

**UNIVERSITY COMMITTEE ON PRIVILEGE AND TENURE
2020-21 Annual Report**

TO THE ASSEMBLY OF THE ACADEMIC SENATE:

Under Senate Bylaw 195 and consistent with [Bylaw 40](#), the University Committee on Privilege and Tenure shall: (Am 23 May 01; Am 28 May 2003)

1. Advise the President, the Academic Senate and its Divisions, and the Divisional Privilege and Tenure Committees on general policies involving academic privileges and tenure [see [Bylaw 334](#)]. (Am 25 May 76; EC 28 May 2003)
2. Constitute special Hearing Committees as provided for in Bylaw 336.A. (EC 28 May 2003)
3. Maintain statistical records of the grievance, disciplinary, and early termination cases taking place on each of the campuses, as specified in [Bylaw 334.B](#) . (EC 28 May 2003)

Topics of Note During the 2020-21 Year

Title IX and P&T Hearings

In SVSH cases, there is a mandated Title IX process that involves an investigation and a hearing where the accused and the accuser confront each other, call witnesses, and are advised by attorneys. Since there is now a mandated Title IX process in SVSH cases that involves a hearing, there was a question as to whether the committee should change anything about the P&T process which also requires a hearing. There was a worry that having two hearings would place an undue burden on complainants.

The Chair asked for volunteers to create a task force to decide what should be done about this issue. The task force created a report which was reviewed by the committee. Members discussed how hearings were handled on the various campuses. The Chair added that the next task before the committee was to develop guidelines regarding what kind of questions would rise to the appropriate level, who is determining that decision, and why were those questions not asked before. The committee formed a task force of members Tucker, Guthman, Hankamer, Ferrero and Gill to develop [guidelines for hearing committee chairs](#) with specific attention to SVSH cases.

Revisions to Bylaw 336

Last year's requirement from the Department of Education that SVSH cases be decided according to the same standard of evidence for faculty, staff, and students, together with the California law that states that the standard for students be "preponderance of the evidence," put Bylaw 336 in non-compliance. In response, UCPT needed to make a decision. One possibility was to revise the Bylaw and leave it to be understood that the discipline recommended might depend on how strong that case was. The other possibility was to explicitly say in the Bylaw that in a case where the committee has determined that the argument has been made by a preponderance of the evidence, the committee can decide what discipline to recommend - whether or not it had been established by the "clear and convincing" standard.

The committee decided to change the wording of the Bylaw. In February, the Assembly approved the committee's [amendment to Bylaw 336.F.8](#) to allow for the "preponderance of evidence" standard to be used in P&T hearings that involve violations of the SVSH policy.

Later in the year, another change to the Bylaw was suggested. Given concerns about duplication of effort and the burden on parties involved to go through two full hearings, a task force of UCPT members considered proposed changes to P&T roles in SVSH-related discipline cases. UCPT adopted the task force recommendation regarding acceptance of evidence from the Title IX process and what may be subsequently permitted for P&T hearings. This formed the basis of the proposed Bylaw revision. The intent was to align Senate Bylaws with new federal Title IX regulations while preserving the APM 016 right to a hearing for a faculty member facing discipline. In June, the Academic Council approved

UCPT's proposed change to Bylaw 336.F.3 with some slightly amended language:

For cases in which there was a hearing at the Title IX stage regarding violation of the University's policy on Sexual Violence and Sexual Harassment ("SVSH Policy"), the Hearing Committee shall accept into evidence the record and written determination from the Title IX process. Other evidence, including witness testimony, regarding whether there was a violation of the SVSH Policy will not be permitted unless the Hearing Committee determines before the hearing that the evidence pertains to newly discovered facts or circumstances that might significantly affect the determination of whether there was a violation of the Faculty Code of Conduct and that were not reasonably discoverable at the time of the Title IX process. The P&T Hearing Committee may carry out any investigation it deems appropriate for the determination of a potential violation of the Faculty Code of Conduct.

The language places a responsibility on the hearing committee and the chair to pay attention to the need to avoid duplicative evidence and the calling of witnesses who have already testified. However it also makes clear that a hearing committee has the authority to investigate allegations of violations of the Faculty Code of Conduct.

Simultaneous Misconduct Charges and Merit and Promotion Considerations

A member raised an issue as to what to do when a campus is encountered by a simultaneous misconduct hearing and promotion review process. The interim action was to pause the personnel action until the misconduct case was completely resolved. The personnel action could then be run retroactively. This is just one solution that was on the table. Members discussed the possibilities. The Chair remarked that the issue could be taken up in 2021-22.

Guidance re Standard of Proof

In August, the Chair and Vice Chair worked with Adviser Meltzer to create guidelines for cases where the charges are filed with the new standard in place, but the alleged conduct occurred when the "clear and convincing" standard was in place. The three developed this language to address the issue:

On February 10, 2021, the Academic Assembly approved a revision to Senate Bylaw 336.F.8 specifying that, whereas the Chancellor or Chancellor's designee normally has the burden of proving allegations in disciplinary cases by clear and convincing evidence, "for allegations of a violation of the University's policy on Sexual Violence and Sexual Harassment [SVSH], the Chancellor or Chancellor's designee has the burden of proving the allegations by a preponderance of the evidence." This change was prompted by the combination of the 2020 Title IX regulations requiring the use of a consistent evidentiary standard for faculty respondents and student respondents for certain SVSH cases, and state law requiring use of the preponderance of the evidence standard in an overlapping set of SVSH cases with student respondents. *See* 34 C.F.R. § 106.45(b)(1)(vii); Cal. Educ. Code § 67386(a)(3). In drafting this revised bylaw language, it was the University Committee on Privilege & Tenure's ("UCPT") intent that this updated standard of proof apply to all cases alleging SVSH violations in which disciplinary charges were filed by the Chancellor on or after February 10, 2021, the effective date of the bylaw revision, regardless of when the underlying alleged conduct took place or when the Title IX investigations took place.

UCPT therefore is issuing this guidance to confirm that campus Hearing Committees should use the preponderance of the evidence standard for all allegations of a violation of the University's SVSH policy where the charges were filed on or after February 10, 2021, regardless of when the

underlying alleged conduct took place or when the Title IX investigations took place.¹ However, in cases where the Hearing Committee finds that the Chancellor or Chancellor’s designee has met their burden of proving such allegations by a preponderance of the evidence, and the alleged conduct took place prior to February 10, 2021, the Hearing Committee may, at its sole discretion, separately indicate whether the allegations would also satisfy the clear and convincing evidence standard. Disciplinary recommendations in such cases, however, should be based only on whether the preponderance of the evidence standard is met.

Possible Amendment to the Title IX Regulations – Graduate Council

A member asked the group if it felt P&T can be bypassed with a decision made by the graduate councils to remove an individual out of his/her graduate group when that individual has been charged with an SVSH case, but has not yet had discipline imposed. Director Taylor and Attorney Adviser Meltzer agreed to look into this question. The committee discussed the option of paid administrative leave. They also discussed the erosion of faculty rights and the need to protect due process.

Reports to UCPT from Chancellors in Discipline Cases

The Chair informed the committee that in Bylaws 335 and 336, the section on hearing and post-hearing procedures says that the hearing committee will promptly make its finding of facts and forward these to the to the parties in the case, the chancellor, the chair of the divisional P&T committee and the chair of the systemwide P&T committee. He asked if divisional committees are complying with this requirement. The committee discussed confidentiality concerns of such a collection versus its utility, and whether the collection would be “searchable.” A member suggested that five years of files be requested from the campuses. The Chair added that – moving forward – such submissions to the systemwide UCPT chair need to also be copied to the systemwide UCPT analyst for recordkeeping.

Acknowledgements

UCPT is grateful to have had valuable input from - and exchange with- these UCOP and campus consultants and guests over the past year: Vice Provost Susan Carlson, Associate Vice Provost and Deputy to the Vice President Amy K. Lee, Senior Counsel Joshua Meltzer, Senior Counsel Mark Morodomi, Senior Counsel Chad Pimentel, and Systemwide Title IX Director Suzanne Taylor. Special thanks to Academic Council Chair Mary Gauvain, Vice Chair Robert Horwitz, and Senate Executive Director Hilary Baxter.

Respectfully submitted,

Jorge Hankamer, Chair (UCSC)
Luca Ferrero, Vice Chair (UCR)
Samuel Otter (UCB)
Julia Simon (UCD)
Irene Tucker (UCI)
Vilma Ortiz (UCLA)

Lin Tian (UCM)
Roya Zandi (UCR)
Philip Gill (UCSD)
Daniel Bikle (UCSF)
Eckart Meiburg (UCSB)
Julie Guthman (UCSC)

¹ Allegations not related to a violation of the SVSH policy continue to be evaluated under the clear and convincing evidence standard.