

**UNIVERSITY OF NOTRE DAME
MEETING OF THE ACADEMIC COUNCIL
JANUARY 20, 2005**

Members Present: Rev. Edward Malloy, C.S.C., Rev. John I. Jenkins, C.S.C., Nathan Hatch, Jean Ann Linney, Christine Maziar, Dennis Jacobs, Jeffrey Kantor, Rev. Mark Poorman, C.S.C., Douglas Archer, Sunny Boyd, Jay Brandenberger, Seth Brown, Olivia Remie Constable, Don Crafton, Neil Delaney, Thomas Frecka, Stephen Fredman, Nasir Ghiaseddin, Brad Gregory, Hope Hollocher, Frank Incropera, Eileen Kolman, Michael Lykoudis, Joseph Marino, Paul McGowan, Patricia O'Hara, Teresa Phelps, Ava Preacher, Meghan Rhatigan, John Robinson, Mark Roche, Valerie Sayers, Mihir Sen, Jeremy Staley, Carol Tanner, Bill Westfall, Carolyn Woo, Jennifer Younger.

Members Absent: Tom Cosimano, Katie Crossin, Tim Dale, Patricia Maurice, Richard Taylor

Members Excused: John Affleck-Graves, Panos Antsaklis, Joseph Buttigieg, Kenneth DeBoer, Paula Higgins, Christian Moevs, Tom Noble, Teresa Phelps, Crystal Salcido

Observers Present: Kevin Barry, Mary Hendriksen, Harold Pace, Col. Michael Zenk

Observers Absent:

Observers Excused: Dan Saracino, Matt Storin

Guests Present: Jill Bodensteiner, Associate Vice President and Counsel, Office of General Counsel; Scott Howland, Program Coordinator, Office for Students with Disabilities; David A. Smith, Chair, University Committee on Libraries

The Reverend Edward Malloy, C.S.C., called the meeting to order at 3:05 p.m. Prof.

Hatch offered a prayer.

1. Minutes of the meeting of November 22, 2004: The minutes of the Academic Council meeting of November 22, 2004, were approved without change.

2. Annual report (2003/04) of the University Committee on Libraries: Prof. Hatch explained that the annual report (years 2003/04) of the University Committee on Libraries has been sent to

members as an information item. If there are issues with the report that members would like to address through the Council's various committees, they may do so.

3. Policy on academic accommodations for undergraduate and professional students

(excluding law students) with disabilities: Prof. Hatch said that the main item of business today is discussion of a proposed University policy for accommodating students' disabilities in circumstances when academic work may be affected. He commented that this area of law and policy is complex; thus, the policy presented to members today has gone through several drafts and been reviewed by many different people. The Executive Committee discussed a previous draft of the proposal for nearly two hours and made a number of minor changes and clarifications before voting to endorse the version presented to members today. He knows that representatives of the Law School have some suggested changes to the proposed policy, but, before discussion, Jill Bodensteiner, associate vice president and counsel, and Scott Howland, director of the Office for Students with Disabilities (OSD) [<http://www.nd.edu/~osd/>], will provide some background on the proposal as a whole.

Prof. Linney added that the proposed policy would not replace a current University policy; rather, it is new policy that commits to paper general University practice in this area. She also explained that, as drafted, the policy would not apply to students enrolled in the Graduate School. With so many complicated issues related to their theses, dissertations, and laboratory work, members of both the Graduate Council and the Executive Committee decided that the University should establish a separate graduate student policy. As for the University's professional students, Dean Woo of the Mendoza College of Business supports applying the

policy to M.B.A. students; Dean O'Hara of the Law School, however, will explain to members why she will recommend extracting law students from it and creating a separate policy for them.

Mr. Howland spoke first. He related that the Office for Students with Disabilities was first created in 1995. Since that time, the number of students the office has identified and documented as having a disability has grown from 36 in 1995 to 196 this year—split between 171 undergraduates and 25 graduate students. Over the past few years, he has seen an increase in questions or concerns on the part of faculty members about accommodating students' requests; thus, it is important to develop a policy that will help to clarify not only the role of the OSD but also that of students and faculty members. Mr. Howland then provided additional statistics: In the fall semester of 2004, 96 students made 404 requests for accommodations related to their academic work. Those requests involved 249 professors and 223 courses. While the OSD receives other types of requests—for large-print textbooks, note-takers, or similar accommodations—requests in this second category do not typically have the potential to interfere with course requirements or standards. The policy presented to Council members today is focused on the first type of request—"academic requests." These are requests made by students that have the potential to fundamentally alter the nature of a course—particularly by impacting the core elements of what the professor is attempting to evaluate.

Ms. Bodensteiner spoke next. She remarked that educational law is very cyclical in terms of issues that might be labeled "hot button" issues. Accommodating students' disabilities is that kind of issue now—which she knows by counting the number of seminars dedicated to it at the most recent annual convention of college and university lawyers. The popularity of the topic is good evidence that other institutions are dealing with numbers similar to those Mr. Howland has

related for Notre Dame.

Ms. Bodensteiner said that there are four critical legal issues that come into play in the area of academic accommodations for disabilities and two laws that govern policy and practice in this area: the Americans with Disabilities Act (ADA) and the Rehabilitation Act—both of which apply to Notre Dame as a federal contractor and as an employer with places of public accommodation. The four key legal questions are:

(1) Who is a qualified individual with a disability?

To determine the answer to this question, Ms. Bodensteiner explained, Mr. Howland conducts a review to determine if a student has a qualifying disability. He obtains documentation from the student and may consult with medical or mental health providers. Occasionally, she will offer a legal perspective as well, but the initial determination of whether a student falls under the provisions of federal law is made by Mr. Howland as director of the OSD.

(2) What are confidentiality restrictions?

Confidentiality of disability-related issues for students is governed by three laws: the ADA, the Family Education Rights and Privacy Act (FERPA), and Indiana laws regarding the privacy of medical records. Because of these laws, the OSD is rather limited in the kind and extent of information regarding a student's disability that it can share with faculty members.

(3) What is a reasonable accommodation for the student under the law?

Once a student is determined to be a qualified individual with a disability, Ms. Bodensteiner explained, the next step is determining what may be a “reasonable” accommodation for that disability. She said that the notion of providing a reasonable accommodation relates to the underlying goal of the ADA as a whole: to provide “a level playing field” for people with

disabilities. In an academic context, court decisions regarding reasonable accommodations make it necessary to explore whether a certain accommodation will “fundamentally alter the nature of the course.” Attention to that issue explains why that particular phrase appears in several sections of the proposed policy.

(4) What is the grievance procedure by which students with disabilities can file a formal grievance regarding the denial of an accommodation?

Finally, under federal law, colleges and universities are required to have a grievance procedure in place for hearing disputes related to disabilities. Notre Dame has a disability grievance procedure in place; it is referenced in the proposed policy and provides students with the ability to grieve the provost’s ultimate decision regarding an academic accommodation.

Ms. Bodensteiner continued that, within this legal framework, she and Mr. Howland regularly address issues related to students’ disabilities. The University does not currently have a policy on academic accommodations on paper—and is not legally required to have one—but, as Mr. Howland has said, adopting a formal policy would clarify the procedure for all involved. This is especially important in that, as she has mentioned, disability law is now very much in the spotlight for educational institutions.

There are three ways that disputes regarding accommodation of students’ disabilities can be raised, Ms. Bodensteiner explained. One is via the internal grievance policy she mentioned earlier. Currently, the University is in the midst of its second-ever grievance hearing, which, she believes, is indicative of the fact that these issues are beginning to arise more frequently. A second way a student can bring a formal complaint is through the Office of Civil Rights in the federal government’s Department of Education. Here, too, the University is now involved in a

complaint—for this procedure, its first. The third way that a student could raise an issue of academic accommodation is through a private lawsuit, although she does not believe that the University has ever been sued under the ADA or the Rehabilitation Act.

Ms. Bodensteiner commented that because, in one semester, both a grievance and an Office of Civil Rights' complaint have been filed, it appears that it is time for the University to be proactive in this area and to adopt a formal policy. To put that policy in place, there are four practical issues that she and Mr. Howland see more and more frequently in dealing with students' requests for accommodations. The proposed policy is designed to address all four.

The first practical issue is: Who makes the initial recommendation as to what the reasonable accommodation might be? A few institutions have decided that the decision should be up to faculty members. Many more institutions have determined that the decision-maker should be a trained staff member—someone like Mr. Howland. Ms. Bodensteiner said that she supports the second approach because of confidentiality concerns mentioned earlier; also, it is a heavy burden on faculty to make accommodations decisions. Having one person trained to decide on and negotiate appropriate accommodations takes the burden off the faculty as a whole to gain expertise in this area. Additionally, having one person make the initial recommendation provides consistency throughout all of the University's colleges and departments—which she believes is important.

Ms. Bodensteiner identified the second practical issue as defining what procedure to use when a faculty member believes that an accommodation a student and the OSD request will “fundamentally alter the nature” of a particular course. The proposed policy provides that in such a situation, first, the faculty member and the OSD program coordinator will discuss the

specific situation. If the faculty member still wishes to deny the accommodation, he or she provides reasons for the denial, in writing, to the dean. If the dean decides that the accommodation request is reasonable but the faculty member continues to believe it is not, the faculty member can appeal to the provost. Or, if the dean agrees with the faculty member that the request is unreasonable and will fundamentally alter the nature of the course, then all documentation and reasons for denying the student's request are forwarded to the provost. In this situation, if the provost denies the accommodation request as well, the student has a right to file a grievance under procedures outlined in *du Lac*.

A third practical issue in this area, Ms. Bodensteiner said, is what information the faculty member can receive about a student's disability. Mr. Howland has had faculty members ask how they can help a student or say, for example, "I have children with the same disorder, and I can really help this student if he or she just tells me about the situation." Despite the good intentions behind such questions, Ms. Bodensteiner said, for legal and other reasons it is important that the student give written consent to having a conversation of that type with an instructor or that the student initiate the conversation.

Ms. Bodensteiner identified the fourth practical issue as the timing of accommodations requests—a matter that must be dealt with in every case. Ms. Bodensteiner said that she understands the frustrations of faculty members when a student asks that a particular accommodation be put in place in the next day or so. Thus, when the proposed policy was drafted, the goal was to create a balance between students' rights and those of faculty members. Given the legal obligations involved, the balance that was struck is a seven-calendar-day notice period. That is, unless exceptional circumstances arise, the student and the instructor must have

signed an “Arrangements for Reasonable Accommodations” form at least seven days before the accommodation is to be implemented.

Finally, Ms. Bodensteiner said, most of the administrators who have reviewed the proposal have concluded that it makes sense to exclude law students from the academic accommodations policy and to create a separate policy for them. Other than that change, the proposal members have in front of them is the current proposal.

Professor O’Hara, dean of the Law School, explained the rationale for excluding law students from the proposed policy. She said that because of the Law School’s blind grading procedures, the proposal already contains a partial carve-out for law students (Section 3). Yet, once a partial carve-out is created, the rest of the steps outlined in the policy do not work well.

More substantively, Prof. O’Hara explained, the reason that law students should have a separate policy is that the Law School’s assistant dean for students regularly handles academic accommodations requests and all documentation accompanying them. Most law students requesting an accommodation have already been through similar procedures at the undergraduate level and come to the Law School very well versed in how to document a disability. It is rare for questions to arise over whether a disability exists. Moreover, the bulk of requests the assistant dean receives relate to examinations, which are graded “blind” in the Law School; thus, faculty need never be involved in the grant of the accommodation. Prof. O’Hara said that most requests for accommodations are granted; yet, if there is a dispute, normal Law School procedure calls for a ruling by the Dean and, if necessary, the provost—just as this policy provides. Given its current practice, Prof. O’Hara said, it will be very easy for the Law School to adopt a parallel written policy.

Fr. Malloy said he assumes that there are clear guidelines as to what constitutes a disability and asked if the discussion centers on only those defined criteria.

Ms. Bodensteiner replied that the proposed policy is designed to deal with students who have a physical or mental condition that substantially affects a major life activity. That is the framework she and Mr. Howland use for students who come to the OSD to register as a student with a disability.

Fr. Malloy asked her to clarify further.

Prof. Linney said that federal law defines what constitutes a qualified disability; then, the proposed policy comes into play once a student with a qualified disability requests an accommodation.

Fr. Malloy asked if federal law gives concrete examples of disabilities or whether the law is more general. That is, does an individual define himself or herself as coming under the law and seek to be included, or is it manifestly clear when a student describes his or her condition that he or she falls within federal law?

Ms. Bodensteiner replied that even if a student has an obvious disability, such as a mobility impairment requiring use of a wheelchair, the University is not required to provide accommodations until requested to do so by the student. In fact, another set of legal problems can arise if a faculty member or administrator approaches a student and suggests that he or she *has* a disability requiring an accommodation. It is totally within each student's discretion whether he or she wants to go to the Office for Students with Disabilities, register there, and seek accommodations.

Prof. Hatch asked whether federal law specifies the kinds of disabilities that are included

and those that are not.

Ms. Bodensteiner responded that generally speaking, it is a very individualized determination whether a physical or mental “substantially affects a major life activity.” If so, the person is considered disabled; if not, they are not. Thus, a person may have diabetes, or cancer, or multiple sclerosis, but in each case, a determination must be made as to whether a particular condition substantially affects a major life activity such as to qualify them as an individual with a disability under the Rehabilitation Act and the Americans with Disabilities Act.

Ms. Bodensteiner continued that federal law requires the University to consider the student’s condition in light of whatever mitigating measures they are using. Thus, if a student has an eye condition and use glasses, we consider his or her condition with the glasses. The fundamental analysis, whatever a student’s condition, is always whether they are “substantially limited” in a major life activity, such as walking, learning, reading, breathing, or sleeping. That is all the law specifies. It does not unequivocally require accommodations by type of disability.

Fr. Malloy said that the issue seems to be expansiveness of category and to what extent it varies across time, which it clearly does, for there will always be re-definitions in process. His previous questions relate to how clear current definitions are.

Prof. Gregory commented that it seems that, as is often the case with these sorts of legal definitions, much depends on the adverb “substantially” and the adjective “major.”

Ms. Bodensteiner agreed.

Prof. Marino asked whether there are any differences under federal law in the expectation of accommodations for a state university versus a private university.

Ms. Bodensteiner replied that there are not. The Rehabilitation Act, Title IX, and Title VI

are what are referred to as “federal funding statutes.” Thus, whether public or private, if an educational institution receives federal funding, it is treated exactly the same under the law.

Prof. Marino asked Ms. Bodensteiner to outline the expectations of federal law in terms of physical accommodations. For example, he said, the College of Science is building a new laboratory building. Is there an expectation that its benches and other equipment will accommodate students with disabilities?

Ms. Bodensteiner replied that the federal government’s accessibility guidelines do set forth various requirements. They differ for existing construction and new construction.

Prof. Marino observed that perhaps existing construction is exempt from certain laws.

Ms. Bodensteiner said that even with existing construction, institutions are required to make “reasonable” accommodations. As always, what is considered reasonable varies from case to case, but the University must make some accommodations and remove barriers even in existing facilities. In fact, the Department of Justice’s Accessibility Board has just issued a total rewrite of accessibility guidelines that change a wide range of physical specifications, for example, the number of accessible drinking fountains that may actually apply to existing buildings.

(Ms. Bodensteiner noted that the University is involved in the revisions of the accessibility laws by commenting to the Department of Justice. A key part of the new guidelines is whether they will apply to new construction only. If the Department of Justice determines that they will apply to *all* construction, the University would be required to go back in, for example, to the just-built Performing Arts Center and reconfigure many aspects of it.)

Prof. Lykoudis asked how federal guidelines and the proposed policy affect programs

which, as part of the required course of study, have foreign components. For instance, the School of Architecture requires all its third-year students to study in Rome for a year; yet, Italy has a completely different set of accessibility standards. He asked Ms. Bodensteiner to speak to the obligations of the School of Architecture under the policy now under consideration.

Ms. Bodensteiner suggested that perhaps Prof. Robinson could answer that question, as she believes he has written an article on extraterritorial application of the Americans with Disabilities Act.

Prof Robinson replied that it is William Hoye in the General Counsel's office who has written an article on that subject. He knows, however, that it is not a defense to making *no* accommodations for students that an educational institution has sent them to another country. On the other hand, an institution need not do everything in Rome that it must do in South Bend. What must be done to accommodate students' disabilities when they are abroad is, again, decided on a case-by-case basis and guided by relatively vague standards.

Prof. Kantor asked how Ms. Bodensteiner envisions the proposed policy applying to students engaged in field research, independent research, or laboratory work.

After clarifying that Prof. Kantor was speaking about undergraduate students only, Ms. Bodensteiner replied that she and Mr. Howland must discuss that more thoroughly whether the proposed policy is actually designed for the vast majority of requested accommodations—those related to tests and quizzes. If so, perhaps the policy should contain a separate paragraph dealing with other types of accommodations, such as note-taking, procedures during field research, and other accessibility issues. Because this second type of accommodation does not typically have the potential to “fundamentally alter the nature of a course,” it may be best to decide that the

OSD should work with individuals on a case-by-case basis when this second type of accommodation request arises.

Prof. Fredman asked whether the phrase “fundamentally alter the nature of the course” refers only to the particular student requesting the accommodation or to *all* students in the class.

Ms. Bodensteiner replied that the phrase is designed to probe whether a particular accommodation will somehow fundamentally change what the instructor is trying to teach all students or how all students will be evaluated. The most well-known example is the so-called NASA situation, in which a certain task must be completed in 30 minutes. The question is whether a fundamental part of the test *is* that it be completed in 30 minutes—as must occur during actual flight. If so, giving a person more time to complete the test would fundamentally alter its nature.

Prof. Fredman said that he is still uncertain as to whether an accommodation granted to one student affects other students.

Ms. Bodensteiner replied that keeping in mind that the concept of what is a “reasonable” accommodation under the law is intended to level the playing field for students with disabilities, the question can always be asked whether a certain accommodation might give a student an *advantage* over other students. If so, then the requested accommodation might be considered “unreasonable.” Determining whether a requested accommodation would “fundamentally alter the nature of the course” is a different, more global question. Presumably, a faculty member has certain goals for a course that are made evident during the testing process. The question is whether a certain accommodation would fundamentally alter the nature of that evaluation.

Prof. Younger asked: Once all parties agree on a reasonable accommodation, is the

student then responsible for conveying his or her right to that accommodation to others at the University? For example, if a student with a qualified disability comes to the library, there are specific accommodations that can be made. Is it up to the student to ask for those services, or, is there a set of guidelines that sets forth what the library should be prepared to accommodate?

Mr. Howland responded that when classroom accommodations are at issue, it is the responsibility of the student to request them when necessary. For non-classroom accommodations, although the student should still initiate an accommodation request, he would assemble a three-way group—for example, the library, the student, and the OSD—to best serve the student.

Fr. Malloy asked if the vote to be taken is on the policy as circulated to members before the meeting.

Prof. Linney said that it is, except for deleting the reference in Section 3 to law students and a title change to reflect that law students are not covered by the policy.

Prof. Preacher said that she supports the proposed policy. Accommodating students' disabilities at the University is an area much in need of clarity. Now, when students raise an accommodation request directly to a faculty member or to a dean, it is difficult to know how to respond. She welcomes this policy because it allows deans' offices to direct a student to the OSD and so begin an entire process.

Prof. Brown said that it is helpful to have a policy on academic accommodations so that faculty know what to expect in these situations and their role in the process. If the proposed policy is approved, he encourages Mr. Howland to have some mechanism for publicizing it so that faculty are made aware of the proper procedure.

After noting that because the proposed policy on academic accommodations for undergraduate and M.B.A. students was brought forward from the Executive Committee, it does not require a second, Fr. Malloy called for a vote. It was unanimously in favor.

4. Committee reports:

(a) Undergraduate Studies Committee: Prof. Preacher reported that her committee is working primarily on grade inflation but has some other issues to discuss as well.

(b) Graduate Studies Committee: Prof. Kantor reported that the Graduate Council met on December 1 and, after a presentation by Mr. Howland, discussed a previous version of the policy on academic accommodations for students with disabilities. At that time, the proposal included graduate students; however, given the number of concerns that were raised both at that meeting and at the meeting of the Executive Committee, the policy just approved excludes graduate students.

The second item of discussion at the December Graduate Council meeting was graduate student stipends. Members held a lengthy and extensive discussion about the gradual erosion of Notre Dame's stipends relative to peer universities. Prof. Kantor said that he is pleased to report that since that time, his office has sent letters to department chairs and directors of graduate studies about an increase in stipends for Ph.D. students. This fall, the University's minimum stipend for entering Ph.D. students will be \$15,000, with a slightly higher stipend for students in science and engineering. In addition, he is able to announce certain enhancements to the Graduate School's prize scholarships and the establishment of a fund to support competitive counter-offers. Both will be discussed in more detail at the next meeting of the Graduate Council in early February.

(c) Faculty Affairs Committee: Prof. Robinson reported that committee members' primary agenda item this term is working with the Faculty Senate and the Provost's Office to assess the adequacy of provisions in the *Academic Articles* addressing the termination of academic programs.

Prof. Linney called members' attention to one final item of business. The Faculty Senate submitted a request to the Provost's Office asking that a joint committee be formed from the Faculty Senate, the Academic Council, and the Provost's Advisory Committee to address the issue of evaluating teaching at the University. The Faculty Senate and the Provost's Advisory Committee will identify three members of that committee, and she has asked the Faculty Affairs Committee to identify three members as well. Dennis Jacobs, associate provost, will chair the joint committee.

Before adjourning the meeting, Fr. Malloy noted that some present may have had the pleasure this past weekend of participating in inauguration ceremonies for former associate provost Carol Ann Mooney, now president of Saint Mary's College. It was a splendid set of events, he said, and all at the University continue to wish Prof. Mooney well.

There being no further business, Fr. Malloy adjourned the meeting at 3:40 p.m.

Respectfully submitted,

Jean Ann Linney