

ACADEMIC COUNCIL
Monday, August 10, 2020, 2:00 p.m.
Via Zoom Meeting, University of Notre Dame

MINUTES

Members present: Scott Appleby, James Bathon, Bob Bernhard, Laura Carlson, Patricia Champion, Patricia Clark, Marcus Cole, Martijn Cremers, Colleen Cross, Patricia Culligan, Shannon Cullinan, Michael Desch, Patrick Flynn, Mary Galvin, Anne Garcia-Romero, Dan Groody CSC, Erin Hoffmann Harding, John Jenkins CSC, Lionel Jensen, Dan Johnson, Christopher Kolda, Parker Ladwig, Khachatur Manukyan, Chris Maziar, Paul McGinn, Margaret Meserve, Nancy Michael, Connie Mick, Marie Lynn Miranda, Sarah Mustillo, Clive Neal, Hugh Page, Michael Pippenger, Stefanos Polyzoides, Ramachandran Ramanan, Maura Ryan, Maria Salerno, Mark Schurr, Jason Springs, Thomas Stober, Joe Urbany, Elliott Visconsi, Diane Parr Walker, Shawn Wu

Members excused or absent: Ann Astell, Kasey Buckles, Patrick Griffin, Ben Heller, Michael Hildreth, Michel Hockx, Connor Mullen, Glen Niebur, Bryan Ritchie, Carter Snead, Katherine Wallace, Molly Walsh, Samir Younes

Observers present: Kevin Barry, Brian Flaherty, Jim Frabutt, Chuck Hurley, Matt Lahey, Mark Prokopius, Ryan Willerton

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1. **Opening Prayer** – Fr. Jenkins invited Hugh Page to offer the opening prayer.
 2. **Approval of the Minutes of the meeting of March 27, 2020** - Fr. Jenkins asked that the minutes from the meeting of March 27, 2020 be accepted. The minutes were approved without objection.
 3. **Discuss and vote on the proposed changes to the Academic Articles** –Fr. Jenkins invited Erin Oliver and Matt Lahey to present the proposal. This proposal was previously discussed and approved by all three subcommittees of the Academic Council.

Oliver introduced the proposal, which was driven by changes to the federal Title IX regulations. She indicated that the intent is to implement an interim solution to ensure compliance, and then engage in benchmarking and conversation to establish a longer-term solution. Compliance is required by August 14, 2020.

Lahey introduced the required changes. He shared that the regulations have updated the definition of sexual harassment to include instances that are both severe and pervasive, where previously the regulations indicated severe or pervasive. The updated regulations also implement trial like procedures for hearings.

Compliance with the regulations requires changes in two areas. First, the University is required to use one standard of evidence across all cases and appeals, regardless of who the complainant and respondent are. Currently, all hearings use a preponderance of the evidence standard. However, there is one circumstance in which the standard is clear and convincing – that is an appeal hearing for a respondent who is a faculty member who has been found responsible and has received a severe sanction. Second, the University is required to provide both complainants and respondents with equivalent appeal opportunities and processes. Currently, hearings where the respondent is a faculty member do not afford the complainant the same appeal procedure that is available to the respondent.

The proposal applies the preponderance of the evidence for all cases. The severe sanctions appeal process would no longer apply to sexual harassment cases. The proposal applies to this semester only. In the absence of further action, the language reverts to the prior language on November 20, 2020. Any changes approved prior to November 20 apply to all pending cases, including those in appeal. This stipulation provides assurances that the

agreed policy will be the policy that is applied for any cases pending when the new policy is implemented, rather than the interim language.

To apply a single standard of evidence, the University could either change the standard of evidence for the appeal of severe sanctions against faculty members to the preponderance of the evidence standard, or it could change all other cases and appeals to the clear and convincing standard. In the prior 5 years, there have been more than 800 cases brought forth. None of those cases have resulted in a severe sanction against a faculty member that was then appealed. While it is possible a case could come forward this semester, the prior 5 years show that is remote. To limit the impact on the University, the proposal leaves all other cases at the same standard, and moves the severe sanction appeals to the preponderance of the evidence standard.

The protections for faculty are codified in the Academic Articles, so any substantive changes must be approved by the Academic Council, and cannot be changed outside the faculty governance process.

Provost Marie Lynn Miranda thanked all of those who have been working on this. She affirmed that academic freedom is a bedrock principle, and that rolling that back would be counter to everything we hope to accomplish as a research university. She reminded the group that a solution must be in place by August 14. The timeline was compressed because of the frequent and significant changes by the government. Miranda stated that, in her view, this proposal does not represent a long-term solution. She believes it will be sufficient as a temporary policy for the fall semester. There have been faculty who have shared their thoughts regarding academic freedom and legal process, and Miranda encouraged all to read those statements. Miranda indicated that she will charge a university committee to develop policies and procedures. The committee will include the Office of General Counsel, the Office of Institutional Equity, appointees suggested by the Faculty Senate, appointees suggested by the Academic Council, undergraduate students, and graduate students. An interim report will be requested by 10/1 to ensure sufficient time for robust campus discussion. An acceptable solution must maintain academic freedom as a bedrock principle. It must preserve any recommendation of severe sanctions against a faculty member coming from a panel of peers. Further, Miranda pledged to not impose any severe sanctions against faculty through this process before the end of the semester, when the new policy would go into effect.

Fr. Jenkins reminded the group that the final proposal would be brought to the Academic Council for approval. He invited a motion to approve the changes to the articles. The motion was made by Pat Flynn. Dan Johnson seconded the motion.

Discussion points included:

The Faculty Affairs Committee met last week. As a part of that discussion, a formal statement on Academic Freedom in the policy document was requested and drafted. The proposed statement in the policy document presented is not as strong as originally drafted.

The proposal was supported in the Faculty Affairs Committee because of the circumstances, but not because it is the preferred solution. The group was reminded that Carter Snead's statement had been shared with the group via email. There was also discussion of a case of a retaliatory conduct charge against a Northwestern faculty member who spoke out about a process, reminding the group that it is possible that this extends beyond sexual harassment, and into freedom of speech and academic freedom. The assurance from Miranda is reassuring, but limited because that represents a departure from the parallel process for students. There is support for this proposal to bring us into compliance while we develop a solution that is not a serious threat to tenure and a serious threat to academic freedom.

Another member indicated that a vote in support at the Faculty Affairs Committee was made with the understanding that the statement on academic freedom would be included. Peers and aspirational peers are going to be looking at these statements. The current language would set a precedent by not reinforcing as strongly as possible the statement on Academic Freedom.

A question was raised in reference to Snead's memo, which indicated a "middle path" is possible, i.e. splitting the standard of evidence between hearings and appeals and changing the panel makeup. Lahey confirmed that panel makeup may be determined by the University. He also indicated that the Department of Education was clear that there may be only one standard of evidence applied. Snead's proposal can be reviewed over the semester, but it

was Lahey's view that this is a strained view based on the language of the regulations. It was Lahey's view that the current proposal brings us into compliance. Splitting the standard would not.

It was noted that there has been a tightening of what constitutes a violation in the updated regulations. It was suggested that there is a need for a good communication in common language, perhaps with examples, to share these changes with students to bring about conversations and gain their input.

It was stated that the Faculty Senate has been heavily involved with these deliberations since June. A recommendation was offered that independent legal counsel be obtained, at the University's expense, to advise the faculty on a solution that protects academic freedom.

It was asked if there is a reason we cannot adopt the language proposed previously and shared with the Faculty Affairs Committee. Lahey indicated that the statement provided previously could be incorporated.

Miranda proposed a revised statement. She indicated that there are limits to the speech that would be deemed acceptable in the classroom, and was concerned that the prior draft would not appropriately indicate that. The proposed language was:

The University recognizes that academic freedom and the associated protections of tenure are fundamental to the scholarly enterprise. Because the University remains committed to the principles of academic freedom as articulated in Article IV/Section 2/Academic Freedom and Associated Responsibilities of Faculty, protections of academic freedom and tenure should be considered in any applications of this Policy. Vigorous discussion and debate are fundamental to the University and this policy is not intended to stifle teaching methods or infringe upon academic freedom.

Lahey expressed concern with the inclusion of tenure status. That status should not be a factor when reviewing a case and determining responsibility or determining a sanction. Its presence in the statement could be construed as a factor not available to non-tenured faculty, staff, or students.

It was stated that this is just an interim solution, and should be viewed as only such. The group must be cautionary and careful in establishing a temporary fix so that does not create perceived constraints in the development of a long-term solution.

Lahey was asked if there were grounds for an extension for compliance. Lahey indicated that there was not. Others' attempts at injunctions were denied.

A suggestion was made to change the "should" in the proposed statement to "will" or "must" to strengthen the commitment to academic freedom. A question was raised about the passage before the academic freedom reference in the policies document, Lahey stated that the language in the policy is written so that the University can still prohibit conduct that has always been prohibited. Behavior or alleged conduct that does not meet the regulatory definition of sexual harassment would apply the current process, and not be impacted by the regulatory changes.

In response to Lahey's concern about the inclusion of the term tenure in the statement, there was discussion reaffirming the connection between tenure and academic freedom. Lahey acknowledged agreement and support, but indicated that academic freedom is already a part of the Academic Articles. The language suggested is already approved and a part of University policy.

The group was encouraged to ensure student voices are heard. It was indicated that the faculty had shared important perspectives, and that they are all respected members of the University. All were encouraged to be sure that students are asked to participate in the process, and that they take time to listen to their perspectives and responses.

Miranda shared a proposed statement:

Academic freedom and the associated protections of tenure are fundamental to the scholarly enterprise. Because the University remains committed to the principles of academic freedom as articulated in Article IV/Section 2/Academic Freedom and Associated Responsibilities of Faculty, protections of academic freedom will be considered in any applications of this Policy. Vigorous discussion and debate are fundamental to the University and this policy is not intended to stifle teaching or research methods or infringe upon academic freedom.

At the conclusion of the discussion, members voted using the “Participants” panel in Zoom. The proposal was unanimously approved.

4. Adjournment

With no other business, the meeting was adjourned at 3:10pm.

Note: Prior to the meeting, all members were informed via email of actions the Executive Committee had taken between the March 27, 2020 meeting and this meeting.

The Executive Committee of the Academic Council took action on several items between the March meeting of the Academic Council and the meeting today. These actions were all brought through the appropriate subcommittee, and were all related to the pandemic response efforts. As required by the Academic Articles, those items are being shared with you here.

April 20, 2020:

Approval of the Graduate Architecture Pass/No Credit option for spring 2020

Approval of the Graduate Business Pass/No Credit option for spring 2020

Approval of the P/NC implementation for undergraduates on probation

Approval of the P/NC implementation for grad school students on probation

Approval of the Undergraduate Academic Code addenda for spring 2020

May 20, 2020:

Approval of the Graduate School Academic Code appendix for spring 2020

July 22, 2020:

Approval of the Undergraduate Academic Code compendium for 2020-2021