Mona D. Litrownik, Coordinator



GARY WATSON
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December 10, 2003

PROFESSOR LAWRENCE PITTS
CHAIR, ACADEMIC COUNCIL

Re: New Policy on Sexual Harassment

Dear Larry,

At its November 21, 2003 meeting, the University Committee on Academic Freedom discussed Paragraph G of UC's proposed new Policy on Sexual Harassment. Paragraph G is entitled, "Free Speech and Academic Freedom." Most UCAF members thought that the proposed draft needed improvement. In particular, those who expressed an opinion on the question agreed that protections for students should receive more emphasis, and that it is important to explicitly mention the protection of scholarship. Beyond this, the Committee was divided on the question of which of two alternative drafts would be preferable. The two alternatives are attached below. One has been formulated by the UCLA CAF with input from the Davis CAF. It calls for expansions as indicated. The other is offered by the UCR CAF, which prefers a more concise version. Three members preferred the UCLA version while two members preferred the UCR versions. Let me emphasize, however, that there was agreement that the proposal needed improvement in the ways indicated above. UCAF requests that Council consider these revisions and forward them to the appropriate administrative office.

Sincerely,

Gary Watson
Chair, UCAF

GW/ml
cc: UCAF members
Academic Council Director Bertero-Barceló

Paragraph G, “Free Speech and Academic Freedom”

"As participants in a public university, the faculty and other academic appointees, staff, and students of the University of California enjoy significant free speech protections guaranteed by the First Amendment of the United States Constitution and Article I, Section 1 of the California Constitution. This policy is intended to protect members of the University community from discrimination, not to regulate protected speech. This policy shall be implemented in a manner that recognizes the importance of rights to freedom of speech and expression. The University also recognizes principles of academic freedom as a special area of protected speech. Consistent with these principles, no provision of this policy shall be interpreted to prohibit conduct that is legitimately related to course content and teaching methods of an individual faculty member. Freedom of speech and academic freedom, however, are not limitless and do not protect speech or expressive conduct that violates federal or state anti-discrimination laws."

UCLA/Davis Revision:

As participants in a public university, the faculty and other academic appointees, staff, and students of the University of California enjoy broad free speech protections guaranteed by the First Amendment of the United States Constitution and Article I, section 1 of the California Constitution. This policy is intended to protect members of the University community from discriminatory actions and unprotected speech, not to regulate protected speech. This policy shall be implemented in a manner that recognizes the importance of rights to freedom of speech and expression. The University also recognizes principles of academic freedom as a special area of protected speech. Consistent with these principles, no provision of this policy shall be interpreted to prohibit conduct that is legitimately related to course content, teaching and research methods, scholarship, or public commentary of an individual faculty member, or to the political, artistic, literary, or social expression of students or student groups. Freedom of speech and academic freedom, however, do not protect threats, libel, or speech or expressive conduct that falls within the other narrow exceptions to the First Amendment. Such unprotected speech or expressive conduct may violate this policy, and federal or state anti-discrimination laws.

UCR Revision:

This policy is intended to protect members of the University community from discrimination, not to regulate protected speech. As participants in a public university, the faculty and other academic appointees, staff, and students of the University of California enjoy broad free speech protections guaranteed by the First Amendment of the United States Constitution and Article I, section 1 of the California Constitution. In addition, the University also recognizes principles of academic freedom as a special area of protected speech. Academic freedom includes the freedom of the faculty to determine course content and teaching and research methods, and of faculty and students to conduct research and scholarship. Therefore, no provision of this policy shall be interpreted to prohibit conduct that is protected either by the First Amendment or by Academic Freedom, as formulated in APM 010.



LISA ALVAREZ-COHEN
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December 3, 2003

PROFESSOR LAWRENCE PITTS
CHAIR, ACADEMIC COUNCIL

Re: *Proposed Policies on Sexual Harassment and Conflicts of Interest Created by Consensual Relationships.*

Dear Larry:

UCEP discussed both the proposed Policy on Conflicts of Interest Created by Consensual Relationships (PCICCR) and the proposed Sexual Harassment Policy at its November meeting. To begin with, members were struck by the complete lack of coordination between these two policies. For example, this language appears in the PCICCR:

... conflicts of interest created by consensual relationships in employment or education may lead to charges of sexual harassment brought by third parties who believe the consensual relationship creates a discriminatory work or educational environment.

But there appears to be no language about harm to third parties in the Proposed Sexual Harassment Policy. Furthermore *sexual harassment* is not clearly defined apart from *discrimination*, for which we believe a separate policy exists. At a minimum, prior to finalizing any of these policies, the PCICCR, Sexual Harassment Policy and the Unequal Treatment (or Anti-Discrimination) Policy should all be considered in the context of the whole, so that interrelationships between the policies can be clarified.

Specifically with respect to the PCICCR, UCEP felt that the policy lacked any mechanism to clearly address the issues of past relationships between colleagues in the same department, including the behavior of former spouses. Further, favoritism associated with non-romantic relationships was not addressed at all.

It was noted that the policy *requires* the removal of conflicts caused by consensual relationships however, there are no specific guidelines about how conflicts should be removed. This is especially a problem in small departments for example, where a spouse serves as department chair and thus is unable to make teaching assignments or participate in personnel actions for their spouse. It was proposed that instead of creating a prescriptive policy to deal with consensual relationships, that common-sense guidelines should be proposed and specific mechanisms

instituted and widely advertised to deal with problems and complaints that arise. There was significant support for guidelines based upon good judgment coupled with a strong supported complaint mechanism.

Sincerely,

Lisa Alvarez-Cohen
Chair, UCEP

LAC/ml

cc: UCEP members
Academic Senate Director Bertero-Barceló



UNIVERSITY COMMITTEE ON PRIVILEGE AND TENURE (UCP&T)
Carolyn Martin-Shaw, Chair

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November 18, 2003

**LAWRENCE PITTS, CHAIR
ACADEMIC COUNCIL**

RE: Proposed New Policy on Conflicts of Interest Created by Consensual Relationships and Revised Policy on Sexual Harassment and Procedures for Responding to Reports of Sexual Harassment

Dear Chair Pitts:

Given the extremely short response time that the Office of President has given us to review both the proposed new "Policy on Conflicts of Interest Created by Consensual Relationships" and the revised "Policy on Sexual Harassment and Procedures for Responding to Reports of Sexual Harassment," the University Committee on Privilege and Tenure (UCP&T) has made considerable efforts to attempt to review these proposals without the benefit of being able to meet together as a committee. More time to review these proposals would have enhanced the ability for UCP&T and the other Academic Senate committees to conduct deliberative consultation. We trust that for future proposal reviews the administration will take the time constraints of shared governance into account. UCP&T's review of these two proposals follows.

Proposed New Policy on Conflicts of Interest Created by Consensual Relationships

This policy effectively extends the principles that were developed for student-faculty consensual relations to other university employees in supervisory-subordinate roles. While our committee supports the creation of such a policy, we have some concerns about specificity and clarity of language used in the proposed document.

UCP&T believes that the title of the proposed policy, "Policy on Conflicts of Interest Created by Consensual Relationships," is not acceptable. Our committee members had concerns about both the term "conflict of interest" and the term "consensual":

The term "conflict of interest" is usually used, both inside and outside the University, to refer to financial conflict. The University has been careful to avoid confusion about this term in the past by separating "conflict of interest" (financial) from "conflict of commitment" (time). Extending this term to the

context of personal relationships might be unnecessarily confusing and subject to misinterpretation.

2. The intent of the policy is to prohibit romantic and/or sexual relationships in which one individual has power or authority over the other. Whether or not these relationships are deemed "consensual" seems irrelevant to this policy.

In the "Policy" section, the phrase "as soon as practicable," which establishes the timeline in which the individual in the supervisory position must take steps to remove himself or herself from professional decisions concerning the other individual involved in the relationship, is vague and hence may raise implementation difficulties (p. 1). One suggestion is to note that the person with supervisory responsibility must seek consultation with a third party for advice about when "as soon as practicable" might be, rather than leaving the entire decision up to the person involved in the relationship.

In the "Responsibilities Toward Students" section, some rephrasing should occur in the sections regarding unequal distribution of power and the circumstances in which exceptions would be approved (p. 2):

1. The third sentence of the first paragraph implies that it is unequal power that must be protected, not the students. This sentence should be revised to read: "Because of the unequal institutional power inherent between students and particular members of the University community, students must be protected..."
2. It is not clear in what cases exceptions can be approved. We assume that the power to approve exceptions covers all prohibitions stated, whether those specific to students or not, but this is not clear.
3. The final paragraph of this section references and provides a summary of the consensual relationships section of APM 015. While it is appropriate for a reference to APM 015 to remain, the summary is not needed and needlessly confuses whether this policy or APM 015 is the proper statement. We suggest merely stating: "Consensual relationships between faculty and students are also governed by APM 015, the Faculty Code of Conduct."

Proposed Revised Policy on Sexual Harassment and Procedures for Responding to Reports of Sexual Harassment

Our committee commends various revisions to the policy, specifically important changes in the definition of sexual harassment, reports of sexual harassment, filing false reports, retaliation for filing a sexual harassment report, discrimination as sexual harassment, and academic freedom. However, we have some concerns and recommendations for modifications to this and other parts of the policy:

The phrasing "severe and pervasive" in the definition implies that the harassment must be both severe and pervasive (I.B., p. 1). We strongly recommend changing

the wording from “severe and pervasive” to “severe, persistent, or pervasive” to indicate that the conduct will be judged as harassment whether it is a single serious act, a long-continued set of actions, or a systematic pattern.

2. The phrase, “in a timely manner,” which defines the time limit for filing a complaint or grievance regarding the resolution of a report of sexual harassment, needs greater clarification (II.C., p. 8). Obviously the issue of filing such complaints or grievances in a timely manner is an important one, but the language here is vague, especially given that the date on which the time begins is specified in the proposed policy language, but the end date is not. Some specified time for an end date or a time limit needs to be indicated.
3. Earlier systemwide policy on sexual harassment included remedies for complainants whose allegations of sexual harassment were deemed well-founded through the University’s procedures. Some campuses also have local procedures that allow the Title IX officer or the officer in charge to suggest remedies. These remedies could include restoration in pay or reinstatement in position. The proposed policy includes no remedies short of those protective measures used while a case is being pursued (e.g., separation from post or change of housing, etc). This lack of remedies might discourage a complainant from filing a report of sexual harassment.
4. The new procedure, as well as the older version, explicitly states that the complainant shall not be told what disciplinary action has been taken against the accused when the finding is that the accused did commit acts of sexual harassment (II.E, pp. 8-9). We understand that this policy is based on the protection of the privacy of the accused’s personnel records. We would argue, however, that the disciplinary process and the personnel record are not coterminous, are not identical processes or documents, and that the complainant should be made aware of the actual discipline before it is officially reported to the personnel record. There are several reasons for our concerns:
 - a. When a person has been judged to have been the target of sexual harassment, one important outcome of the resolution of the case should be to make the complainant whole and to bring closure to the situation. It must be very frustrating for a victim of sexual harassment to receive a final letter stating, “appropriate action has been taken,” without an explanation of what the action was.
 - b. In actual practice, Title IX officers on many campuses report to the complainant the range of disciplines that are appropriate, sometimes narrowing the range sufficiently to let the complainant have some idea of the specific disciplinary action.

Our committee, therefore, recommends finding a way to better fit the policy to the practice or to allow for specific information to be given to the complainant.

- 5 While University policy on privacy of information requires that personal and confidential information, other than that of the person requesting the report, be redacted, it is unclear as to exactly what information is redacted in the versions of the investigative report that the complainant and the accused are allowed to receive (II.B/4.i, p. 7). We recommend that this section be rewritten so that it is clear that the University is protecting the identity of individuals and not removing any other information that could be considered as evidence.

We hope that the administration will take our recommendations and concerns seriously and revise the proposals accordingly. We look forward to being given a sufficient opportunity to review both of the proposals again once amendments have been made.

Sincerely,

Carolyn Martin-Shaw, Chair
UCP&T

cc: Maria Bertero-Barcelo, Executive Director
UCP&T Members



UNIVERSITY COMMITTEE ON FACULTY WELFARE

Ross Starr, Chair
rstarr@weber.ucop.edu

December 9, 2003

**LAWRENCE PITTS, CHAIR
ACADEMIC COUNCIL**

Re: UCFW Comments on Proposed Revised Sexual Harassment Policy

Dear Larry:

The UCFW has reviewed the proposed policy on sexual harassment. Sheila O'Rourke, Executive Director and Special Assistant to the Provost, attended the UCFW meeting to discuss the proposal and how it differs from existing policy.

UCFW enthusiastically supports the aim that the University of California should be free from sexual harassment so that students, faculty and staff can enjoy a productive, safe, and hospitable setting for research, teaching, and work. Members voiced a variety of concerns with elements of the proposal:

1. The first concern is procedural. The time and resources available for review of the proposal are inadequate. The proposal has not been distributed in printed form. Some committee members found the proposal text difficult to download from the web. Written comments were sent out by e-mail in haste, only the afternoon before the meeting --- many members had not seen them. This is not the way to formulate a serious policy where faculty rights are at risk.

The proposal will be presented to the Regents in March, and that requires inclusion in the January packet of information sent to the Regents. There is no justification why this matter has to be moved so fast through the Senate-review stage. UCFW was told that the proposal merely conforms written policy to current practice. There has been inadequate time to review campus experience. UCFW regards the subject as sufficiently important to take the time to do it right.

The proposal should be accompanied by a carefully prepared executive summary fairly describing what's new and what the significance of that new material is. The document setting forth this proposed policy falls far short of that standard. It was noted that a "track changes" comparison of this proposal to the present (1992) policy might not be helpful because the changes are so great. Indeed. Then these extensive changes ought to be highlighted; otherwise

the process of review becomes hide and seek, teasing out the hidden features of the proposal and understanding their implications.

2. The next concern is formal. The proposed policy is unclear, inadequately precise and carelessly composed. It says more and less than it means to say. See the definition of "sexual harassment" (page 1). The definition is a bit complex --- one sentence goes on for five lines with several clauses --- and is subject to interpretation.

For example, sexual harassment prevention officers note that it includes by implication 'third party sexual harassment' (concern for preferential treatment, annoyance, or embarrassment to some university community members arising from otherwise non-harassing actions among other members of the university community), an interpretation that requires several logical steps and is not explicit in the document.

As written, it is unduly broad. For example, it applies to all members of the "university community" including visitors to university campuses. Taken literally, this means that university disciplinary procedures would be available to a campus visitor claiming sexual harassment by another visitor to campus. Sexual harassment prevention officers have informed the committee that this interpretation is not what is intended. The drafters of the proposed policy should be afforded the time to write what they mean.

The definition of harassment offered is subjective, based on whether conduct is "unwelcome" and covers interactions between peers as well as those of managers and subordinates. There is little distinction, then, between harassment and behavior that is merely boorish or foolish.

Part B.4g of the draft policy (page 7) states that "The report may be relied upon as evidence in other related procedures, such as subsequent complaints, grievances and/or disciplinary actions." The suggestion that the report may be "relied upon" conveys the impression that the report can be believed and that it may substitute for direct testimony at a hearing. This is inappropriate. This passage should be revised or deleted.

3. Relation to current law. UCFW was given to understand that the proposed new policy merely "updates" the definition of sexual harassment set forth in the existing (1992) U.C. Policy on Sexual Harassment and associated procedures to conform to current legal standards. This may not be the case however, since the federal courts impose strict, not loose, standards in determining whether sexual harassment is actionable, especially when there is little or no power imbalance between the parties (as in the typical co-worker case) and the conduct involves sexuality (such as provocative clothing, boasting of sexual exploits, or crude gestures of a sexual nature) but does not consist of demands to engage in sexual activity. This may be too lax a standard, but the process of arriving at such a judgment should not be distorted by an unsubstantiated claim that the law leaves UC no option but to adopt a vastly expanded standard of sexual harassment.

4. Issues of speech protected by constitutional guarantee or academic freedom (page 3). Offensive speech falling under the interpretation of "sexual harassment" in the proposed document may nevertheless be protected. UC is not treated by law as a private employer, but

rather as part of the state of California. It is required to respect constitutional limits on state censorship of or retaliation for disfavored speech. In addition, faculty and students in the course of research and instruction have academic freedom in speech and writing, APM 010 – Academic Freedom should be referenced at the end of this provision.

5. Provision of counsel and indemnification of faculty in litigation. The proposed policy states “Conduct that is sexual harassment or retaliation in violation of this policy is considered to be outside the normal course and scope of employment and not a direct consequence of the discharge of an individual’s duties.” UCFW earnestly agrees that sexual harassment is not part of faculty duties. The implication of this statement however is that --- should litigation arise --- faculty rely on University Counsel to recognize that their conduct is not harassment. If conduct is (perhaps erroneously) interpreted to be sexual harassment, counsel will no longer be provided at UC expense to a faculty member in litigation and UC no longer undertakes to indemnify the faculty for damages that may be assessed in litigation

A successful policy will be clearly written, fully reviewed, so that faculty can understand and support it. The proposal should be revised with this aim in mind.

Yours truly,
/s/

Ross Starr, Chair
UCFW

cc: UCFW Members



COORDINATING COMMITTEE ON GRADUATE AFFAIRS
Chair Kent Erickson

November 17, 2003

LAWRENCE PITTS
CHAIR, ACADEMIC COUNCIL

Re: Proposed Revised Policy on Sexual Harassment and Procedures for Responding to Reports of Sexual Harassment

Dear Larry,

At its November 4, 2003 meeting CCGA discussed the Proposed Revised Policy on Sexual Harassment and Procedures for Responding to Reports of Sexual Harassment. The committee had the following minor suggestions:

- On page one, it states "the harassing conduct must be sufficiently severe or pervasive." A member suggested that this be changed to "severe or pervasive."
- The statute of limitation for reporting sexual harassment conduct should be set firmly at one year.
- On page 6 section 4.c, instead of "may" it should state that the investigation "should" include interviews with the parties and witnesses."

Sincerely,

Kent Erickson,
Chair, CCGA

cc: CCGA



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12 November 2003

Lawrence Pitts, Chair
Academic Council

Re: Proposed New Policies. 1. Policies on Conflict of Interest Created by Consensual Relationships. 2. Policy on Sexual Harassment.

Dear Larry,

In response to your request for review by responsible committees of the Davis Division of the Academic Senate of the two proposed policies named above, I offer a few succinct comments.

The Committee on Privilege and Tenure:

Overall, the Committee had no real problems with the two proposals. One committee member, however, expressed serious reservations because the tenor of the sexual harassment policy was biased in assuming that anyone accused is probably guilty. The member also did not see the logic of singling out a deteriorating faculty-student romantic relationship as any more likely to lead to sexual harassment as any other deteriorating relationship.

Another member was concerned with the language in the last paragraph of the second page that warns faculty about entering into a romantic relationship with any student for whom he/she "...should reasonably expect to have in the future..." some kind of academic responsibility. The member thought that the policy required a bit too much clairvoyance. (Of course, this was a similar concern in Academic Council and the Assembly of the Senate last year by some members of the faculty during the revision of APM 015 – Faculty Student Relations).

From, Professor Arnold Sillman, Chair, Committee on Privilege and Tenure

The Committee on Academic Freedom and Responsibility: The committee offered the following recommendations for revision of the draft.

Section G, Free Speech and Academic Freedom, should be amended to include the term "research." The fifth sentence under G should read: "Consistent with these principles, no provision of this policy shall be interpreted to prohibit conduct that is legitimately related to course content and teaching or research methods of an individual faculty member."

Research methodology quite frequently necessarily excludes members of a particular gender from participating in the study (i.e., females that are or might become pregnant are often excluded from receiving certain drugs). This might be construed by some as a prohibited form of gender-based discrimination.

Equally important to the proper level of protection against accusations of sexual harassment is the delineation of what is conduct “legitimately related to course content and teaching or research methods” and what is not. We may all feel that we “know” when the bounds of legitimacy have been breached but in reality this is not true.

There is no complete all-inclusive definition of these subjective concepts that can be made without possible encroachment on constitutional rights, which, as a public university, the administration has an obligation to protect.

Under these circumstances the university may well go too far when it includes under the term “harassment” conduct that is not in the policy clearly definable. For example, under Section B, paragraph 6 actions or comments based on gender, sex stereotyping or sexual orientation if it is “sufficiently serious to deny or limit a person’s ability to participate in or benefit from University educational programs, employment or services” will be considered as harassment. However, how is a faculty member to know *a-priori* what the sensitivity of any particular individual might be to a body of information or opinions such that it would be “sufficiently serious to deny or limit their ability to participate in or benefit from university educational programs, employment, or services” because they felt harassed by the information?

There is also a statement in Section G that reads: “Freedom of speech and academic freedom, however, are not limitless and do not protect speech or expressive conduct that violates federal or state anti-discrimination laws.”

In point of law constitutional guarantees, such as freedom of speech, do in fact supersede federal and state anti-discrimination laws where there may be a conflict. Therefore, the real issue is whether parts of the university policy on sexual harassment may be a violation of freedom of speech. This will be particularly relevant if the university policy is co-extensive with federal and state anti-discrimination laws. If, on the other hand, university policy is broader than state or federal law the policy statements fail to clarify to what extent they are broader and how the university can justify such a policy.

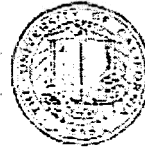
For example, it is not clear from the current draft whether the stated prohibited conduct only qualifies as sexual harassment under the policy if it is committed on university property. If the policy applies to activities that occur off-campus as well, then the policy should put the faculty and staff on notice that this is the intent.

Finally, the issue of whether peer review involves power or authority over someone else needs to be stated one way or the other. If a faculty member is having a sexual relationship with another faculty member in the same department, should they be prohibited from participating in departmental votes on merit advances or promotional recommendations for their lover?

From, Professor Jerold Theis, Chair, Committee on Academic Freedom and Responsibility

Sincerely,

Bruce R. Madewell, Chair
Academic Senate, Davis Division



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November 6, 2003

PROFESSOR LAWRENCE PITTS, Chair
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SUBJECT: Proposed Revisions of the University of California Policy on Sexual Harassment and Procedures for Responding to Reports of Sexual Harassment

Dear Larry:

In response to your email request of October 15, the proposed revisions of the University of California Policy on Sexual Harassment and Procedures for Responding to Reports of Sexual Harassment were transmitted specifically to the Division's Committees on Academic Freedom, Faculty Welfare, and Privilege and Tenure, and more broadly to the Senate Council. The Council took up the matter at its November 3 meeting. Because of the abbreviated review period, there was not time to systematically confer with the campus Title IX Compliance Coordinator and, therefore, there are likely to be proposed revisions of a technical nature that have escaped our review. Nonetheless, the Council endorsed the revised policy in general, and we note below some concerns that were raised.

In the first paragraph of the Policy, Section I. B. (Definition of Sexual Harassment), the phrasing "severe and pervasive" implies that the harassment must be both before discipline may be imposed. We were not certain whether the wording "severe and pervasive" is a legal term of art in the context of sexual harassment laws; however, we suggest instead the words "severe, persistent, or pervasive" to indicate that the conduct will be judged as harassment whether it is a single serious act, a long-continued set of actions, or a systematic pattern of misbehavior. ✓

With regard to Policy Section I. E (Disciplinary Action in Response to Sexual Harassment), concern was expressed about the last sentence, which states, "Conduct that is sexual harassment or retaliation in violation of this policy is considered to be outside the normal course and scope of employment and not a direct consequence of the discharge of an individual's duties". It was not clear to us whose decision it would be to judge whether conduct is outside the normal course and scope of employment, and whether this statement could result in a lack of protection and/or indemnification for a third party responsible for reporting.

It was felt there might be some need make additional clarifications in both Policy Section E (Disciplinary Action in Response to Sexual Harassment) and Section F (Intentionally False Reports). With regard to the former, the policy says that those who are responsible for reporting but do not do so

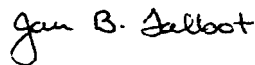
may be subject to disciplinary action. In the case of grossly negligent or reckless failure to report, the responsible individual(s) should absolutely be subject to discipline. With regard to the latter, those responsible individuals who report a meritless complaint should also be subject to discipline.

We did not have nor take the time to look at other campuses' local policies, but we note that UCSD's policy and procedures includes examples of conduct which might be sexual harassment. Such examples would be helpful as well in the Universitywide policy

Additionally, a few editorial recommendations were noted. They follow below

Finally it would be most helpful if the Office of the President could be asked to post revisions to UC policies in a form that includes existing and proposed text. This would ensure that reviewers are clearly aware of the revisions being proposed, and it is particularly important when the review period is truncated.

Sincerely,



Jan B. Talbot, Chair
Academic Senate, San Diego Division

cc: D. Tuzin
ChronFile

Editorial recommendations

Policy Section I. B., last sentence of paragraph 4: Omit "that violates this policy". [In addition, romantic relationships between members of the University community which begin as consensual may evolve into situations that lead to charges of sexual harassment. ~~that violates this policy.~~]

Policy Section I. B., first sentence of paragraph 6: Change "serious" to "severe"

Procedures Section II. B., first sentence of paragraph 5: Omit "optimally". The phrase "optimally no later than one year" conflicts with the last sentence. [Local procedures shall encourage reports of sexual harassment to be brought as soon as possible after the alleged conduct occurs, ~~optimally~~ no later than one year after the alleged conduct.]

Appendix I, first sentence should read: "...elects to file a grievance "

Appendix II, Section A: A space is needed after the word "Conduct".



Office of the Academic Senate

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VIA E-MAIL

November 12, 2003

Lawrence Pitts, Chair
Academic Senate
c/o Executive Director María Bertero-Barceló
1111 Franklin Street, 12th Floor
Oakland, CA 94607-5200

RE: UC Policy on Sexual Harassment

The UC Irvine Councils on Faculty Welfare and Student Experience reviewed and the proposed UC Policy on Sexual Harassment and found it thorough and well constructed. A summary of their comments follows.

Two substantive matters deserve further consideration before the policy is finalized.

1. The proposed policy elevates the threshold of sexual harassment to “severe and pervasive”. UCI’s current policy and legal standards typically require conduct to be severe or pervasive before a formal action, including a written warning, could be initiated. The lower standard is preferable insofar that it affords intervention sooner.
2. The second paragraph on page 5 of the draft proposal states that “local procedures shall encourage reports of sexual harassment to be brought as soon as possible after the alleged conduct occurs, optimally no later than one year after the alleged conduct.” We would like to see the language amended to state: “Local procedures shall encourage reports of sexual harassment to be brought as soon as possible after the alleged conduct occurs, optimally within a year after the alleged conduct.” Flexibility in reporting sexual harassment after one year is needed especially for graduate students who may have experienced the alleged conduct in the context of an on-going seminar and/or research setting.

We also suggest that two changes in the text would clarify the intent.

1. Part B. Definition of Sexual Harassment, the first line. “...requests for sexual favors, and verbal physical, or other...” should be, “...requests for sexual favors, and verbal [**insert comma**] physical, or other...”

Lawrence Pitts
UC Policy on Sexual Harassment
November 12, 2003
Page 2

In Part G. Free Speech and Academic Freedom, 3rd and 4th lines from the bottom, "...no provision of this policy shall be interpreted to prohibit conduct that is legitimately related to course content and teaching methods of an individual faculty member," is covered by the Academic Policy Manual section on Academic Freedom. This should be referenced as follows: (see APM 010, Academic Freedom)."


Abel Klein, Chair

BERKELEY DIVISION

November 12, 2003

CHAIR LAWRENCE H. PITTS
Academic Council, Assembly of the Academic Senate

*Subject: Draft Revised Policy on Sexual Harassment and Procedures for
Responding to Reports of Sexual Harassment*

The Divisional Council and several divisional committees considered the draft revised University of California Policy on Sexual Harassment and Procedures for Responding to Reports of Sexual Harassment. There was general support for the policy in concept. Two committees commented that the policy was carefully thought out and well written. However, some Senate members raised concerns about the policy in practice. The legal nature of the policy seems to address primarily the University's responsibility as an employer. The policy as written is less helpful to faculty, staff and students, as many of the concepts and terms used in the policy are not readily understood in day-to-day practice.

We offer the following comments for consideration prior to implementation of the revised policy.

It would be helpful to define the terms and concepts presented in the policy, especially those that may be defined by case law. For example, what constitutes "severe and pervasive" harassing conduct?

In Section I.B., Definition of Sexual Harassment (first paragraph, last sentence), we recommend amending "severe and pervasive" to "severe and/or pervasive", recognizing that a single act of sexual harassment may be sufficiently severe to warrant action.

In Section I.E., Disciplinary Action in Response to Sexual Harassment, the last sentence is perplexing. Is it necessary to state "Conduct that is sexual harassment or retaliation in violation of this policy is considered to be outside the normal course and scope of employment and not a direct consequence of the discharge of an individual's duties"? If this statement is necessary, it would be helpful to rewrite this section in such a way as to explain more clearly the intent.

In Section I.F., Intentionally False Reports, the language in this section is not strong enough. In the penultimate sentence we suggest substituting "will" for "may be" so that it is clear that disciplinary action will ensue from intentionally false or malicious accusations.

In Section II.B. 4., Procedures for Formal Investigation, it would be helpful to include a description of what governmental entities, under what conditions, may subpoena or otherwise obtain access to records or reports of an investigation of sexual harassment. This would presumably include subpoenas or court orders by the Attorney General under the USA PATRIOT Act.

In Part II, Procedures for responding to Reports of Sexual Harassment, a few syntactical issues were noted. In Section II.D., Referral to Disciplinary Procedures, the third sentence would be clearer if it read "Violations of the policy may include engaging in sexual harassment, retaliating against a complainant for reporting sexual . . ." In Section II.F., Confidentiality of Reports of Sexual Harassment, the second paragraph might more logically begin "Local authorities [or those in positions of responsibility] procedures shall notify individuals.

- Under Part II, Procedures for Responding to Reports of Sexual Harassment, there are multiple references to "local procedures". It is not clear how this policy will be implemented in concert with The Faculty Code of Conduct (APM 015) and University Policy on Faculty Conduct and the Administration of Discipline (APM 016). The Senate must be actively involved in the development of local procedures, which will define this policy in practice.

We appreciate the opportunity to comment on the proposed policy revision.

Sincerely,

Ronald Gronsky
Chair

cc: Sanjay Govindjee
Margaretta Lovell



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LOS ANGELES DIVISION
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November 13, 2003

To Larry Pitts Academic Senate Council Chair

Re: UCLA's Response to the "*Proposed Revised Policy on Sexual Harassment and Procedures for Responding to Reports of Sexual Harassment*"

The Academic Senate, Los Angeles Division received four responses from academic senate members about the *Proposed Revised Policy on Sexual Harassment and Procedures for Responding to Reports of Sexual Harassment*. Below are the highlights from those responses.

Suggestion:

1. The policy is missing any attempt to put in place an evaluation system that can determine if the policy is fairly implemented and executed. The present lopsided ratio of female/male cases (*60/40 to 80/20 for female/male complainants is an expected ratio in a university population compared to 95/5 and 98/2, the female/male ratio complainants at UCLA*) provides strong documentation that the university uses sexual profiling in the implementation of its current sexual harassment policy. Before the proposed new policy is approved, two strongly recommended additions are:
 - a. a section be added that requires the Title IX Coordinator to monitor the policy's effectiveness and fairness
 - b. mandate the publication of ratios of observed and expected cases initiated by female and male complainants

Concerns:

2. Is the evaluation of this type of complaint being removed from the relevant Academic Senate Committee? Is the "Title IX Compliance Coordinator" now to decide the fate of charged faculty without input from faculty peers?
3. What basis is there for giving predictable meaning to the key term "romantic" and "physically intimate"? The vagueness and lack of reference to guiding examples invites confusion, anxiety, irresponsible accusations, gossip, and trouble that can be invited with precise terms.

The complete responses from UCLA's academic senate members to the "*Proposed Revised Policy on Sexual Harassment and Procedures for Responding to Reports of Sexual Harassment*" are available upon request.

Sincerely,


A handwritten signature in black ink, appearing to read "Clifford Brunk". The signature is written in a cursive style with a large initial "C".

Clifford Brunk, Chair
Academic Senate, Los Angeles Division

ACADEMIC SENATE
SANTA BARBARA DIVISION

November 14, 2003

TO: Lawrence Pitts, Chair, Academic Council

FROM: Walter Yuen, Divisional Chair 

SUBJECT: UC Policy of Sexual Harassment and Procedures for Responding to Reports of Sexual Harassment

The Charges Officer, and the Committees on Privilege and Tenure (P&T) and Academic Personnel have reviewed, the proposed revisions to the subject policy. Both the Charges Officer and the P&T have responded with substantive comments.

We note a more detailed definition of sexual harassment as well as more definition of groups of people who have varying roles and obligations in the reporting process. With this much definition, further questions arise. For instance, mention might be made of the much larger group of people that fall into neither of the "supervisor, manager, and other designated employee" nor the "confidential resources" groups, and what, if any, obligations are incurred by that much larger group. It may also be useful to clarify the limitations of the two named groups. Can a person in, say, the "designated employee" group act as a person in the "confidential resource" group, if, e.g., that person is approached as a confidante?

A bit more clarity on what must be included in the mandatory reports that are sent to TNCC would be helpful. For instance, are the accused and complainants to be identified? Or is it just a description of an occurrence?

A substantial change is the attempt to avoid duplication of fact-finding procedures. It would allow the Senate to use title IX Compliance Officer's report for the Senate charges process. If this policy is enforced, campus procedures would need to be changed to comply.

The Charges Officer brings up a philosophical question regarding what the complainant is entitled to know about the outcome of the process begun by his/her complaint. It appears that the policy of protecting privacy—in this case that of the accused—would not allow a victim of harassment to know what disciplinary action had been taken or even if any/none had been imposed. The result is, then, that there is no sense of closure for the victim; no sense that the case is finished. If this is really the case, it might warrant more thought on the subject.

The comments of the Charges Officer and P&T are attached for your information.

**ACADEMIC SENATE
SANTA BARBARA DIVISION**

November 10, 2003

Walter Yuen, Chair
Academic Senate

From: J. William Forgie
Charges Officer

UC Policy on Sexual Harassment and Procedures for
Responding to Reports of Sexual Harassment.

I have comments on two topics discussed in the draft policy. The first has to do with the obligation to report instances of sexual harassment. Apparently there is to be a group of “supervisors, managers and other designated employees” (DEs for short) who are obligated to report any instances of sexual harassment to the Title IX Compliance Coordinator (hereafter the TNCC). And there is to be another group of “confidential resources” (CRs) to whom complainants or victims may go to discuss instances of sexual harassment but who are not obligated to report those instances of sexual harassment to the TNCC. Presumably there is also a large group of university personnel who fall into neither of these two groups. It is important to clearly define each of these groups. Often victims of harassment simply need someone with whom to discuss their problems and do not want to formally accuse the harasser or have knowledge of the incident to spread beyond the one to whom they are confiding. Many victims would not come forward to speak with anyone if they knew their complaint would be passed on to someone else or be the start of some inquiry or even formal investigation.

Also, it is not quite clear what obligations, if any, are incurred by those who are neither DEs nor CRs. If someone comes to a member of this third group and reports an instance of sexual harassment, may they, without any further action or request by the victim, report what they have learned to the TNCC (thus making them different from the CRs); or may they keep what they have learned to themselves, making no report to the TNCC (thus making them different from the DEs). Most members

of the university community will be neither DEs nor CRs, and so it is important for them to know what is permissible, forbidden or required of them. And it is important for a victim of harassment to know, before discussing their experience with a member of the university community, what their listener is permitted, required or forbidden to do with what they hear.

It may be useful also to clarify the obligations of those DEs who are approached and talked with as DEs and those who merely happen to be DEs but who are approached in some other capacity or for some other reason. If I am just an ordinary faculty member and a student in my class who personally trusts me comes to talk to me about harassment by a colleague, I may have no obligation to report the incident to anyone else. I may be able (pending clarification of the issues posed in the previous paragraph) to behave like a CR. But suppose I were the department chair (presumably one of the DEs) and I were approached as before, i.e., simply out of trust. Is a DE prohibited from behaving like a CR when he/she is approached not because he is (or even in ignorance that he is) a DE but simply because he/she is someone the complainant trusts?

Finally, it is not clear what must be included in those mandatory reports that DEs are to send to the TNCC. Are they conceived to be merely general descriptions of an incident, with neither accused nor complainant identified? Or are names to be revealed? Clarity on these matters would help hesitant complainants decide whether they wish to discuss their complaint with a DE.

The second topic concerns what the complainant is entitled to know about the outcome of the process started by his/her complaint. And here I don't have any complaints or suggestions, just a philosophical question. The draft states that the complainant is entitled to know that action was or was not taken in response to his/her complaint, and is entitled to know "that the matter has been referred for disciplinary action". But the complainant is not entitled to learn (at least without the consent of the accused) any of the "details of the recommended disciplinary action" (if any), nor (apparently) what discipline, if any, was ultimately imposed. The complainant is to be kept in the dark about all these things evidently because of "University policies protecting ... privacy", in this case the privacy of the accused. I am curious about what conception of privacy is motivating these considerations. Certainly no similar conception operates in the criminal or civil courts. It would obviously be ludicrous for victims of the Oklahoma City bombing to be told that because of concerns for Mr. McVeigh's privacy they were not entitled to know whether he had been convicted or executed. Victims of harassment naturally want to know if their complaints were supported

by the institutions they entrusted to handle them, whether the “system worked” as people say. They want “closure” as people also say. How do they get any that given the notion of privacy that seems to be at work here?

ACADEMIC SENATE
SANTA BARBARA DIVISION
Committee on Privilege and Tenure

November 4, 2003

To Walter Yuen, Chair
 Academic Senate

From Goeffrey Rutkowski, Chair
 Committee on Privilege and Tenure

Re Proposed Revisions to the Sexual Harassment Policy and
 Procedures

The Committee on Privilege and Tenure has reviewed the proposed systemwide revision to the Sexual Harassment Policy and Procedures, as you requested. The Committee notes the following significant changes which may affect Privilege and Tenure:

- The document provides a much more detailed definition of sexual harassment and includes a warning about consensual romantic relationships, consistent with the proposed policy on Conflict of Interest Created by Consensual Relationships.

It adds a section about the protection of free speech and academic freedom such that “...no provision of the policy shall be interpreted to prohibit conduct that is legitimately related to course content and teaching methods of an individual faculty member ...”

It adds privacy safeguards

- It permits the filing of a complaint or grievance pursuant to the applicable academic, student, or staff complaint resolution or collective bargaining agreement grievance procedure either **instead of or in addition to** making a report to the Title IX Compliance Coordinator

It allows the grievant to file a complaint or grievance alleging that actions take in response to the report of sexual harassment did not follow University policy.

It suggests that the local sexual harassment policy be coordinated with disciplinary procedures to avoid duplication of fact-finding procedures whenever possible. **This is significant for us since it suggests that the Senate can and should use the Title IX Compliance Officer's report for the charges process:**
"Investigation reports pursuant to this policy may be relied upon as evidence in subsequent disciplinary proceedings as permitted by the applicable disciplinary procedures" Our Charges Procedures would need to be changed to include an explicit statement to that effect.

We assume that the Sexual Harassment Policy and Procedures for the campus are going to have to be revised so that they are consistent with this new systemwide policy and procedures. That being the case, we would expect broad consultation between the administration and the Senate in the formulation of a new campus policy and procedure.