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Faculty Affairs Committee Minutes of the Academic Senate 2014-02-27

University of Dayton. Faculty Affairs Committee

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Minutes for the Faculty Affairs Committee of the Academic Senate

Thursday, February 27, 2014, 12:00 – 1:15p - St. Mary's 113B

Attendance: Linda Hartley (Chair), Pat Donnelly (ex officio), Jamie Ervin, Ralph Frasca, Harry Gerla, Emily Hicks, Carissa Krane, Paul McGreal, Leslie Picca, Yong Song, Eric Taglieri, Katie Willard

Absent: Abdullah Alghafis, Kurt Mosser, Tony Saliba, Joe Watras

Meeting called to order by Dr. Linda Hartley at 12:02 pm.

1. With minor edits, the FAC minutes from February 13, 2014 was approved.
Vote was unanimous.
2. Announcements:
 - a. Today is Dr. Hartley's birthday. Happy Birthday, Linda!
 - b. Next FAC meeting: Mar. 13, St. Mary's 113B, 12:00 – 1:15pm.
Main topic: Prohibited Conduct Policy
 - c. Future Agenda Item: Intellectual Properties Policy
 - d. Future Agenda Item: from UDRI, the Policy on Misconduct on Research & Scholarship. FACAS is waiting on directions for clarification.
 - e. Meeting minutes for remainder of semester: Mar. 13 – Jamie Ervin; Mar. 27 – Harry Gerla; Apr. 10 – Eric Taglieri; Apr. 24 – Ralph Frasca
3. Agenda: Nondiscrimination and Anti-Harassment Policy Discussion

Guest: Dr. Lori Shaw, Title IX/504 Coordinator and Equity Compliance Officer

Dr. Hartley clarified that the job of FACAS is to make recommendations and a list of concerns, then take it back to ECAS.

Dr. Shaw noted the faculty feedback is critical on the document Nondiscrimination and Anti-Harassment Policy. SAVE, the violence against women act, is supposed to be out in March 2014, yet it will not be out until 2015; this will be the next document that will be up for discussion. The Title IX Act requires a lot of discussion, and the documents will need to be fluid to keep up with changes in the law. Dr. Shaw opened the floor for questions and discussion. [Please note that subheadings were added after the discussion by the recording secretary to ease reading.]

Protected Class

Dr. Hartley asked a question about the definitions on page 3 for “protected class” and how it relates to genetic information. Dr. Shaw noted an example where a woman tested positive for the BRACK gene meaning she could be at greater risk for breast cancer; this genetic information constitutes a protected class. Dr. Donnelly asked a follow-up question regarding how does this designation as a protected class differ from the laws that have been on the books for a while, such as for sickle cell. Dr. Shaw noted the difference between being currently disabled versus the potential for being disabled in the future. (DuPont, for example, used to screen people for sickle cell.) Dr. Shaw wants to make sure we are clear on all forms regarding genetic testing as a protected class. The list of protected classes will likely change in the future (with medical advances, for example).

Dr. McGreal noted on page 12, number 4, under “Hazing” that the protected class is not noted. Is the omission deliberate? Dr. Shaw noted no, it is not deliberate as the wording was pulled from the Student Code of Conduct, and this omission needs to be corrected. Dr. Shaw thanked Dr. McGreal for the “good catch.”

Amorous Relationships

Dr. McGreal commented on pages 7-8 about the Amorous Relationships in consensual relationships. The text is not set up as a prohibition, but as an advisory and warning. Dr. McGreal asked on page 8, under 3 b., is “inappropriate” supposed to note prohibition? Dr. Shaw noted that this text was lifted from other existing policies; there should be a warning that such situations heighten the risk of sexual harassment. Dr. Shaw asked for input of the Academic Senate as this is a sticky situation. For example, if a faculty comes to UD, they may bring their spouse who comes to UD as a student and this is an amorous relationship. We all have different roles, and we need to be mindful that this opens the door for claims of harassment.

Dr. Donnelly vaguely remembers these same conversations from 20 years ago. We don’t want to outright ban these amorous relationships, yet we need to make people aware of the need to be careful as it can be inappropriate and lead to claims of harassment. Prof. Hicks noted this section was unclear and asked about the policies at other universities; simply “discouraging” may not provide enough protection for people who lack power in the situation. Dr. Frasca noted the policy may need to reflect conversations about marriage, partners, and significant others. Dr. McGreal stated that the policy can apply to any relationship. He noted that all behaviors carry risk, and some relationships need to be reported, especially in light of mandatory reporting. He asked if the relationship is

inappropriate, do we need to report it. Prof. Hicks commented that we need to consider the context, such as if the relationship began after the student was enrolled in a class.

Dr. Shaw clarified that this conversation is the type of input they need from the faculty, especially how to strengthen or enhance the policy. In some cases, the law requires action and there is no ambiguity, but this section of the policy on amorous relationships requires a cross section of faculty discussion.

Dr. Donnelly raised the question if an adult is a part-time returning student in one department, and becomes involved with a faculty member in a different department: Is this a professional relationship? How does the policy handle this situation? Dr. McGreal noted that this may be beyond discrimination and harassment, but involve integrity and employment that may be covered by other areas of the policy. Perhaps we need another policy on these types of consensual relationships and reference it here.

Dr. Shaw noted that most schools don't prohibit these types of relationships, but other schools may use stronger language than we do. These UD policies come from other documents; we also don't want to interfere with private choices. Dr. Shaw will look into the language used at other schools regarding consensual relationships.

Dr. Donnelly clarified that the language on consensual relationships came from HR policies, and we may need someone in HR and the Provost Office to investigate how other universities handle this issue, as it may not need to be included in Title IX. Dr. Shaw agreed that we may not need it written into Title IX, but it could be referenced here. Dr. Donnelly volunteered to connect with the Provost Office and HR about looking into these policies. Dr. Shaw will pull material from other universities and ATIXA (Association of Title IX Administrators).

Perception

Dr. Frasca raised the question about perception, as p. 6 of the document notes "'discriminatory harassment,' if it is based upon an individual's actual or *perceived* membership in a protected class" [italics added for clarity]. He asked if the perception is based on the perpetrator or victim. Dr. Shaw answered it is based on the offender. For example, you can't discriminate against someone who is Muslim, or someone who is perceived to be Muslim.

Frequencies: Hostile Work Environment

Dr. Frasca asked on page 7 how to distinguish an offensive versus a hostile work environment. Dr. Shaw clarified that if it is a one-time

offense, it is not a hostile work environment. For example, "Title IX does not guarantee a happy or a civil workplace." Title IX covers a spectrum of behaviors: if it happens frequently to permeate the environment, yes, it is covered by Title IX. If it is a one-time event, then no, it is not covered by Title IX. Unfortunately, we don't know the number in-between as that is decided on a case by case basis. Dr. Shaw noted that just because an action isn't enough to violate Title IX policy, the University will still act as education is part of our job. This is where BRIP, Bias Related Incident Process, comes in. Dr. Shaw receives a report from BRIP as she is the gatekeeper. For example, if there is one offensive bed sheet in the student neighborhood, that isn't enough to violate Title IX policy, but it will go to BRIP, as well as other areas of campus life like Student Development, Community Standards and Civility, Human Resources, etc. Dr. Shaw notes that the Office of Civil Rights is looking at this. For example, a university in Montana is seen as a blueprint for initially they only looked at hostile work environment without dealing with harassment. Here at UD, BRIP says we deal with both: even if the event is not egregious enough to constitute a hostile work environment, BRIP will deal with it.

Academic Freedom

Mr. Taglieri asked what "academic freedom" referred to in the Title IX policy. Dr. Shaw noted that there is context to language and discussions. In some classes, we talk about topics that may be offensive, such as rape and affirmative action. These discussions are critical to education and do not exhibit biases when in the context of classes that use proper exercise.

Competing Protected Classes

Prof. Hicks asked a question about competing protected classes, for example, if gender bias and religious bias collide. Dr. McGreal pointed to page 11, C2, "...actions that deprive other members of the community..." and excluding people from groups, yet some religions say to divide the genders. For example, the RecPlex offer classes just for women as some Muslim women do not want to work out next to men. Dr. Shaw noted that this is worthy of broader faculty discussion as at some point a decision will need to be made.

Safeguards

Dr. Krane raised a question about process. On page 9, it notes that an investigative team completes a report in the case of a non-student event; it then goes to the Provost or Vice President or Legal Affairs who makes a recommendation as to what is implemented. Is there one person who makes a decision whether or not the recommendation is honored? The CRC reports back to the same person; is this the best policy? Given recent events at Penn State and Northwestern, having a single person make the decision whether or not to act has the potential to put the university in a bad light.

Dr. Shaw noted that there are different models for how this works, although it's hard to get away from one person imposing a penalty. At Ohio University, Title IX has one investigator and that person makes a recommendation. If the administration doesn't follow the recommendation, they need to write a memo indicating why they aren't following the recommendation. There can be policies to safeguard the process so it is not falling on one person.

Dr. Donnelly added that only an administrator can fire an employee; a committee can't do that. Dr. Krane questioned if we are setting up a policy to leave UD open to a lawsuit. There is no mechanism for oversight and there is no external investigator. Also, there is a question as to what is conveyed back to the complainant. Dr. Shaw noted that the complainant is not always notified of the results. If the respondent is fired, yes, the complainant will be notified; if the respondent is referred to counseling, the complainant will not be notified. Dr. Shaw asked the question what are safeguards we can put into play. Dr. Donnelly noted that one person will always make the decision. A discussion took place regarding safeguards to put in place to protect the university from one person as the decision maker. Dr. Shaw noted the distinction between remedy and sanction. Title IX requires a remedy and prevention. Title IX does not do sanctions (firing a faculty, expelling a student), and is not a criminal action.

Dr. McGreal confirmed that the Equity Compliance Officer reports to Tom Burkhart who reports to the President. The Vice President of HR, Office of Legal Affairs, and Provost are different reporting lines. The Equity Compliance Officer needs to know s/he has an independent reporting obligation, and it is her/his responsibility to bring consistency. However, this is not stated here, and he is reading this by inference, and it needs to be more deliberately stated. Dr. McGreal notes that it is ambiguous who is involved, and there needs to be more deliberate language. Additionally, there are many places where the process can end without further review, such as if an investigatory team finds no probable causes and can end the process. A question was raised if there needs to be more oversight in the places where the process can end without further review.

Prof. Hicks asked if the respondent is referred to a different process on campus, is the complainant notified. Dr. Shaw said yes.

Ms. Willard noted that at a recent Academic Senate meeting, we were shown a flow chart to clarify the Title IX process. In order to address the ambiguity within the lines of community, could there be a supplemental flow chart of communication to show the checks and balances. Dr. Shaw noted that this was an excellent idea.

Dr. Krane noted the mandatory reporting policy, and gave an example where a student tells a faculty that she has been sexually assaulted. As a professor, the concern is to make sure the student is safe and to call the police; the first reaction is not to file a report. Dr. Krane asked if the policy can explicitly say to contact the police and take care of the victim first, then file the report. Dr. Shaw absolutely agreed. Title IX requires a report within 60 days, and we can't always wait for police investigation; the police work together with Title IX and vice versa.

Dr. Krane noted that she is aware of two separate instances where a faculty member was harassed by a student. The faculty didn't know there were mechanisms in place to protect the faculty. Is it possible to remove a student from class for that kind of harassment? Dr. Donnelly answered yes, it was possible for protected classes. Dr. Shaw commented that when she first began as Title IX coordinator, she did a spreadsheet for every possible scenario ("I am a visitor and I am harassed by..."), and she saw that there were holes in the process. There were informal processes in place, yet people didn't always know where to go. Now there aren't any gaps because everyone can file under Title IX. Dr. Krane asked the question where is the process noted because it isn't in the faculty handbook. It was noted that the equity officer can intervene on a case by case basis. Dr. Donnelly offered that this year we had a student removed and it was handled by the Student Judicial system.

Relationship with Other Policies

A question was raised regarding how this policy fits with the faculty grievance policy. What changes need to be made to the policy for clarification? For example, if a case involves sexual harassment, the policy addresses this. However, there are different types of claims that faculty can bring. For example, if a person is denied tenure because she is a woman, she can file this with Title IX. However, this is beyond the level of expertise for Title IX. Title IX investigators don't award tenure. Dr. Shaw would want to ask a faculty committee, should this person be given tenure, and if the answer is yes, then it would be given to Title IX as the person was denied tenure based on gender.

Dr. Hartley noted that more clarity is needed, for example, "if 'X', then the process is 'Y'." The policies for grievances and faculty by-laws need to be reexamined and need more discussion. Dr. Hartley raised the question that we need to look at this policy and consider how it aligns with existing policies and other documents. Dr. Donnelly echoed the need to work with other committees. The Title IX work will finish in May, and there will be working groups over the summer to examine other policies.

Final Comments

Dr. Hartley returned to the question of protected class, and if it includes physical appearances. Dr. Shaw noted that it depends upon which state you are in. Weight is covered in Michigan, but not in Ohio. Size and height are not protected, yet we have no idea what the federal and state government may say tomorrow and if it will be a new protected class. Dr. Hartley asked if this policy could include size or physical appearance. Dr. McGreal noted this may play out in perception, such as associating it with disability.

Dr. Krane asked if the Equity Compliance Officer will not be faculty. (Dr. Shaw is Interim Equity Compliance Officer, and faculty in the Law School.) As faculty report to the Provost, the Equity Compliance Officer can't be faculty. Dr. McGreal asked if there will be employment protection at will for the Equity Compliance Officer. He wonders if there will be protection from retaliation for doing her/his job.

Dr. Shaw commented to the committee that this is a fluid document, and she is seeking comments and feedback from individuals and committees.

Dr. Hartley asked FACAS if the committee wants further discussion with Title IX, otherwise our committee needs to formulate a recommendation to send to ECAS. Prof. Hicks offered that it would be good to get something in writing first, and then seek further clarification, if necessary.

Dr. Hartley thanked the recording secretary for her feverish typing to document the good discussion.

Meeting adjourned at 1:16 pm.

Respectively Submitted,
Leslie Picca