

November 5, 2018

Dear UFC Members and Senators:

The principal and principled complaint in my letter of October 23 was that the administration had misrepresented its proposal. My complaint now stands admitted. The administration's unsigned response to my letter—written from Day Hall by John Siliciano et al. in defense of their proposal—implicitly admits that its proposal broadly eliminates many protections for accused faculty, including the right to a hearing. Anyone who reads their proposal as fitting within the administration's prior description—"improving the basic clarity and completeness of procedures . . . in almost all cases, the new Policy 6.4 enforcement procedures represent either no change from existing practice or constitute an appropriate improvement in the support and protection afforded to faculty while also offering corresponding enhancements for complainants"—is living in a dream world.

Let me respond to their new description, utilizing their response's three headings.

1. *The Role of the AFPS Committee in the Current Procedures*

Current Procedures: The administration misrepresents the current procedures, which you can read for yourself at https://hr.cornell.edu/sites/default/files/documents/faculty_policy6.4procedures.pdf. This is how the current system is supposed actually to work:

If the “complaint arises out of the nature of a subordinate-supervisory relationship between a faculty member and the student (such as while engaged in teaching, advising, research, and thesis or dissertation supervision), **or** that could have involved an issue of academic freedom”—that is, not a case of, say, stranger assault—then from the very outset a faculty member has to be appointed as co-investigator. See § III(C).

If the accused later objects to the investigatory report and contends that issues concerning the supervisor-supervisee relationship or academic freedom are involved, and the Committee on Academic Freedom and Professional Status of the Faculty (“AFPS”) agrees, then there is a whole new, de novo hearing before the AFPS on the merits with full procedural rights. See § III(J)(2) & App. A. The investigatory report ceases to have any bearing, in accordance with these provisions taken verbatim from Appendix A:

- The respondent will be entitled to be accompanied and represented by an advisor or attorney of his or her own choice.
- The respondent will be entitled to be present throughout the hearings and, either personally or through his or her advisor or attorney, will be entitled to give evidence and to present witnesses on his or her own behalf, to hear the evidence against him or her, and to confront and cross-examine adverse witnesses (including the complainant or parties) who appear before the Committee.
- The Committee will encourage WPLR to turn over to the respondent all exculpatory evidence in their investigatory files.
- The Committee will not find the respondent responsible unless the Committee, after evaluating all of the evidence, is satisfied that the charge has been proven by clear and convincing evidence.
- The Committee will base its findings of fact and conclusions solely on the evidence presented at the hearings.
- The Committee will decide by a majority vote of the members present and voting whether there is clear and convincing evidence to find that the respondent is responsible for each of the charges specified in the investigation report.
- The Committee will make a written report setting forth the Committee's findings of fact, conclusions, and recommendations.
- The respondent, a complainant, or WPLR may appeal the Committee's findings of fact and conclusions to the University Faculty Committee, as provided for in Cornell University Policy 6.4. Following the conclusion of an appeal, the respondent, a complainant, or WPLR may rebut the Committee's recommendations concerning sanctions to the appropriate dean or equivalent unit head, as provided in Cornell University Policy 6.4.

These rights were negotiated by the Faculty with the University, and the prior University Counsel considered them untouchable. The current administration proposes to eliminate them by a supposedly stylistic rewrite of Policy 6.4.

Proposed Procedures: See <http://theuniversityfaculty.cornell.edu/news/x-revisions/>. The administration's proposal hides major changes from the current procedures. Most prominently, the right to a hearing is gone. Not to worry, says the administration, there will be a dismissal in its place.

Under new § 23.3 (or rather the first section they number as 23.3), if the Title IX Coordinator finds that academic freedom actually prohibits the proceeding, the case may be dismissed. But there will no dismissal or hearing if academic freedom is merely involved, and no possibility of dismissal or hearing if the case arises from a supervisor-supervisee relationship. Thus, the new dismissal provision covers the

tinest fraction of the current AFPS jurisdiction. Moreover, “involvement” of these issues is a far different standard than “prohibition” by academic freedom, so that § 23.3 will almost never result in dismissal. (And where it would, a dismissal would have been the result in the current system under § III(G)).

I think the administration is disrespecting the UFC and Senate when it sums up the proposed change in this way: “We believe that faculty members would support an early (and easy) determination on the issue of academic freedom at the beginning of a matter rather than as an appeal after a finding of responsibility for prohibited conduct under Policy 6.4.” That is a gross mischaracterization of the choice put before you.

As Professor Risa Lieberwitz has expanded on lost hearing rights in the comments: “The current Policy 6.4 provides faculty members with a hearing before their peers. Where a complaint arises out of a ‘subordinate-supervisory relationship’ between a faculty member and a student (e.g. teaching, advising, research, graduate committee) or where a case raises issues of academic freedom, a full evidentiary hearing is held by the Faculty Senate Committee on Academic Freedom and Professional Status (AFPS). In any other case, a grievance hearing is held under the College-level academic grievance procedures. The proposed revisions to Policy 6.4 would eliminate any and all of these hearings. . . . The proposed revisions also eliminate the right to hearing before suspension or dismissal as adopted by the Faculty Senate and the Board of Trustees in 2007 (see, Chapter 4.3 of the Cornell Faculty Handbook).”

2. The Investigation Process Described in Detail in New Procedures

The administration says that pp. 27-32 of the proposal lay out a detailed investigatory process. It is true that there are a lot of words, but they describe a method that brings to mind the uncontrolled methods of the Greek military chronicled in the film *Z*. We have all seen how the investigators ran roughshod over the accused’s procedural rights in cases against our faculty colleagues. You have not seen how the investigators override student rights in the hidden proceedings under Policy 6.4. There are reasons that in America we disapprove of investigators being allowed to operate as police, prosecutor, judge, *and* jury.

As to their claimed detail, here’s what their proposal says verbatim in § 23.4.1:

Specifically, during the investigation, each party will have the opportunity to:

- be interviewed by the investigator;
- review their own interview statements prior to the statements being distributed to the other party and included in a draft investigative record;
- provide evidence to the investigator;
- suggest witnesses to be interviewed by the investigator;
- propose questions to be asked of witnesses; and

- review a draft investigative record and comment on it, in writing, before the investigator finalizes the record and prepares an investigative report

These are not rights. All these matters are left to the investigator's discretion, as later provisions of the proposal clarify by saying verbatim in §§ 23.4.3 - .5:

- The investigator has the discretion to determine the relevance of any proffered witnesses, and, accordingly, the investigator will determine which witnesses to interview.
- The investigator has the discretion to determine the relevance of any requested evidentiary materials, and, accordingly the investigator will determine what evidentiary materials to seek to obtain.
- The investigator has the discretion to determine the relevance and reliability of any expert testimony and materials, and, accordingly, the investigator will determine what, if any, expert testimony and materials will be included in the investigative record.

Clearly, all the familiar, commonsensical rights as to evidence that ordinarily guide fair decisionmaking are denied to accused faculty by the proposal. Under article V of the current Policy 6.4 for faculty, the investigator must consider all witnesses and evidence forwarded by the accused. Remarkably, the administration does not allude to these lost rights.

Similarly, Professor Cynthia G. Bowman has raised the point that article II of the current Policy 6.4 for faculty provides robust opportunities for informal resolution and mediation. The proposed § 22 would cut those opportunities way back ("The Title IX Coordinator will oversee the Alternate Resolution process The Title IX Coordinator will consult separately with both parties and recommend to the parties the terms of a potential Alternate Resolution agreement."). Again, the administration does not allude to these lost opportunities.

3. New Procedures Meet Professor Clermont's Requirements of Fairness

To say that the new procedures are fair, as the administration insists under its final heading, reveals an odd sense of fairness, neutrality, and transparency.

I am getting tired, as is the reader, I am sure. But let me make a few quick responses to the administration's points:

They say the accused has the ability to "pose" questions to the accuser. That's just pulling a fast one. As explained above, the accused has a right to "propose" questions that the investigator does not have to ask. (Interestingly, the new regulations soon to emerge from the Department of Education will prohibit such a discretionary procedure.)

They say that the Dean plays the role of an adjudicator as was demanded by the law faculty in 2015. That is false. We demanded a fresh evidential hearing before a neutral panel, which the students later acquired. The review by the Dean under § 23.5 would be only a review of the investigator's ungoverned ruling, during which the Dean can and will consult with University Counsel and other university officers. The Appeal Panel would come next under § 23.6, and it can increase sanctions on appeal, a practice declared unconstitutional in real life. *Greenlaw v. United States*, 554 U.S. 237 (2008).

The administration also says: "The current and new procedures permit each party to have support persons and advisors (including attorneys) throughout the process." The reason that I am getting tired is that it is hard to refute such half-truths one after another. As quoted above, the current procedures provide:

The respondent will be entitled to be accompanied and represented by an advisor or attorney of his or her own choice. The respondent will be entitled to be present throughout the hearings and, either personally or through his or her advisor or attorney, will be entitled to give evidence and to present witnesses on his or her own behalf, to hear the evidence against him or her, and to confront and cross-examine adverse witnesses (including the complainant or parties) who appear before the Committee.

By contrast, the proposed procedures say in § 14:

Advisors and support persons may accompany the party to all meetings, such as investigative interviews, but may not speak on the party's behalf or otherwise interfere with meetings or proceedings.

Respectful colleagues would not suggest to their colleagues that those two provisions are equivalent.

In summary, I believe that the proposed procedures seriously undermine faculty members' existing process rights. We should be thinking of applying AFPS-like procedures to all faculty cases, rather than regressing to the purely investigatory procedures deemed inadequate for students in 2016. *Why in the world are students given a hearing, but faculty would not get one?*

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